Strasbourg, 19 May 2004

CDL-UD(2004)008
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with
THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA

UNIDEM SEMINAR

"EUROPEAN STANDARDS OF ELECTORAL LAW IN THE CONTEMPORARY CONSTITUTIONALISM"

Sofia, 28-29 May 2004

FROM THE ELECTORAL SYSTEM REFERENDUM TO CONSTITUTIONAL CHANGES IN SLOVENIA (1996-2000)

Report by

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1. Characteristics of the Electoral System Referendum

A referendum was held at the end of 1996 to decide whether to change the electoral system in Slovenia and replace it with one of the three proposals put forward. It was neither the first nor the last time that the fate of a country's electoral system was being decided at a referendum. Let me mention two examples that I have a special appreciation for. The first was the introduction of a combined double-vote electoral system based on the German system[1], introduced in New Zealand in a 1993 referendum. The second example is a set of two attempts to repeal the proportional electoral system by means of a single transferable vote in Ireland. Both attempts failed, which is surprising since the single transferable vote system is considered a system in which the division of votes is very complex to understand; it is appreciated in theory but unpopular with voters. I believe that its success at the Irish referendums - quite tight the first time and convincing the second time[2] - has to do with the fact that the extended use of a system can reduce its shortcomings. Let me explain this statement with the example of Slovenia, where the electoral system is being reproached for deceiving voters: in casting their ballot in one of the electoral districts, voters have the feeling of taking part in majority elections and selecting among individual candidates; yet when they see the effects of their vote, they realise it was a vote for the party's list of candidates according to the proportional electoral system. However, the more experience they have, including negative surprises[3], and the longer the system is in use (In Slovenia, it has been used a tenth of the time that it has been in use in Ireland), the less likely it is that voters will be misled or fail to grasp what effect their vote has.

Nor is the choice of three proposals and a controversial referendum result characteristic only of Slovenia. For example, Brazil decided on a 'trilemma' in 1993 when the voters chose between a presidential system, a parliamentary system and a monarchy. In Italy, meanwhile, the results of a 1993 referendum were exceptionally tight: 90 percent of the votes were in favour of a change in the electoral system, but it was not enacted as turnout was below the 50% quorum (49.6%). Still, Slovenia's example is unique in many ways: the choice was between four electoral systems; all possible means of calling a referendum were used at the same time; the Constitutional Court reached surprising decisions and engaged in a genuine political war with the majority in parliament regarding the interpretation and implementation of the referendum results; the constitutional system was in jeopardy of coming to a deadlock; a constitutional amendment was

[1] This electoral system is most commonly referred to with the acronym MMP (Mixed Member Proportional). Arguably the best short definition of the system is: "Under MMP the list PR (proportional representation) seats compensate for any disproportionality produced by the district seat results". (The International Idea Handbook of Electoral System Design, Stockholm, 1997: 147.) In other words, based on the second vote the lists get seats in opposite proportion to the success of their candidates in the majority part of the elections (the first vote). This system is justifiably called combined since the majority of deputies are elected based on the first-past-the post majority system.

[2] In terms of effect, this system is proportional but took more from the treasury of the majority system than proportional system; it is not based on party lists as voters choose between individuals (in multi-member constituencies) whereby voters vote by prioritising (first, second, third preference, etc.) with the help of so-called alternative voting. The voters thereby do what would otherwise happen in the first, second and third round of the election. Ireland has had this system since 1922. In 1959, it barely survived with 52% against 48% (although the referendum was held at the same time as presidential elections wherein the opponent of this system was elected). The second time it was challenged was nine years later, when a proposal to introduce a majority system was rejected by 61% against 39% (the majority system was to reduce the number of parties and improve the stability of the executive). Compare: Sinnott, Richard. "The Electoral System", in: Politics in the Republic of Ireland, Galway, 1992: 65-67.

[3] Voters as well as candidates are disappointed when they realise that a candidate (of a larger party) was not elected although he or she received most votes in his electoral district (e.g. 30%) while a candidate (of a smaller party) was elected although he or she received only a fraction of the votes (e.g. 10%).

passed to overcome it; advocates of the majority system made the dispute international by asking the Venice Commission whether the constitutional changes were in harmony with European democratic principles, etc. Considering its twists and turns, Slovenia's example is unique and even made-up examples from the office of a very resourceful electoral system expert can hardly compare to it.

