

# THE EVOLUTION OF NATIONAL REFERENDUM TOOLS IN CZECH REPUBLIC AND SLOVAKIA'S COMPARATIVE CASE

## LA EVOLUCIÓN DE LAS HERRAMIENTAS DEL REFERENDUM NACIONAL EN EL MARCO COMPARATIVO DE REPÚBLICA CHECA Y ESLOVAQUIA

FABIO RATTO TRABUCCO

*Visiting Professor in Comparative Public Law  
University of Ss. Cyril and Methodius in Trnava*

ORCID ID: 0000-0002-2273-4019

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**Abstract:** This article analyses and compares the direct democracy tools in the Czech Republic and Slovakia in the framework of the former socialist Central-Eastern European area. Based on comparison and the previous Czechoslovak Republic experience, the author draws conclusions about shortcomings of the legal framework of direct democracy in the Constitutions of both countries. However, the Czech and Slovak national referendum experiences since 1993 confirm a weak usage of these tools. The majority of politicians are unwilling to make use of the national referendum tools and to make further regulations of the legislation of the referendum tools. In both countries, except for the EU accession field, the national referendum tools have been virtually non-existent. Moreover, the national referendums are tools in the hands of the political parties systematically used by politicians to discredit the opposition political part. The resulting of these two factors is that the tool becomes a real parody of direct democracy.

**Keywords:** national referendum tools, Rule of law, people's participation, Czech Republic, Slovakia.

**Resumen:** Este artículo analiza y compara las herramientas de democracia directa en la República Checa y Eslovaquia en el marco de la antigua área socialista de Europa Central y Oriental. Sobre la base de la comparación y la experiencia previa de la República de Checoslovaquia, el autor saca conclusiones sobre las deficiencias del marco legal de la democracia directa en las Constituciones de ambos países. Sin embargo, las experiencias del referéndum nacional checo y eslovaco desde 1993 confirman un uso débil de estas herramientas. La mayoría de los políticos no están dispuestos a hacer uso de las herramientas del referéndum nacional y hacer más regulaciones de la legislación dentro de este ámbito. En ambos países, a excepción del campo de adhesión a la UE, las herramientas del referéndum nacional han sido prácticamente inexistentes. Además, los referendums nacionales son herramientas en manos de los partidos políticos utilizados sistemáticamente por los políticos para desacreditar a la parte política de la oposición. El resultado de estos dos factores es que la herramienta se convierte en una verdadera parodia de la democracia directa.

**Palabras clave:** herramientas del referéndum nacional, Estado de derecho, participación popular, República Checa, Eslovaquia.

**Summary:** I. Introduction. II. The Czechoslovak Republic experience. III. The 1991 Constitutional Act of the Czechoslovak Federal Republic. IV. The Czech national referendum experience since 1993. V. The Slovak national referendum experience since 1993. 1. The instrumentalization of national referendum tools in Slovakia. 2. The Slovak national referendum tools and lobbies indoctrination. VI. Conclusive remarks.

## I. Introduction

1. The referendum institution has never enjoyed a particularly active role in Czech Republic and Slovakia (nor in the Czechoslovak Federal Republic, prior to its establishment on January 1, 1993). For more than 80 years, Czechs and Slovaks have been functioning within one political, economic, and social system. The Czechs had economic power in the socialist state (federal since 1969), while Slovaks were the poor part due to various political and economic circumstances which resulted in this pacific division.

2. In 1989, the Velvet Revolution restored democracy<sup>1</sup>. The word “socialist” was removed from the country’s full name on March 29, 1990, and replaced by “federal”. In 1992, because of growing nationalist tensions in the government, Czechoslovakia was peacefully dissolved by the Parliament. On 1 January 1993, Czechoslovakia formally separated into two independent countries, Czech Republic and Slovak Republic.

3. Both are the youngest and least experienced states in Europe, as far as direct democracy is concerned. Direct democracy functions on both nation-wide and local level, but only on the latter, it laid the roots. The referendum tool on the national level was, to all intents and purposes, virtually non-existent. Although referendum has always been part of the legal order since the establishment of the Czechoslovak Federal Republic in 1918, it was always regulated in the narrowest possible way in periods characterized by a positive legal basis. The latter aspect probably accounts in large measure for the fact that the referendum institution had no practical impact in both Czech Republic and Slovakia: since the establishment of the Czechoslovak Federal Republic in 1918, not any nation-wide referendum took place. The local referendum, which will be further discussed, had a more active role in both countries (as well as in the Central-Eastern European area, in countries like Albania, Bulgaria, Hungary, Poland, and Slovenia), yet due to its finely sub-national nature, it has never had a broad impact on political or legal affairs<sup>2</sup>.

4. Since referendum tools do not enjoy an extensive history and practice, I propose to outline a brief historical survey since 1918. I consider that this approach can give a better illustration of the general attitude toward referendums in Czech Republic and Slovakia as part of the traditionally negative attitude toward any form of direct democracy.

