

CONSTITUTIONAL ADJUSTMENT OF THE WHOLE – NATIONAL REFERENDUM IN THE SLOVAK REPUBLIC

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Resume

The presented article deals with one form of the direct democracy represented by referendum. Content of the article concentrates on the brief analysis of the constitutional adjustment of the mentioned institute in the Slovak Republic. Besides that, the author tries to point out some failures of the currently valid constitutional adjustment.

Key words: *direct democracy, principle of the peoples' sovereignty, referendum, proceedings on the subject of referendum, proceeding related to the results of referendum*

Resume

Článok sa zaoberá jednou z foriem priamej demokracie – referendom. Jeho obsahom je stručná analýza ústavnoprávnej úpravy daného inštitútu v Slovenskej republike. Autorka zároveň poukazuje aj na niektoré nedostatky platnej ústavnej úpravy.

Kľúčové slová: *priama demokracia, princíp suverenity ľudu, referendum, konanie o predmete referenda, konanie o sťažnosti proti výsledku referenda*

The Constitution of the Slovak republic recognizes direct and representative democracies which are declared in Article 2 section 1. It is affirmed that state power comes from citizens and it is executed by means of their representatives, or directly. It can be said, that it comes from two basic forms of state power execution which are declared to be equal de constitution lata. (Palúš, Somorová, 2008, p. 181)

This measure expresses fundamental principle of democracy to make citizens to become decisive actors of the creation and execution of power. One of the original principals of modern constitutionalism is the principle of democracy which is generally known as the principle of the rule of people. Domination and sovereignty of people is evident primarily by means of the use

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of political pluralism, the free choice of their representatives, execution of the direct democracy, and the real implementation of measures which follow the principle of upholding the law. Citizens are defined by constitution in the following ways; firstly as the source of power, known as the constitutive power, and secondly as the executive power, known as the decision-making power. Moreover, the principle of democracy is expressed also in Article 30 section 1 of the Slovak Constitution which declares distinctly that citizens have the right to participate in governing public affairs directly, or by means of free elections of their deputies and representatives.

The fifth chapter of the Constitution of the Slovak republic is divided into two equal parts. In the first part the legislative power is adjusted, the second part legalizes constitutional and legal institute represented by referendum, which can be considered to be one of the forms of the classical direct democracy. Referendum is not only the constitutional and legal institute, but at the same time it is a political matter. The Constitution of the Slovak republic sees democracy as an inseparable part of the representative system; elements of direct democracy are included into the decision-making mechanism of the delegated democracy. (Palúš, Somorová, 2008, p. 181)

The purpose of referendum is to provide a guarantee to citizens who are the holders of the primary power in order to make them involved in the creation of the state force of willpower. By means of referendum citizens of the Slovak republic express their opinions to question, respectively questions which are the subject of a referendum, and in this way they are directly entitled to participate in determining the state force of willpower. It can be assumed that in some cases referendum also serves as a practical means how to divert occasional conflicts which might occur in opinions among the highest state authorities, and in this way it fulfills the function of control. In the pre-Munich Czech Republic the institute of referendum was amended in Article 46 of the constitutional script. In case when the legislative body did not approve a bill of law, a government was allowed to announce a referendum by means of unanimity consent, it meant that people by casting their votes had decided whether the bill of law refused by the lawmaking body could finally become a law. (Čič, 1997, p. 349) In the period of socialism the institute of referendum had not been amended in Czechoslovakia.

Legal orders of the Slovak republic recognize a whole-national referendum, a local referendum on the municipality levels and a regional self-

govern referendum. People's vote on the removing of a president of the SR from his /her office can be understood as the forms of direct democracy. The way of providing local referendum or referendum called within the territory of the higher – territorial unit is specifically stated by the law.

Until now there has been only one successful referendum in which the Slovak citizens have expressed their approval for the Slovak republic to become one of the member-states of the European Union. However, ineffectiveness of this institute proves that its importance has been rather underestimated and, therefore, it has not belonged to the key and central issues up till now. (Palúš, Somorová, 2008, p. 184-185) The dominant form of democracy in the Slovak republic is the representative democracy.

The whole- national referendum is called by the president of the Slovak Republic if it is asked for by a petition signed by a minimum of 350, 000 citizens, or on the basis of a resolution of the Slovak National Council. Proposal to approve resolution of the Slovak National Council can be placed by deputies or government. The motion to pass a resolution of the Slovak National Council concerning calling the referendum is decided by the government on the base of a decree pursuant to Article 118 of the Slovak Constitution. The National Council of the Slovak republic decides on motions laid down by deputies or government referring the calling a referendum by the resolution if it is approved by more than one-half of the presented deputies. It is evident that the Constitution clearly defines two subjects who are eligible to initiate a referendum.