2. Development of the Electoral System up to 1996

After the fall of the Berlin wall, countries in transition tested an extraordinary array of electoral systems whose practical effects were often far removed from theoretical conclusions and the expectations of their designers. These effects were also related to the degree of political pluralism in the individual countries[4]. Countries in transition have particular characteristics, so the selection of an electoral system does not affect the workings of the constitutional system as much as it would elsewhere. The first multi-party election in Slovenia provided many interesting topics for electoral system researchers. In the spring of 1990, voters elected representatives to the tricameral parliament based on the then still applicable Yugoslav Constitution. Yet the new Slovenian legislation determined that each of the three chambers would be elected by a different electoral system. The opposition parties united in the Demos coalition won by a landslide in the Municipality Assembly, which was elected by a two-round majority system, but were less convincing in the Socio-political Assembly (55%), which was elected by a proportional system wherein each voter could cast a preferential vote for candidates on different lists; they only won a minority of seats in the United Labour Assembly, where representatives were elected in a first-past-the post majority system (only employees were allowed to vote for this chamber). Such an inconsistent arrangement resulted in formidable problems for the political parties: should they join forces, which was useful for the municipality assembly, or should they act independently, which was appropriate for the socio-political assembly; should they focus on the party's agenda in the campaign or stress the qualities of individual candidates; should they emphasise local interests (the Municipality Assembly), the interests of employees (the United Labour Assembly) or national interests (the Socio-political Assembly), etc.

From the theoretical point of view, it is more or less indisputable that the majority system rewards the winner and reaffirms the stability of his power, while the proportional system alleviates the problems of the losers and increases their chance of making a comeback in a coalition government (possibly even before the next election). In Slovenia in 1990 the opposition parties (the ultimate winners) advanced the proportional system, and the governing parties (the ultimate losers) advocated the majority system. This should not be attributed to their poor knowledge of the effects of electoral systems. Instead, the opposition did not expect it could win the first election, while the ruling parties did not believe they could lose, having relied heavily on public support won in the struggle with Slobodan Milošević.

Before and after the elections there were intensive debates on what the electoral system should be like in the future. Political parties were tempted to ensure election success by tailoring the electoral system to their needs instead of doing the opposite - adjusting themselves to the system. These options are very limited in Slovenia as electoral system legislation is adopted in a procedure more demanding even than constitutional amendments, which require a two-thirds

[4] See: Karakamiševa, Tanja. Development of the Electoral Systems in the Former Socialist States with Special Emphasis on the Republic of Macedonia, doctoral dissertation, Ljubljana: Faculty of Law, September 2002. The author places Slovenia alongside Poland and the former Czechoslovakia among the countries where the processes of gradual political pluralisation and the staging of multi-party elections went hand in hand, simultaneously. In other countries, one or the other process lagged behind.

majority of all legislators. It is therefore logical that the struggle to change the electoral system moved from parliament to referendum (unlike a constitutional referendum, a legislative referendum has no quorum, while the majority of the valid votes decides) and on to the Constitutional Court.

3. Criticism of the Pre-referendum Electoral System

The 1991 Constitution instated the National Assembly and a weak second chamber representing local and professional interests (the National Council), yet it had to leave the electoral system up to legislation due to the political parties' failure to come to agreement. The new electoral system for the National Assembly remained within the boundaries of the proportional system (which until then had applied for the Socio-political Assembly) but it attempted to personalise[5] the election by introducing electoral districts[6] (replacing preferential votes).

The quest for a new electoral system started with a strongly exaggerated criticism of the aforementioned system, with fierce criticism coming from all sides. The most widely used reproach was that voters were being deceived. The advocates of the various electoral systems - proportional, combined, majority - reproached the system with labels such as “deceiving”, “misleading” voters, “double fraud”, “indistinct”, “deformed”, “unjust”, “undemocratic” and the “rule of partitocracy”[7]. Such criticism is exaggerated, although the electoral system of the time displayed many shortcomings.