5. Broadly speaking, the main objective of this comparative analysis is to understand how deep the *deficit* of democratic participation in Czech Republic and Slovakia is with particular reference to the evolution of national referendum tools. The legal study question, or better the puzzle of the present article, is the weak experience of direct democracy in both countries at the national level with only one vote in Czech Republic and – conversely – in Slovakia, all referendums except one had lack of

<sup>1</sup> I wish to thank Prof. Jaroslav Mihálik by University of St. Cyril and Methodius in Trnava for the excellent and helpful research assistance.

See: V. ŽÁK, “The Velvet Divorce – Institutional Foundation”, in J. MUSIL (ed.), *The End of Czechoslovakia*, Budapest, Central European University Press, 1995, pp. 225-244; J. SIMON, *Czechoslovakia’s “Velvet Divorce”, Visegrád Cohesion, and European Fault Lines*, Washington, Institute for National Strategic Studies, 1993, pp. 2-3, available at: <http://www.files.ethz.ch/isn/23474/mcnair23.pdf>.

<sup>2</sup> See A. AVTONOMOV, “Sub-national Referendum in Central-Eastern European Countries”, in A. AUER, M. BÜTZER, *Direct Democracy: the Eastern and Central European Experience*, Aldershot, Ashgate, 2001, pp. 325-339.

sufficient participation *quorum*. Particularly, the gap in the literature I want to address is related to the secondary objective of this study, which is to highlight the poor implementation of national referendum tools in favor of formal rules that ensure these institutes. Indeed, I want to point out that the “burlesque” national direct democracy experience in both Czech and Slovak Republics has never been emphasized by legal scholars so far. The high level of political distortion of people’s initiatives by the party system, particularly in Slovakia, is a clear litmus test of the strong patronage that characterizes people’s direct participation.

## II. The Czechoslovak Republic experience

6. The constitutional charter of the Czechoslovak Republic of March 6, 1920, No. 121/1920 Coll., provided for a very limited form of the referendum – a facultative referendum that could only be called at the initiative of the government and only in relation to a statute which the government had proposed and the Assembly rejected<sup>3</sup>. The general attitude toward referendums may be inferred from the fact that the original draft of the 1920 constitutional Charter did not contain a provision on referendums; it was not until the debate that the Assembly itself introduced such a provision (article 46)<sup>4</sup>.

7. Article 46 of the Czechoslovak constitutional Charter provided that, if the Parliament rejected a statute proposed by the government, the government could, by a unanimous resolution, put the statute to a referendum. As the government was the only possible initiator, the provision could certainly not be considered a means of strengthening direct democracy, but rather as a tool affecting the balance between the legislative and executive branches. Also, changes to the constitution could not be effected in this way, so that one of the most significant characteristics of referendums, leaving to “the people” decisions on basic issues of governance, was in Czechoslovakia the very thing denied to the people<sup>5</sup>.

8. Issues of how referendums were to be held were meant to be regulated in a statute. As such a referendum could only diminish Parliament’s role, it is not surprising that none was ever adopted, leaving article 46 a “dead letter”<sup>6</sup>.

9. Moreover, there were not national referendum tools in the communist Constitutions of May 9, 1948, and July 11, 1960<sup>7</sup>. However, it is important to remember that Czechoslovakia, since its beginning, has an encoded inner division that was capable of breaking up this state. Apparently, in principle, there were no Czechoslovakians but Czechs and Slovaks inhabiting separate territories and besides, they

<sup>3</sup> See T. LEBEDA, “Referendum o přistoupení ČR k Evropské unii. Několik různých pohledů na první všelidové hlasování v Česku”, *Politologický časopis*, No. 3, 2004, pp. 206-223.

<sup>4</sup> This attitude is also well illustrated by the following quote from Headlam-Morley: «Distrust of a representative assembly [...] has always been strong in Germany; and it is in that country and in those influenced by German thought that the widest use of the referendum and initiative has been made [...]. In Poland, Yugoslavia, and Czechoslovakia, on the contrary, where the influence of French constitutional thought is stronger, the referendum and initiative have been entirely, or almost entirely, dispensed with. So strong, however, was opinion in favor of the theory of direct legislation that the system was rejected in these countries, not so much because it was objected to in principle, but because it was considered unsuitable for a people not long used to the practice of self-government». See A. HEADLAM-MORLEY, *The New Democratic Constitutions of Europe: a Comparative Study of Post-war European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, The Kingdom of the Serbs, Croats & Slovenes and the Baltic States*, London, Oxford University Press, 1928, p. 133.

<sup>5</sup> This aspect was also pointed out by Headlam-Morley: «Its object is to strengthen the position of the Government as against the Chamber. [...] [It] seems to be to enable the Government to pass a measure against the will of Parliament, without taking the extreme step of dissolving Parliament. So far the cause has remained a dead letter». See A. HEADLAM-MORLEY, *The New Democratic Constitutions of Europe*, cit., p. 139.