The motion to call a referendum is laid down to President by the Chairman of the Slovak National Council within five days from the approval of the resolution by parliament. Petition of citizens to call a referendum is directly addressed to president.

Pursuant to legal amendment the presented referendum questions concerning citizens` decisions must be devised in such a way so their final answers will be 'yes or no', and the questions must not mutually influenced each other, they have to be unbiased and impartial.

In case when the referendum is initiated by citizens` petition, it is called the facultative referendum since it is connected with the important questions of public interest. The notion public or community interest is not precisely defined by our legal rules and orders. Questions referring to state interests, respectively to the needs of some numerically large social groups might be considered to be

of public community interests. (Čič, 1997, p. 349-350) The question which does not have a character of a public interest cannot become the subject of referendum. The president guarantees the fulfillment of these required conditions. (Palúš, Somorová, 2008, p. 184)

The referendum is called by the president of the Slovak republic within 30 days after the receipt of citizens` petition, or the resolution of the National Council of the Slovak Republic. Under the conditions when the content of the citizens` petition is found not to be in compliance with the Constitution and/or a stated constitutional law referring to the petition right as it is amended in Act No. 85/1990 Coll., the president can refuse to call a referendum. This rule is also applicable in case when the petition has not the obliged requirements stated by the law. In one of the proclamations of the Constitutional Court it is clearly declared that according to the Constitution of the Slovak republic Article 95 the right of the president to call referendum commenced by the citizens` petition is closely interrelated with his rights to examine the constitutionality and legality of the presented petition. (PLÚS 42/95 Constitutional Court, 1996, p. 79)

Apart from what was said, the preventive control of constitutionality of the subject of referendum is acknowledged by the Constitution of the Slovak republic. If the president of the Slovak republic is of the opinion that the specified subject of referendum is doubtful and it is not in compliance with the Constitution or constitutional act, then he can file it to the Constitutional Court before it is called. If he has some doubts about the compliance of the referendum subject with the Constitution or constitutional act, it is not only his duty but it is his constitutional right that before calling a referendum he has to file it with the Constitutional Court. The president of the Slovak republic cannot accept the legal responsibility for applying or for not making use of the right to claim in order to start proceedings on the subject of referendum. (Drgonec, 2008, p. 138) The necessity of this legal adjustment is justified by the fact that it provides a needed extent of time to validate and to state legally whether the proposal for calling a referendum is in accordance with the Constitution and/or constitutional act. The stated assessment is of a professional character, not to mention the fact that the accomplishment of referendum requires quite costly budget expenses. On the other hand it is desirable to put into attention that the mentioned proceedings do not belong to the traditional competencies of the Constitutional Court. System and idea of the constitutional judiciary of the Slovak republic are based on the phenomenon to follow strictly the protection of

constitutionality. According to my opinion, the declared constitutional adjustment creates enough room for the president to deal the case with the Constitutional Court, but by doing this a considerable misbalance is created among the constitutional institutions. Consequently, the president's political responsibility is in some way transferred to the Constitutional Court which causes not only some extra and inadequate commitments and an abnormal preoccupation for its members, but the fact that the Constitutional Court might be entangled into some political disagreements cannot be excluded as well. That is something which has nothing to do with the constitutional and legal issues which belong to the agenda of the Constitutional Court.

In two cases the valid constitutional adjustment counts for the preventive control, respectively, it is concerned with safeguarding constitutionality, in this way it diverts from the conception of the consequential protection of constitutionality. Another case refers to decisions concerning harmonization of the agreed international treaties, the type of treaties which require before their ratification the consent of parliament, the Slovak National Council, in order to fulfill the necessary requirement to be in accordance with the legal order of the Slovak republic.

Before proclamation of its decision the Constitutional Court asks the National Council of the Slovak republic to present its own statement if the referendum is to be called on the basis of its resolution, or the proclamation of the petition committee is required if the referendum is called on the legitimate bases of citizens' petition. As it is declared by the Constitution, the Constitutional Court decides on the motion within 60 days after its receiving. From the valid constitutional adjustment we can conclude that in any time the Constitutional Court might decide on the motion, even after the expired term, as it is affirmed by the Constitution, but the condition that the lasting of this term is not connected with the legitimate effects has to be fulfilled. The Constitutional Court decides on the presented motion by means of finding done in an assembly meeting, and after that, it is delivered to the petitioner and to the National Council, or to the petitioner committee. If the Constitutional Court decides that the subject of referendum is not in compliance with the Constitution or constitutional laws then the referendum cannot be called by the president.