The electoral system placed too much emphasis on encounters between candidates of the same political party (fighting for a nomination in a better district[8] and for a larger share of votes as compared to candidates on the same list in other districts of the same constituency). The threshold was set low (at least three deputies elected, which required just over 3% of the votes) and contributed to a fragmented political scene. The option introduced on the proposal of smaller parties - that a candidate can run in two districts in exceptional cases - was widely abused by larger parties, which resorted to this solution for their cabinet ministers and other better known candidates. Voters were also annoyed by the fact that in practice, political parties engaged in mutual fighting to substantially raise their approval rating but ended up forging coalitions after the election. Yet the system's largest flaw was that with the help of special national (state-wide) lists, the parties could bring their leading members into parliament regardless of the voters' actual support. The Constitutional Court ruled that this arrangement is not unconstitutional although it led to an unequal representation between candidates and constituencies (at the expense of peripheral regions; politicians from the centre of the country were placed on national lists). The Court assessed that “regarding the question which candidate they want to give their vote to, the voters’ will cannot be established” (since each party had only one candidate in an electoral district)[9]. For the biggest party in parliament (LDS) the ratio

[5] Grad, Dr. Franc, Volitve in volilni sistem (The Elections and Electoral System), Ljubljana: IJU, 1996: 148-150.
[6] Interestingly, Slovenia had a very similar system during the Kingdom of Yugoslavia. See: Pitamic, Dr. Leonid, Država (The State), Ljubljana, Družba Sv. Mohorja, 1927: 333-334.
[7] More in: Ribičič, Dr. Ciril. Podoba parlamentarnega desetletja (Image of a Parliamentary Decade), Ljubljana, 2000: 25.
[8] Slovenia is divided into eight constituencies each of which has 11 electoral districts. 88 deputies are elected this way, while the remaining two deputies are elected by the Hungarian and Italian minorities, respectively, from among their ranks in a majority system using alternative voting.
[9] Deputies filed the request for a constitutional review with the explanation that it violates the constitutional right to equality of voting rights. The Constitutional Court decided that only the failure to present national lists before the election is unconstitutional (Decision on case No. U-I-106/95, February 2, 1996). In his dissenting opinion, Judge Matevž Krivic assessed that even without the national lists, the electoral system is

between the actual votes and their seats in parliament was 36.3% to 38.6% in 2000 and 27% to 28.4% in 1996.

4. Referendum War

In Slovenia, the National Assembly has the power to call a legislative referendum and must call such when so requested by the National Council, by one-third of the deputies (30) or by 40,000 voters. All these options were used simultaneously in 1996. One of the political parties launched a signature collecting campaign and gathered over 43,000 signatures for a referendum on the introduction of a two-round majority system whereby the two candidates that mustered the most support in the first round in the one-member constituencies make it to the second round. Meanwhile, on the proposal of the non-governmental organisation the Slovenian Development Council, the National Council proposed a somewhat improved two-vote combined system that was modelled on the German system. Additionally, 35 deputies proposed minor improvements to the proportional system and the elimination of national lists. Alongside the three proposals, the existing proportional system with electoral districts was the subject of the referendum. Neither the Constitution nor the legislation contain regulations on how to act in the event several proposals on the same subject are to be the subject of voting, as they presuppose that each proposal is decided upon separately (the first proposal filed having the first date).

The referendum war started when the National Council took advantage of the period when signatures for the majority system were still being collected, and filed its proposal for the introduction of a combined system. The National Council approved the referendum request, yet while the National Council President was having lunch, a group of 35 deputies signed and (as the President was paying for his lunch and making his way to the Speaker of Parliament to submit the request) filed its own request for a referendum, which consisted of minor improvements to the extant electoral system[10]. The National Assembly called a referendum on the latter proposal, regarding it as the one that had been filed first. Yet the Constitutional Court issued an interpretative decision ruling that all referendums must be called at the same time such that the results be determined for each one separately; the one with the most votes would win. The decision was passed in a 5:4 vote with judges submitting seven separate opinions. Dr. Lojze Ude wrote a dissenting opinion stating that the interpretative decision[11] had "replaced the legislative regulation of referendums, that it replaced a law which is passed by a qualified majority" in "a case where the subject of a referendum decision would be the electoral system, the cornerstone of parliamentary democracy". The Constitutional Court continued passing such tight decisions regarding the calling of the referendum, the required majority to reach a decision and even the deadline for the referendum to be called, while at the same time engaging in mutual reproaches on politically motivated decision-making[12].

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deformed beyond recognition, incomprehensible, non-transparent and repulsive to such an extent that it is no longer compatible with the principles of democracy.

[10] This proposal was withdrawn before the referendum and replaced with a proposal for a proportional system where electoral districts would be eliminated and the preferential vote introduced.

[11] Decision of case No. U-I-201/96, May 9, 1996.