<sup>6</sup> See: D. BRABEC, “The Determinants of Civic Participation in the Czech Republic”, in M. MARCZEWSKA-RYTKO, K. AKSIUTO, D. MAJ, M. POMARAŃSKI (eds.), *Civic Participation in the Visegrád Group Country after 1989*, Lublin, Maria Curie-Skłodowska University Press, 2018, pp. 19-20; M. GILLIS, “Czech Republic”, in A. AUER, M. BÜTZER (eds.), *Direct Democracy: the Eastern and Central European Experience*, cit., p. 40.

<sup>7</sup> See P. PECHANEC, *Přímá demokracie v České republice*, Praha, Wolters Kluwer Česká Republika, 2011, p. 32.

were not territorially mixed, separated by a very clear border that did not change over centuries although it was then only of administrative character<sup>8</sup>.

10. Finally, the Czechoslovak experience is an ample illustration of the *dictum* that your point of view depends on where you stand, with a certain ironic twist. Under the Austrian-Hungarian Empire, the Czech and Slovak political elites were in favor of autonomy for their groups. Once Czechoslovakia was established, the leading Czech politicians were against autonomy, while the Slovak political elite still was in favor. And once Slovakia was established, the Slovak political elite unanimously refused to grant political strong autonomy to the Hungarian community in an *ad hoc* region<sup>9</sup>.

### III. The 1991 Constitutional Act of the Czechoslovak Federal Republic

11. The Federal Assembly of the Czechoslovak Federal Republic (CSFR) constitutional Act on referendums, of July 18, 1991, No. 327/1991 Coll., provided the first legal basis for a nation-wide referendum. While this Act contains some very significant and powerful elements of direct democracy, it addresses one issue – the resolution of constitutional relations within the federation of the Czech and Slovak Republics. Had this tough issue been resolved by political means, the Act would have lost its purpose. As it was, its significance (or lack thereof) was amply demonstrated by the fact that, when the terminal crisis of the CSFR came about, this Act was entirely ignored.

12. It provided for the calling of referendums on two issues: the first – rather generally phrased (albeit still limited in breadth) – concerned the decision of basic issues of the CSFR constitutional organization; the second – very specifically – the secession of a republic from the federation<sup>10</sup>. Of course, in a certain sense, these two issues shade into each other – the referendum on secession is a specific instance of the more general type, differing perhaps only in its apparent finality and the fact that it is held at the republican level. Also, the more general type encompasses the issue of joint (federation-wide) decisions on dissolution by agreement, not by secession. While the referendum on the former issues was facultative (to be called only at the initiative of the Federal Assembly), on the latter issue a referendum was mandatory, to be called by the national council of the republic contemplating succession. Although no direct (people's) initiative was contemplated, the people's voice was binding in the sense that, in the general case, the results had «the binding force of a constitutional act». Though nothing in the Act prevented the Federal Assembly from subsequently adopting a contrary act and overruling the people (although this would seem to be contrary to the purpose of a referendum), a negative result was binding in the sense that no further referendum on the same issue could be held for five years. Although, again, it seems there would have been nothing to prevent the Federal Assembly from overruling the negative result – immediately if it so wished.

13. Article 6, para. 3, makes it amply clear that a positive result on the second issue – the succession vote – was binding, as it directly lays down the consequences, namely that the federation would end one year after the announcement of the results, and that each republic would become a bearer of full state sovereignty. While no explicit provision barred the Federal Assembly from overruling such a result by the adoption of a subsequent constitutional act (though politically such a move would be suicidal), documents make it clear that it was intended to be final and binding.

<sup>8</sup> See T. SIWEK, “Słowacja i Czechosłowacja – geografia regionalna dawniej i dziś”, in T. MARSZAŁ (ed.), *Miasto – region – gospodarka w badaniach geograficznych. W stulecie urodzin Profesora Ludwika Straszewicza*, Łódź, University of Łódź Press, 2016, p. 164.

<sup>9</sup> See E. BUKKE, “The Principle of National Self-determination in Czechoslovak Constitutions 1920–1992”, *Central European Political Science Review*, 2002, Vol. 10, No. 3, p. 196.

<sup>10</sup> See T. LEBEDA, “Referendum o přistoupení ČR k Evropské unii. Několik různých pohledů na první všelidové hlasování v Česku”, cit., p. 207.

14. Since the referendum was to be binding and have such far-reaching and permanent consequences, a rather stricter voting majority was required; an absolute majority (50% plus one) of all eligible voters in favor (the more typical requirement calls for a 50% majority of a *quorum* of at least 50% of the eligible voters, theoretically allowing just over one-quarter of eligible voters to decide an issue).

15. Article 1, para. 1, provides that a proposal for the secession of the Czech Republic or Slovakia could be decided only by referendum. It is possible that dissolution by agreement was not covered. If this restriction was truly intended, one could say that it was repealed by the Federal Assembly of the Czechoslovak Constitutional Act on the dissolution of the CSFR, of November 15, 1992, No. 542/1992 Coll. Whether this was legitimate depends on whether one answers in the political or legal senses. Politically one could say «no, but they got away with it». Legally, it is hard to argue for the entrenchment of this provision, so the posterior constitutional act should prevail over the anterior.