Referendum is called by means of proclamation declared in the Collection of laws and it is accomplished within 90 days since its calling by the president. Pursuant to Article 97 of the Constitution referendum cannot be called in the

shorter time than 90 days before the election to the National Council of the Slovak republic, but it can be called in the day of elections to the Slovak National Council. The stated adjustment considerably impedes to misuse referendum or its results in a political struggle. What's more, taking into consideration an economic point of view, it also helps to use reasonably and economically the state budget resources.

Obligatory referendum, the so called ratification referendum, is required by the Constitution only in one case when it is necessary to confirm an access of the Slovak republic into the union with other states or referring to its leaving from this union. From the valid constitution adjustment it is clearly stated that an access to the union or to leave it cannot be decided only by the accepting constitution law approved by the legislative body. It is valid and applicable only after its approval by referendum. It is the only case in point when approving of the constitution law by referendum is required. By means of referendum citizens decide whether the legitimate effects will be enforced as it is imposed by the constitution law. (II. US 31/97 Constitutional Court, 1998, p. 419)

Political parties and political movements have not the right to initiate, organize and call referendum.

From the point of view of referendum legitimacy the constitution order determines specific conditions which are necessary to be fulfilled. Referendum can be set off only by the subject who is without any doubt justified to do it by the Constitution. Subjects of referendum cannot be in contradiction with the legal order of the Slovak republic and referendum has to be called by the president. Subjects which are not justified under the decisions done by referendum are distinctly stated in Article 93, section 3 of the Constitution. It is declared that citizens are not allowed to decide on the basic rights and freedoms, taxes and the state budget.

The right to participate in referendum is given to every citizen who has the right to take part in elections to the National Council of the Slovak republic. The right of citizens to decide in referendum can be considered to be a political right which is exercised by citizens as it is amended by section 30 paragraph 1 of the Constitution of the Slovak republic. According to it Slovak citizens have the right to participate in public affairs. Each citizen who is eligible to vote in referendum has the right to obtain a ballot paper with questions corresponding to those stated publicly in the announcement of the president of the Slovak republic in order to meet the conditions connected with the calling of referendum

expressed and defined in the Collection of Laws of the Slovak republic. As amended by the Article 94 section 30 paragraph 1 of the Constitution of the Slovak republic, the legal judgment of the Constitutional Court is as follows; to fulfill constitution right of a citizen can be exercised only under the condition when a citizen who has the right to vote in referendum is allowed to participate in referendum which is announced by the president's public statement as it is declared by the Collection of Laws of the Slovak republic.

According to the Slovak Constitution citizens are given the right to decide on some basic issues referring to public interests, but on the other hand this right is curbed by the constitution in this way that it prohibits to decide on some specific questions by means of referendum, or to repeat referendum on the same subject within the three years' time since the last referendum implementation. According to the Constitutional Court the right of citizens is not of an absolute character; it is initiated and exercised only under the conditions stated by the Constitution. (US 22/00 Constitutional Court, 2001, p. 375-378)

Within the content of the Constitution the referendum is valid when more than a half of the eligible voters take part in it and if a decision is accepted by more than a half of the referendum participants. It is required to fulfill both conditions to make referendum legitimate. The Slovak National Council declares the results of referendum in the same way as the law; it means in such a way as it is stated in the Collection of Laws. The proposal accepted by referendum can be enforced by the law on the day of its declaration in the Collection of Laws of the Slovak republic. (Palúš, Somorová, 2008, p. 193)