[12] The Constitutional Court's Decision on case No. U-I-279/96, September 10, 1996 annulled the decree on calling the referendum 90 days after the election, arguing that the date the referendum is held may not be set more than 15 days after the referendum is called. Judge Dr. Peter Jambrek issued a concurring opinion stating that delaying the referendum until after the election is a reflection of the pathology of Slovenia's constitutional system and the authorities' paternalism to the citizens. Judge Dr. Lojze Ude, meanwhile, issued a dissenting opinion arguing that holding the referendum at the same time as the election would jeopardise the election right as set down in the Constitution.

5. Alternative Electoral System Proposals Competing at the Referendum

The main advantages of the **majority electoral system** are its simplicity, transparency, a reasonable degree of personalisation and the resulting stability of the executive branch. Its weaknesses lie in the fact that the executive office can be won with a minority of votes and that it leads to a bipartisan polarisation. The advocates of the majority system in Slovenia stressed that introducing this system would create a more direct relationship between the voters and the representatives elected in the single-member constituencies[13]. Personalisation was said to be more explicit than in a proportional system, the party leaderships would no longer be able to push through their leading members who do not have significant support among voters, and the government would be made more stable. The opponents stressed that such would lead to an excessive two-block polarisation (which is already present in Slovenia as it is) and that it would reduce the variety of choice between political agendas. Behind the introduction of a majority system was the hidden agenda to unite right-of-centre parties into a uniform block and end the practice where one of them always ended up being part of the government coalition.

The key benefit of the **proportional electoral system** lies in its very name: it provides for a proportional representation of political parties whose number of seats in parliament corresponds to the share of votes they have won. The downside of this system is that there is a choice between a large number of small parties, not between the candidates' personalities. The proportional system overcomes this shortcoming with levellers such as the threshold, the preferential vote and electoral districts. Just like the advocates of the majority system, the proponents of the proportional system in Slovenia highlighted the flaws of the current system of electoral districts. They stressed, however, that the introduction of a majority system would be like jumping out of the frying pan and into the fire. Compared to a majority system, a proportional system is superior in that it prevents parties which may win a distinct minority of votes from winning a majority of seats in parliament. The imbalance between the actual number of votes and the party's seats in parliament is significant in a first-past-the-post majority system. In the 2001 election in Great Britain, the winning party won 40.7% of the vote and got 62.7% of the seats. Even in a two-round majority system, the imbalance is often considerable. In the last general election in France in 2002, the ruling party got 33.7% of the vote and as much as 61.9% of the seats in parliament. In a parallel system, too, the underlying logic of the majority electoral system prevails, albeit to a somewhat lesser degree: in Russia in 2003, the largest party won 37.6% of the vote and 49.3% of the seats. The deficiencies of a pure proportional system should be alleviated by a decisive preferential vote with which the voters affect the election of individual candidates. The advocates see the benefits of their proposal in that it eases the polarisation of the political scene and gives the voters the chance to select between a larger number of political agendas (a rainbow of diverse political parties and their candidate lists). The opponents of this system, meanwhile, stress that the rule of partitocracy is too strong, personalisation too indistinct and that people prefer selecting candidates to parties.

In the polarised political environment of the 90s, political parties showed little willingness to reach out for a creative compromises that would combine the advantages of both extremes and sidestep their weaknesses. This was on the agenda of the non-governmental Slovenian Development Council, which proposed the introduction of an improved double-vote **combined system** based on the German model. This system produces relatively proportional results

[13] Due to the disharmony with the Constitution, the proposal to introduce the recall and create special seats for Slovenians living abroad was dropped.

although it slightly favours larger parties and awards the winning party[14]. In the 2002 election in Germany, the winning party received 38.5% of the vote and won 41.6% of parliamentary seats. The ratio between votes and seats was very similar in New Zealand, where the ruling party won 41.3% of the vote in the 2002 election and 43.3% of the seats. This proposal consisted of the introduction of a double-vote system whereby additional elements of the majority system would be included (strengthening the role of personalisation by electing candidates from party lists according to the number of votes they have won in the majority part of the elections). Voters would support a party list by voting for the candidate that they favour[15]. Yet in a departure from the German model, which has a (second) vote for the party, less than half the deputies would be elected this way (similar arrangements are in place in New Zealand and Italy). The advocates of this system, including myself[16], have stressed that it combines the advantages of both extremes, having borrowed proportional representation of political agendas from the proportional system and personalisation from the majority system. Furthermore (and in connection with a higher election thresholds) it leads to a more stable government and to a reduction in the number of political parties, which is more acceptable than a bipartisan system. This model is unpopular with party leaderships; unlike the proportional system, it renders it more difficult to elect leading party members. It has therefore been avoided by advocates of the proportional and majority systems alike. The supporters of the majority system were willing to concede to a parallel system[17], while the champions of the proportional system considered the combined system a lesser evil only as long as there was the threat that the majority system might actually be implemented against their will.