#### IV. The Czech national referendum experience since 1993

16. Concerning the pre-existing legal regulation of the referendum tool, since Act No. 327/1991 Coll. was never formally repealed, questions may be raised about its present validity. Filip lays down a strong case (for purposes of argument, not necessarily to indicate his agreement therewith) for this Act having some current effect, to show that it would still not provide a sufficient basis for the holding of a referendum at present<sup>11</sup>.

17. Firstly, the 1993 constitution brought several crucial changes to the legal order of the Czech Republic. Constitutional Act No. 4/1993 Coll. It contains a general reception clause, providing that all constitutional acts of the CSFR are received as being those of the Czech Republic, as of December 31, 1992. However, as of January 1, 1993, those acts either were repealed (by article 112, para. 2, of the Czech constitution repealing all constitutional acts amending or supplementing the 1960s Czechoslovak Constitution), or were demoted to the status of ordinary statutes, thus being, under article 2, para. 2, of the Czech constitution (which requires a constitutional act as the basis for a referendum), of insufficient legal power to provide the legal basis for a referendum. Furthermore, the 1991 implementation statute (No. 490/1991 Coll.), as called for in article 7 of Act No. 327/1991 Coll., while still in existence, is merely a body without a head – a statute with no purpose because its application presupposes a constitutional act on referendums.

18. The 1993 constitution itself contains no explicit reference to the referendum tool, but article 2, which concerns the sovereignty of the people (para. 1 contains the standard proclamation that «All state authority emanates from the people; they exercise it through the legislative, executive, and judicial bodies») makes an explicit reference to direct democracy in para. 2, which provides: «A constitutional Act may designate the conditions under which the people may exercise state authority directly». Several important consequences follow from this article. There is currently no positive law basis in the Czech Republic for the referendum tool. Unless and until a constitutional act concerning the matter is adopted, «the people», as holders of state authority, have delegated that authority to state bodies, which exercise it in their name. The Czech Republic is a fully representative democracy. Furthermore, the wording of article 2, para. 2, makes it clear that the state has absolutely no obligation to adopt such a constitutional act; the constitution gives it facultative authority - «a constitutional act may designate». Hence, the situation bears strong similarities to that which existed under the First Republic. The tool of direct democracy was introduced in principle in the Constitution, but the perfected legal authority for holding a referendum depends on further action, whereas the state authorities generally lack any political will to adopt such tools as would perfect the legal basis of the referendum institution. As referendums may only be introduced by a constitutional act, the current situation would seem to be even more intractable than that which existed during the First Republic, where an ordinary statute sufficed. From 1993 to 2018

<sup>11</sup> See J. FILIP, *Ústavní právo České republiky*, Brno, Masaryk University Press, 2003, pp. 371-372.

eighteen attempts to adopt such an act have so far been unsuccessful<sup>12</sup>. However, it would not be accurate to conclude that the Czech Republic will not adopt a national referendum rule, as further factors make its introduction quite likely.

**19.** The legal bases of the referendum are included in the constitution of the Czech Republic of December 16, 1992, the Act on Local Referendum of 2004, and the Regional Referendum Act of 2010. Despite many legislative initiatives, there are still no acts on a national referendum in the Czech legal order<sup>13</sup>. An exception is the constitutional act regulating the referendum on the Czech Republic's membership in the EU, but it is of incidental character<sup>14</sup>.

**20.** The Czech local referendum was institutionalized by constitutional law from the year 1990; in compliance with this law, the citizens themselves could decide on local affairs at municipal assemblies, in a referendum, or through the municipal council<sup>15</sup>. The municipal order at the time<sup>16</sup> confined an obligatory arrangement of referendums to the decisions involving the questions of amalgamation or separation of municipalities. A request by one-tenth of the citizens of the municipality above eighteen years of age or one-third of the members of the municipal council was required to proceed to the referendum<sup>17</sup>. Detailed legislation of a local referendum was approved several years later in 1992<sup>18</sup>. The law stipulated that in a local referendum the citizens decide on specific questions that fall within independent powers of the municipality or a city quarter. A local referendum could not be held in taxatively enumerated questions<sup>19</sup>. The turnout of 35% of eligible citizens was required in the voting to making a local referendum valid and an absolute majority of all the participating voters was essential to making the result of a referendum legally binding. Therefore, a completely new law on local referendum came into effect in 2004<sup>20</sup> with recurring mitigation of conditions regarding the validity and legal binding of a local referendum since 2008<sup>21</sup>. Lastly, the latest legislation of a local referendum was passed in the year 2012 and it governed only partial aspects of the law on a local referendum concerning the review of the matters related to the proposal by the preparatory committee<sup>22</sup>. Anyway, the reflection on the practice of Czech local referendums it is strongly complicated for an inaccurate and obsolete register of local referendums<sup>23</sup>.