Pursuant to the second section of the fifth chapter, according to the legal judgment of the Constitutional Court it is not possible directly to change constitution on the basis of the elections provided by referendum, The recognition of the proposal in referendum has the constitution relevance in that sense that citizens who participate in referendum elections pledge the parliament, the Slovak National Council, with an obligation to change that part of the Constitution which constituted the subject- matter of the calling of referendum, and when it is in compliance with the proposal accepted by referendum. (II.US 31/97, Constitutional Court, 1998, p. 419) According to section 72 of the Constitution the right to change Constitution is vested only to the Slovak National Council which is the only legislative and constitution body. It can be said, that in this way the Constitution impedes changing the text of constitution by some other state bodies. The constitutional adjustment might be

comprehended as problematic if the will of citizens has to be carried out expressed in referendum, it can be done only by the approval of constitution law, only in such a way the particular part of the constitution can be changed. The question is, whether the results of referendum have enough force to become a sufficient proposal of the constitution law. Who is then competent enough to put down a motion of the constitutional law, as the constitutional and legislative proposals can be laid down only by deputies or committees of the Slovak National Council and the government of the Slovak republic? Pursuant to the valid constitution and legitimate amendment citizens have not the right to lay down the bill of law. Another problem which might occur rests in the approval of the bill of law itself. Its approval requires the consent of at least three fifths majority from the total number of all deputies of parliament which means 90 deputies from the total number of 150 who have to vote for a proposal if it has to be approved. In reality, there are needed votes of both coalition as well as opposition. Another question is what kind of legal consequences might be if such proposal was not approved by the National Council reflecting thus deputies' disagreement with it and followed by their not voting in favor of its acceptance, or voting for the amended bill which would significantly divest from opinions and attitudes of citizens expressed in referendum? In professional literature we can find legal attitudes and approaches to this problem which are mostly aimed at the requirement to do some necessary changes in our Constitution, or at least to specify its provisions. One of the possible amendments might be to state clearly the procedure concerning the change of the Constitution which might be solely left to the parliament or it can be amended by the so called constitution veto enabling thus citizens to ratify the proposed changes. Another variety is given by the possible public initiative connected with the constitutional substance consisted in such reality where citizens would be able to suggest provisions which should be changed in the Constitution. Suggested changes might be approved only by parliament or by citizens which are given a chance to express their say by means of a ratification referendum. (Krunková, 2008, p. 212) I think it would be appropriate to amend the Constitution and to accept constitution and legislative incentives of citizens and give them a chance to lay down a proposal of law referring to constitution, respectively acknowledge their proposal to amendment by means of a petition signed by an affirmed number of citizens. In this way parliament would be obliged to deal with it and decide by means of voting after the fulfillment of all

formal and material conditions connected with this proposal.

The result of referendum can be changed or annulled by the National Council of the Slovak republic by the constitution Act after three years since its enforcement. Without any doubt, it would be fairer to permit any changes or abolition of the results of referendum by calling a new one; it is the idea which is in accordance with the theory of peoples' rule and power founded on promoting the thesis which refers to people as the original sovereign in comparison to the derived sovereignty of parliament. (Čič, 1997, p. 361)

In compliance with Article 99 section 2 of the Constitution referendum on the same subject can be repeated no sooner than after three years since its implementation. Three – years time for the recalling referendum on the same subject or for the occasional changes and abolition of the results of referendum can be understood as a matter of order and regulation. Applying the above stated measures saves not only stability of the legal order, but at the same time it reinforces the social and political stabilities. It helps to distract a potential misuse of referendum, and finally, it stimulates and leads to a reasonable utilization of financial resources. (Palúš, Somorová, 2008, p. 194)

Pursuant to Article 129 section 3 of the Constitution claims referring to the results of referendum are dealt by the Constitutional Court of the Slovak republic. The subject matter of the prosecution concerning claims which are related to the results of referendum might lead to the assertion that the executed referendum is invalid when it has been found that constitutionality has been abused. Anyway, if conclusions stated in the Constitution of the Slovak republic have to be respected, it is not permissible to declare unconstitutionality of referendum by this prosecution. Grievances against the results of referendum can be laid down by the one fifth of deputies of the Slovak National Council, or by the president, government, Attorney General, or by a group of citizens consisting at least of 350 000 members. Petition and grievances are put down against the state administrative bodies which not only participated in organizing referendum, but they took part in examining its results as well. According to the law the upper limit for presenting grievances is 30 days since the announcement of the results of referendum.

Petitions are considered to be justified only in such cases when they are in relation to the results of referendum made public in ways as it is declared by the law No. 564/1992 Coll. as amended, referring to the execution of referendum. The central referendum committee makes results of elections achieved in

referendum public by means of the Slovak Press Agency. It is done immediately after the receipt of the referendum report by the Slovak National Council. (I.US 39/97 Constitutional Court, 1998, p. 480) The Constitutional Court can declare a referendum for invalid if it has been found the abuse of the Constitution, which might have had a considerably impact on referendum, or in case when there is a justified evidence that the results of referendum were manipulated.

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