6. The Manner of Voting and Ways of Determining the Majority at the Referendum

Two opposite camps gradually emerged. The first, made up of right-of-centre opposition parties, was advancing the majority electoral system. Yet smaller parties had second thoughts, fearing that they would lose their independence in a majority system. The opposing camp consisted of left-of-centre coalition parties and promoted the preservation of the extant system or altering it by eliminating electoral districts.

After the Constitutional Court decided that referendums on the same issue must be held at the same time, politicians continued to engage in conflict over the question of the majority necessary to change the electoral system. One of the reasons for the conflicts was that the Constitution does not provide for a situation where several competing proposals are decided upon, but only sets forth how to vote for or against a single proposal. The supporters of the majority system favoured a solution where the proposal that wins the most votes (a relative majority) wins, and said that separate referendums must be held for each of the proposals simultaneously[18]. Meanwhile, the opponents insisted that a majority of all votes cast is necessary

[14] See: The German Electoral System, Bonn: In-press, 1998 and Jeffrey, Charlie, Electoral System: Learning from Germany, London: F. Ebert Foundation, Working paper no. 2, 1997.

[15] Such a system was in place in the Federal Republic of Germany in 1949; it reduces the influence of party leaderships to the election of deputies. See: Jesse, Eckhard, "The West German Electoral System: The Case for Reform, 1949-87" in West European Politics, July 1987: 446.

[16] Personally, I believe that the combined German system of two votes is not as good as the single transferable vote system in place in Ireland, Malta and Scotland (for the latter only in local elections). Yet considering the complex system of transposing votes into parliamentary seats, it is difficult to push through with this system in Slovenia even in professional and parliamentary debates, let alone in a popular vote.

[17] This idea, which leaders of coalition and opposition parties discussed after the referendum, is related to an increase of deputies from 90 to 120 and the elimination of the second chamber (National Council).

[18] Since multiple proposals could win in this case, the Constitutional Court stated in the above-quoted decision that the proposal which gets the most votes wins in this case.

for changing the electoral system[19]. The latter underlined that the electoral system is passed by a two-thirds majority of all deputies in the National Assembly, while the former emphasised that a simultaneous vote on a larger number of proposals disperses the votes and makes it impossible to change the system. The ruling coalition failed to take into account the warnings of the Constitutional Court and insisted on the constitutionally set majority, saying that it must apply to examples where several proposals are being voted on. The act which enacted such a manner of establishing the referendum outcome (the proposal which wins the absolute majority of the votes cast), which is in contradiction to the position taken in decisions by the Constitutional Court, was not annulled the second time and the referendum was implemented on its basis.

None of the proposals won the majority required by law. With a turnout of 37.9%, the majority system got 44.5% of the vote, the proportional 26.2% and the combined 14.4%; 4.1% voted against all three proposals and 9.8% of the ballots were invalid.

7. Diverging Interpretations of the Referendum Outcome

According to legislation in place at the time, none of the proposals won. The proposal on the majority system received a relative majority (44.5% of the votes cast or 16.9% of all registered voters), but failed to receive the prescribed majority, even if all invalid votes had been excluded. The voters could only cross 'yes' for one of the proposals and the legislative materials make it clear that the National Assembly only called one referendum where all proposals for changing the electoral system were decided upon at the same time[20]. It is therefore beyond doubt that none of the proposals won the necessary majority in the referendum. Yet two years after the referendum, the Constitutional Court decided (by five votes against three)[21], that the proposal on the majority electoral system had won.