**21.** Since January 1, 2011, the most recent tool of direct democracy in the Czech system has been a regional referendum by law approved in April 2010<sup>24</sup>. The requirements for the validity and legal binding of a regional referendum are identical to the ones on the local level. To make the regional referendum valid, it was required to achieve the turnout of 35% of eligible voters at the minimum. The regional referendum has a legal binding provided an absolute majority of participating voters and at least 25% of eligible persons registered in the list of eligible voters voted in favor of the proposal. A regional referen-

<sup>12</sup> See D. BRABEC, "The Legal Basic for Civic Participation in the Czech Republic after 1989", cit., pp. 31-36.

<sup>13</sup> See V. JIRÁSKOVÁ, K. SKOTNICKI, *Parlament Republiki Czeskiej*, Warszawa, Wydawnictwo Sejmowe, 2009, p. 14.

<sup>14</sup> See A. RYTEL-WARZOCHA, *Referendum ogólnokrajowe w państwach Europy Środkowo-Wschodniej*, Warszawa, Wydawnictwo Sejmowe, 2011, p. 132.

<sup>15</sup> Constitutional Law No. 294/1990 coll.

<sup>16</sup> Law No. 367/1990 coll. on the municipal system.

<sup>17</sup> The possibility to declare a referendum upon the request by a municipal council was later abolished. Municipal councils assumed this power no earlier than in 2004.

<sup>18</sup> Law No. 298/1992 coll. on elections to the municipal councils and a local referendum, into effect on 1 July 1992.

<sup>19</sup> They concerned the matters regarding municipal budget, local fees, elections, and a dismissal of a mayor or board or any questions contrary to generally binding legal regulations. Also, the referendum could not be held in the last six months of an election period of a municipal council.

<sup>20</sup> Law No. 22/2004 coll. on a local referendum and amendments of some laws.

<sup>21</sup> Amendment No. 169/2008 coll.

<sup>22</sup> Law No. 142/2012 coll., effective of 1 July 2012. See P. JÜPTNER, P. VALUŠOVÁ, I. KRUNTORÁDOVÁ, "Participation and Elements of Direct Democracy in the Czech Republic: Part I", *Viešoji politika ir administravimas/Public Policy And Administration*, 2014, Vol. 13, No. 4, pp. 651-654.

<sup>23</sup> See P. JÜPTNER, P. VALUŠOVÁ, I. KRUNTORÁDOVÁ, "Participation and Elements of Direct Democracy in the Czech Republic: Part II", *Viešoji politika ir administravimas/Public Policy And Administration*, 2015, Vol. 14, No. 2, p. 288.

<sup>24</sup> Law No. 118/2010 coll. on a regional referendum and amendments of some laws.

dum may also be held on the territory of the capital city of Prague, which is simultaneously a region and a municipality<sup>25</sup>. Anyway, it will remain difficult to understand how the local and regional referendum politics reflects transformations in local civil society, and ultimately in the quality of the local democracy<sup>26</sup>.

**22.** The constitution of the Czech Republic in article 2, section 1 states that all state authority emanates from the people; they exercise it through legislative, executive, and judicial bodies. Section 2 specifies that a constitutional act may designate the conditions under which the people may exercise state authority directly. The provision for the possibility of a referendum is very important because this institution permanently encounters strong resistance from politicians<sup>27</sup>. The analysis of the above-mentioned legal articles allows the author to formulate a conclusion that the institution of a referendum is regulated rather laconically and the representative form of government is superior. Moreover, as Skotnicki rightly points out, the term may designate the conditions in section 2 shows that the nation may exercise indirect power based on each constitutional act and without any permanent legal bases<sup>28</sup>.

**23.** Thus the Czech law does not provide for an obligatory referendum. Each time the decision of ordering this form of direct democracy may depend on different circumstances. As a result of amendments to the constitution of 2003, article 10a was added which says that: «1. Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution. 2. The ratification of the treaty under the paragraph requires the consent of Parliament unless a constitutional act provides that such ratification requires the approval obtained in referendum». Amending the constitution with Article 10a introduced the so-called European integration clause and referred to the possibility of conducting the referendum on membership in the EU. Under article 62 of the amended constitution, the President was authorized to call a referendum and declare its results. The President was to call the referendum within 30 days of signing the accession treaty<sup>29</sup>. It was, therefore, a referendum on the ratification of the EU accession treaty which excludes parliamentary intervention as in the Polish case.

**24.** This solution was limited to the referendum on the EU membership exclusively and, paradoxically, it was obligatory because there was no other option for the Czech Republic to become a member state of the EU<sup>30</sup>. At the same time it was asserted that in case of a negative result of the accession referendum, the next one might be called after two years at the earliest (in the same case and on the same conditions). According to Act of November 14, 2002, No. 515 Coll., on the Referendum on the Accession of the Czech Republic to the EU each registered voter was empowered to petition the constitutional court pointing to legal objections concerning the validity of the referendum within ten days after voting<sup>31</sup>.