With this decision, the Constitutional Court first 'revived' the act that provided for the establishment of the results, since it expired after the referendum was staged. With the imperative part of the decision, the Court furthermore established that the law is not unconstitutional only if it is interpreted such that all three referendums were held at the same time and that the majority be determined for each one separately. It also required that the National Assembly enact the proposal that was passed in the referendum and change the legislation accordingly within six months. In a concurring opinion, Dr. Peter Jambrek wrote that the reasoning of the majority which upheld the decision was logically and empirically watertight. He also provided an advance reply to the critics by saying that their views are "to the benefit of the heirs and successors of the semi-past dictatorship cloaked in a gown of public interest". The judges who voted against the decision listed a series of legal and constitutional arguments that led them to their conclusion. Dr. Dragica Wedam Lukić wrote in a dissenting opinion that the Constitutional Court might have invalidated the referendum, yet it should by no means have decided on an act that had already expired. Furthermore, the interpretative part of the decision goes beyond the explanation of the act and confers on it a content absent from its original form. With its subsequent interpretation, the Court interfered with the principle of trust in the law instead of rejecting the petition because the act had expired. Judge Franc Testen voiced a very similar opinion in his dissenting opinion, warning that it is an interpretation of a "dead" act made after the Report of the Electoral Commission on the Referendum Results

[19] The author of this paper was in favour of holding the referendum in two stages: the two proposals that mustered the most votes in the first round would be voted on in the second round.

[20] See: Ribičič, Dr. Ciril. Zakonodajalčeva volja (Legislator's Will), Ljubljana: Pravna praksa, 18. 1. 1998.

[21] Decision in case No. U-I-12/97, November 8, 1998.

became final (the Court had rejected a constitutional complaint against this report as all other legal means had not been exhausted). A subsequent interpretation of a dead act is unacceptable since the Constitutional Court cannot abrogate an act but can only annul it. Moreover, it causes an internal discord in the act by interpreting it in an impossible way. There were not three referendums; according to the law, there was one referendum on all three proposals. According to Judge Testen, this was constitutionally controversial (a dispersion of votes) but it nevertheless does not permit the Court to treat it as three referendums. In his dissenting opinion, Judge Matevž Krivic stated that the decision exceeded all boundaries of allowableness and reason, especially as regards the revival of a dead act and its interpretation. This cannot benefit the reputation of the Constitutional Court.

The Constitutional Court based its decision on the wrong premise, namely that the National Assembly had not defined what was meant by the wording of the law "of the voters who voted" that is, what exactly constitutes the majority that decides the referendum. Critics also find it controversial how the Constitutional Court took it upon itself to determine the result of the referendum voting (the Constitutional Court "establishes that the referendum passed the proposal…"), which is an interference with the jurisdiction of the Electoral Commission. The Constitutional Court has the power to determine how its decision is to be implemented (it names the authority which has to implement it and the manner of implementation), but it cannot assume the jurisdiction of other authorities.

One of the fiercest critics of the decision was Dr. Ivan Kristan, then President of the National Council, who assessed that what the majority of the Constitutional Court judges did was "hocus-pocus". It is an unreasonable decision, "just like rules had been changed two years after a football game and the result declared based on the new set of rules".

Naturally, the numerous critiques of the Constitutional Court decision cannot obscure the fact that there was a multitude of violations in the National Assembly's decisions about the electoral system referendum requests, whose ultimate goal it was to reduce the chance that the electoral system might actually be changed. This is especially true of the manner of determining the majority, which due to the dispersion of votes greatly reduced the possibility that any of the proposals would succeed.

Notably, the issue was a key systemic question, which in fact should be in the Constitution and which the National Assembly determines with a two-thirds majority of all deputies (a majority required for constitutional changes). From this point of view it is interesting to see the warning issued by Dr. Dragica Wedam Lukić in her already quoted dissenting opinion: that the number of votes which could hypothetically decide the referendum is smaller than the number of National Assembly representatives.

The Slovenian political public split into those who demanded the unconditional implementation of the Constitutional Court decision, and others who noted that nobody can order the deputies what to do, least of all if the Constitutional Court had so bluntly exceeded its jurisdiction[22]. There were a few attempts at a wholesome assessments that would take into account the arguments of both sides. One of them was a speech delivered by Dr. France Bučar at the

[22] Jadranka Sovdat has a different opinion. She says that a decision by the Constitutional Court is legally binding for the National Assembly even when it is wrong; the only legitimate means available to the National Assembly to overturn such a decision are constitutional changes ("Sestava in volitve Državnega zbora" (Composition and Elections to the National Assembly), Komentar Ustave Republike Slovenije (Commentary of the Constitution of the Republic of Slovenia), Lovro, Dr. Šturm (ed), Ljubljana: FPDEŠ, 2000: 775).