**25.** The Czech Parliament several time was working on the act of national referendum in the Czech Republic<sup>32</sup>, without any result<sup>33</sup>. Despite earlier initiatives, there is no act on the national referen-

<sup>25</sup> See P. JÜPTNER, P. VALUŠOVÁ, I. KRUNTORÁDOVÁ, "Participation and Elements of Direct Democracy in the Czech Republic: Part I", cit., p. 651.

<sup>26</sup> See M.L. SMITH, "Making direct democracy work: Czech local referendums in regional comparison", in H. REYNAERT, K. STEYVERS, P. DELWIT, J.-B. PILET (eds.), *Towards DIY-Politics. Participatory and Direct Democracy at the Local Level in Europe*, Brugge, Vanden Broele, 2007, p. 101.

<sup>27</sup> See K. SKOTNICKI, *System konstytucyjny Czech*, Warszawa: Wydawnictwo Sejmowe, 2000, p. 17.

<sup>28</sup> *Ibid.*

<sup>29</sup> See S. HANLEY, *Referendum Briefing No. 6. The Czech EU Accession Referendum 13-14 June 2013*, Sussex European Institute, Opposing Europe Research Network, 2003.

<sup>30</sup> See T. LEBEDA, *Referendum o přistoupení ČR k Evropské unii. Několik různých pohledů na první všelidové hlasování v Česku*, cit., p. 207-208.

<sup>31</sup> See E. KUZELEWSKA, "Direct Democracy in Czechia", in M. MARCZEWSKA-RYTKO (ed.), *Handbook of Direct Democracy in Central and Eastern Europe after 1989*, Opladen, Budrich, 2018, p. 87.

<sup>32</sup> See VLÁDA ČESKÉ REPUBLIKY, *Vláda projedná zákon o referendu*, March 26, 2012, available at: <http://www.vlada.cz/cz/media-centrum/aktualne/vlada-projedna-zakon-o-referendu-94006/>.

<sup>33</sup> See POSLANECKÁ SNĚMOVNA PARLAMENTU ČESKÉ REPUBLIKY, *Sněmovní tisk 661 VI. n. ústavního zákona o celostátním referendu*, April 11, 2012, available at: <http://www.psp.cz/sqw/historie.sqw?o=6&t=661>.

dum in the Czech constitutional system<sup>34</sup>. The Czech citizens have experienced only 30 years of democracy during the past 100 years and they are suffering from a lack of trust in their own ability to directly express their opinion<sup>35</sup>. As Skotnicki wrote, the referendum tools met with strong opposition from the politicians<sup>36</sup>. Indeed, the Czech political elites support the traditional way of solving public affairs (in cabinets) and do not prefer consulting public opinion in a referendum<sup>37</sup>.

**26.** Only from 2013, it should be pointed out that the situation can be changed because of a new populist political party was established like Dawn of Direct Democracy (Úsvit přímé demokracie, UPD) later transformed in Freedom and Direct Democracy (*Svoboda a přímá demokracie*, SPD) founded by Okamura, a Czech-Japanese politician, and entrepreneur. This new party supports introducing a system of direct democracy and encouraging citizen participation in politics following the example of the Swiss model<sup>38</sup>. In this way, the Czech debate on increasing direct democracy tools was initiated but it is premature to evaluate the achievement of this movement insofar as there does seem to be a political consensus that legal conditions should be improved so that local, and perhaps national, direct democracy in the Czech Republic has a chance to flourish<sup>39</sup>.

**27.** As above mentioned, in the Czech Republic, only one national referendum has so far been held, i.e. the voting concerning the EU accession. Previously, there had been unsuccessful attempts to order a referendum on the Czech accession to NATO<sup>40</sup>. Membership of the EU was the key goal for all post-communist governments in the Czech Republic<sup>41</sup>.

**28.** The ruling governmental coalition announced that it would respect the result of the accession referendum regardless of the turnout and victory of any of the parties. The use of referendum and the respect for the will of the nation was a kind of “replacement” of the parliament’s decision<sup>42</sup>. The then ruling authorities were sure of the support of the citizens for the idea of European integration; however, the results of the surveys of the public opinion showed a small but gradual decline in the number of EU supporters<sup>43</sup>.

**29.** Since the Czech referendum law was limited to one specific case, the deputies did not establish any special conditions for the validity of the result. The referendum was thus acknowledged as binding without a *quorum*. The Czech politicians discussed a 50% requirement as in Poland and Slovakia, but eventually, they did not adopt this option<sup>44</sup>. The situation complicated a little after Klaus was elected President in February 2003, which changed the narrative of the referendum campaign<sup>45</sup>. Since Klaus was not a supporter of Czech membership in the EU, it was rightly feared that his attitude could

<sup>34</sup> See V. JIRÁSKOVÁ, K. SKOTNICKI, *Parlament Republiky Czeskiej*, cit., p. 14.

<sup>35</sup> See M. VALACH, “Czech Republic”, in B. KAUFMANN, M.D. WATERS (eds.), *Direct Democracy in Europe. A Comprehensive Reference Guide to the Initiative and Referendum Process in Europe*, Durham, Carolina Academic Press, 2004, p. 48.

<sup>36</sup> See K. SKOTNICKI, *System konstytucyjny Czech*, cit., p. 17.

<sup>37</sup> See E. ZIELIŃSKI, “Referendum w Czechach, Słowacji, Słowenii i na Węgrzech”, in E. ZIELIŃSKI, I. BOKSZCZANIN, J. ZIELIŃSKI (eds.), *Referendum w państwach Europy*, Warszawa, Aspra-JR, 2003, p. 55.

<sup>38</sup> See E. KUŹELEWSKA, “Referendum in the Czech Republic and Slovakia”, *Annales Universitatis Mariae Curie-Skłodowska, sectio K – Politologia*, 2014, Vol. 21, No. 1, p. 100.

<sup>39</sup> See M.L. SMITH, “The Uneasy Balance between Participation and Representation: Local Direct Democracy in the Czech Republic”, in T. SCHILLER (ed.), *Local Direct Democracy in the Czech Republic*, Wiesbaden, VS Verlag, 2011, p. 52.

<sup>40</sup> See M.A. VACHUDOVA, “The Czech Republic: The Unexpected Force of Institutional Constraints”, in J. ZIELONKA, A. PRAVDA (eds.), *Democratic Consolidation in Eastern Europe*, Vol. 2, Oxford, Oxford University Press, 2001, p. 351.

<sup>41</sup> See P. LYONS, “‘It’s the economy, stupid!’ Popular support for EU accession in the Czech Republic”, *Sociologický časopis/Czech Sociological Review*, 2007, Vol. 43, No. 3, p. 524.

<sup>42</sup> See V. PAVLIČEK, V. JIRÁSKOVÁ, *Transformace ústavních systémů zemí střední a východní Evropy*, Vol. 2, Praha, Vodňář, 2000, pp. 223-239.

<sup>43</sup> See F. MENDEZ, M. MENDEZ, V. TRIGA, *Referendums and the European Union. A Comparative Inquiry*, Cambridge, Cambridge University Press, 2014, p. 78.

<sup>44</sup> See I. ŠLOSARČÍK, “Constitutional Changes in the Czech Republic and Case Law of the Constitutional Court in 2000-2002”, *European Public Law*, 2004, Vol. 10, No. 1, pp. 3-18.

<sup>45</sup> See S. HANLEY, *Referendum Briefing No. 6. The Czech EU Accession Referendum 13-14 June 2013*, cit.



discourage the Czechs from taking part in the referendum. The politicians feared that the turnout may not be sufficient since municipal and Senate elections have not achieved a participation rate exceeding 30%. To prevent this from happening, the ruling coalition decided on a two-day accession referendum (June 13-14, 2003)<sup>46</sup>. The same solution has been implemented in Lithuania, Poland, and Slovakia, with successful turnout<sup>47</sup>. Moreover, before the referendum, each Czech citizen received a ballot pamphlet with the basic information on the Accession Treaty<sup>48</sup>.

**30.** All the parties jointly forming the government were firm supporters of the accession<sup>49</sup>. Those against were only the Civic Democratic Party (*Občanská demokratická strana*, ODS) and Communist Party (*Komunistická strana Čech a Moravy*, KSČM) that turned against Brussels' bureaucracy and its temptation of "creeping socialism"<sup>50</sup>. The official referendum campaign was neither long nor particularly intense<sup>51</sup> with discussion in the context of possible EU accession were problems connected with national interest<sup>52</sup>, as Czech sovereignty, security, free movement of workers, growth in price, etc. The turnout in the accession referendum was 55.21% and 77.33% of the voters supported the membership of the EU<sup>53</sup> and the highest support for the accession was recorded in the four biggest Czech cities (Praha, Brno, Ostrava, and Plzeň)<sup>54</sup>. The fewest supporters of the European integration were in central Bohemia and the regions bordering Austria, Germany, and Poland<sup>55</sup>.

**31.** However, the relatively low turnout could be the fact that many Euro-sceptic voters did not participate in the referendum as they were certain of its outcome in favor of accession<sup>56</sup>. From another standpoint towards the turnout, 55% of the participants in the EU membership referendum are relevantly strong turnout, slightly below the 58% figure for the parliamentary elections in June 2002<sup>57</sup>. Balík rightfully shares this point of view. In his opinion this participation of voters should be recognized as a dimension of strong democratic culture and political maturity of the Czechs; the Europeans came to the ballot-boxes<sup>58</sup>. According to Krenzler and Krok-Paszowska (2003), low turnout shows low levels of trust in the state institutions, a lack of communication between state and citizens, and a lack of identification with and loyalty to political parties<sup>59</sup>. On the other hand, participation in the accession referendum and elections to the 2004 EU Parliament brought contradictory results: 55% in the referendum and 28% in the EU elections<sup>60</sup>. Finally, also there are strong connections between voting in a referendum and the

<sup>46</sup> See M. VALACH, "Czech Republic", cit., p. 50.