Constitutional Court on December 22, 1999, at a ceremony marking Constitution Day. He said that the crucial issue was the legal commitment of the parliament to enact decisions of the Constitutional Court, as the lack of observance of these decisions leads to a state of unconstitutionality. Yet on the other hand, "the Constitutional Court must be all the more careful to make all of its decisions - from the value perspective - fully compatible with the ethical standards that are considered untouchable in a democratic society. The Constitutional Court is not without flaw. No court is immune from mistakes, yet it cannot afford the slightest lapse in ethics, especially the Constitutional Court. Any lapse in this field would amount to a self-inflicted dissolution".

8. Constitutional Changes

The Constitutional Court imposed the implementation of the referendum decision and the introduction of a majority electoral system to the National Assembly. This cast a shadow of doubt on the legitimacy of elections that were held on the basis of the unchanged election regulations. Since the National Assembly failed to vote in favour of the implementation of the majority system in several attempts, an ad hoc coalition for changes to the Constitution was formed by the left-of-centre parties and one right-of-centre party (the Slovenian People's Party - SLS). The coalition first offered the champions of the majority system a compromise: the introduction of a combined electoral system which would achieve the majority of goals the latter advocated. When this option was rejected, the constitution was changed.

The Amended Article 80 of the Constitution states that deputies are elected according to the principle of proportional representation, "with due consideration that voters have a decisive influence on the allocation of seats to the candidates". The amendment, which was approved by three quarters of all deputies (the Constitution requires a two-thirds majority), introduced in July 2000 a higher threshold (4%), increased the importance of the allocation of seats on the regional level (The Droop quota replaced the Hare quota), the allocation of seats was partially corrected to the benefit of larger parties, but most importantly, national lists were eliminated. These are minor changes, but they nevertheless somewhat increase the voters' influence on choosing between candidates, not merely parties. The downside of these changes is that they additionally narrow the probability that independent candidates might get elected. Yet they are important in that they have in effect put an end to political struggles regarding the changes to the electoral system, which resonated through Slovenia for four years and threatened to escalate in a full-blown constitutional crisis and jeopardise the legitimacy of the election.

I believe the changed Article 80 of the Constitution permits various systemic solutions, provided that political agendas are represented proportionately and that voters have a decisive influence on the allocation of seats to the candidates. While the former is certainly guaranteed in the current electoral system, the latter is provided for only partially. Many feel that the voters' influence on the allocation of seats to the candidates should be strengthened by introducing a strong preferential vote in place of the districts (a similar system is in place for elections to the European Parliament). I am confident that such a change would not contribute to the personalisation of elections (perhaps after the elimination of electoral districts, the choice between parties would be even more in the forefront than it is in the existing system) which the voters seem to desire. It would therefore make sense to introduce a combined electoral system based on the German model[23], strengthening the role and significance of voters in the selection

[23] Jadranka Sovdat believes that the amended Article 80 of the Constitution would be "fully complied with through the introduction of the single transferable vote system". (Ibid. p 776).

of deputies. This is a system that ensures a proportional representation in parliament and the personalisation of elections, especially if additional improvements are taken into account (more than half of the deputies elected by majority system, taking into account the votes for individual candidates elected from party lists, etc.)[24].

9. Opinion of the Venice Commission

The government, which was elected just months before the general election, asked for the opinion of the Council of Europe's Venice Commission[25]. Although it is true that the petition was an attempt to aggravate the political struggles that paralysed the working of the constitutional system[26], reproaches against it were misplaced. The Venice Commission cannot be regarded as a kind of foreign arbitration since Slovenia is a full member of the Council of Europe and the Venice Commission is as much Slovenia's as it is of other members of the Council of Europe.

The opinion of the Venice Commission - taken before the election and released after it - was convincing. It signalled an end to the escalation of tensions and delays in the proceedings of the Slovenian constitutional system. The Venice Commission wrote: "The Commission finds that the National Assembly's reaction to the risk of a constitutional impasse, i.e. the adoption of amendments to the Constitution adopted on 25 July 2000, in strict compliance with the latter's relevant provisions, is not in conflict with European democratic standards." It warned that it was the duty of all state authorities to help solve the crisis that threatened to bring the constitutional system to a halt. The legislative referendum does not prevent the parliament from adopting a constitutional change and providing for the electoral system in a manner different from the referendum result. In other words, even if the Constitutional Court was right and the proposal for a majority system had indeed won, this does not mean that the National Assembly cannot change the Constitution and install a proportional system[27]. Provided, of course, it acts in strict accordance with the constitutional provisions on the procedure and majority required to pass a constitutional change.

The opinion of the Venice Commission attests to how someone who has an outside view can see more clearly than someone who fails to see the forest for the trees surrounding him, and therefore fails to find a way out. The opinion justified the National Assembly, which resolved the dispute in its competency as the legislator[28] by changing the Constitution. The Commission furthermore underlined the limited reach of a legislative referendum; it cannot be used to prevent

[24] I believe the combined electoral system would have several benefits for Slovenia: it would reduce the number of parliamentary parties yet not lead to a bipartisan polarisation; the government would be more stable but it would still be necessary to form coalitions; it would lead to the greater personalisation of elections without creating the necessity to rule with a minority of votes; there would be fewer possibilities for manipulation in forging post-election coalitions. See: Ciril, Dr. Ribičič, Podoba parlamentarnega desetletja (Image of the Parliamentary decade), Ljubljana, 2000: 28.

[25] Opinion on the Constitutional Amendments concerning Legislative Elections in the Republic of Slovenia, Venice Commission, 44th Plenary Meeting, 16th of October 2000 (www.venice.coe.int).

[26] Three of the five former Constitutional Court judges who voted for the decision on the victory of the majority system in the referendum were ministers in the government that petitioned the Venice Commission.

[27] Franc Testen, Constitutional Court President at the time, made a similar assessment in several public appearances: he argued that the National Assembly "overcame" the Constitutional Court by passing a constitutional change.

[28] The Constitutional Court voiced this similar as the Venice Commission, concluded: "The decision of the Constitutional Court regarding the establishment of the results at the legislative referendum, binds parliament as the legislature but not as the author of changes to the Constitution. As the creator of the Constitution, the National Assembly can change this supreme law of the state as set forth in the Constitution." (Decision on case No. U-I-204/00, September 14, 2000).

constitutional changes[29].

It would be wrong to understand the Opinion of the Venice Commission as uncritical to those incorrect and legally controversial moves by the government majority in the National Assembly which were used in attempts to prevent changes to the electoral system. The Opinion suggests that the general election which was then looming could demonstrate whether and who the voters believed acted contrary to their will and democratic traditions. As it turned out, struggles over the electoral system ultimately had no significant effect on the election outcome. No party was punished for opposing the majority system, but neither was SLS awarded for its constructive stance: the party first voted for the introduction of the majority system but later made a significant contribution to the adoption of the constitutional changes and the resolution of the crisis. Interestingly, the advocates of the majority system remained in such a minority after the election that they can be glad their proposal for a majority system was not accepted.

The opinion of the Venice Commission ends with the recommendation that Slovenia should consider which legislative and possibly constitutional amendments are required to avoid the risk that similar situations arise again. Slovenia has not been successful in upgrading the Referendum Act or the Constitution to resolve these issues[30] and therefore even now faces similar dilemmas to those that preoccupied it four years ago. There are again heated political debates on what issues can be subject to referendum voting, what its effects are and where the boundaries of the Constitutional Court's jurisdictions are or what the effects of its decisions are[31]. But that is another story altogether.

[29] The proponents took a different stance in separate opinions, claiming on the basis of the German doctrine of the unconstitutional constitutional amendment that the decision of the National Assembly was in disharmony with European democratic traditions. However, the opinion of the Venice Commission is based largely on Italian constitutional practice (dr. Peter Jambrek and Klemen Jaklič).

[30] Constitutional law theory has long ago defined what amendments to the Constitution regarding the referendum are necessary, and which restrictions should be built into the constitutional system. Yet the National Assembly has been very reluctant to deal with this issue. See: Kaučič, Dr, Igor, "Zakonodajni referendum" (Legislative Referendum) in Podjetje in delo, No. 7-8/2001: 857 and Cerar, Dr. Miro, "Razmerje med neposredno in posredno demokracijo v slovenski ustavni ureditvi" (Relation between Direct and Indirect Democracy in the Slovenian Constitutional System), Javna uprava No. 2/2002: 246.

[31] At the present, these issues are contested in the framework of the debate on whether the so-called "erased people" (people from other republics of the former Yugoslav federation who opted not to apply for Slovenian citizenship) should have permanent residency rights reinstated which had been revoked over a decade ago, and in the framework of the request for a referendum on the construction of a mosque in Ljubljana, the capital of Slovenia.