<sup>47</sup> See E. KUZELEWSKA, "Do the Poles Influence the Decision-Making Process by Applying Direct Democracy Instruments?", *Annales Universitatis Mariae Curie-Skłodowska, sectio M – Balcaniensis et Carpathiensis*, 2016, Vol. 1, No. 1-2, p. 130.

<sup>48</sup> See D. MAREK, M.J. BAUN, *The Czech Republic and the European Union*, London-New York, Routledge, 2011, p. 26.

<sup>49</sup> The Social-Democratic Party, Christian Democratic Union, People's Party, and the Democratic Union.

<sup>50</sup> See M. PEROTTINO, "The Czech accession referendum: 'yes', but no passion?", in J.-M. DE WAELE (ed.), *European Union Accession Referendums*, Brussels, Editions de l'Université Libre de Bruxelles, 2005, p. 27.

<sup>51</sup> *Ibid.*, p. 25.

<sup>52</sup> See P. ŠARADÍN, "Referendum o přistoupení k EU a vlební podpora politických stran v České republice", in *Sředoevropské politické studie*, 2003, Vol. 5, No. 4, available at: <http://journals.muni.cz/cepsr/article/view/4021>.

<sup>53</sup> Source: Czech Statistical Office (Český statistický řad, ČSÚ), available at: <http://www.volby.cz/pls/ref2003/re?xjazyk=EN>.

<sup>54</sup> See M. BAUN, J. DÜRR, D. MAREK, P. ŠARADÍN, "The Europeanization of Czech Politics: The Political Parties and the EU Referendum", *Journal of Common Market Studies*, 2006, Vol. 44, No. 2, p. 265.

<sup>55</sup> *Ibid.*, p. 264.

<sup>56</sup> See J. VEČERNÍK, *Czech Society in the 2000s: A Report on Socio-economic Policies and Structures*, Praha, Academia, 2009.

<sup>57</sup> See M. BAUN, J. DÜRR, D. MAREK, P. ŠARADÍN, "The Europeanization of Czech Politics: The Political Parties and the EU Referendum", cit., p. 264.

<sup>58</sup> See S. BALÍK, "Několik poznámek k referendu o vstupu ČR do EU", *Revue Politika*, June 20, 2003, available at: <http://www.revuepolitika.cz/clanky/818/nekolik-poznamek-k-referendu-o-vstupu-cr-do-eu>.

<sup>59</sup> See H.-G. KRENZLER, A. KROK-PASZKOWSKA, *Public Attitudes Towards the EU in Candidate Countries: Report of the Working Group on the Eastern Enlargement of the European Union*, Florence, European University Institute, 2003.

<sup>60</sup> See O. KREJČI, *Geopolitics of the Central European Region: The View from Prague and Bratislava*, Bratislava, Veda, 2005, p. 446.

parliamentary elections in 2002. In the Czech regions with high support for the coalition in 2002, the high support for the EU membership was a year later<sup>61</sup>.

**32.** The relatively low participation in the EU referendum in the Czech Republic (lower turnout was only in Hungary and Slovakia) can be explained by the fact that the European integration issue is not exactly independent from domestic politics. This attitude drives the referendum vote in accordance with the government's popularity<sup>62</sup>. The low turnout frequently corresponds with the participation in national elections and in the European elections in most EU Member States<sup>63</sup>.

**33.** The Czech EU membership referendum was a successful step towards a more democratic society in a country whose citizens have no experience of direct participation in public affairs<sup>64</sup>. The referendum results were also the victory for the Czechs who viewed EU membership as an incontrovertible sign of the country's reintegration into Western Europe and the break with its isolation in the past<sup>65</sup>.

**34.** In connection with the discussion on referendum tools, about government system the Czech Republic has so far been classified into typical parliamentary systems; however, due to the shift in constitutional traditions upon the first direct election of the President in 2012, the position of the President has fluctuated. The position of the President in the system will then be closely linked with the personality of the first and actual direct elected Czech President Zeman. Among other things, negative experience with his approach to the constitutional definition of the President considerably also lowers the chances of an implementation of a direct election of mayors and, together with the Baltic States, the Czech Republic will be one of the few countries in this region which elect the mayors indirectly. In his typology of local systems, Swianiewicz ranks the Czech Republic among the cluster of countries for which an indirect election of mayors is a characteristic feature<sup>66</sup>. None of the relevant legislative proposals for the implementation of a direct election of the President represented a deviation from a parliamentary system. The presidential powers were to remain the same or to be even limited, in such questions as amnesty or appointment of the members of the Bank Board of the Czech national bank. Although some of the previous legislative proposals contained a one round majority system, a two-round system requiring an absolute majority of cast votes dominated the discussions and was implemented in the end<sup>67</sup>.

## V. The Slovak national referendum experience since 1993

**35.** The Slovak Republic is one of those multifarious states where a written constitution provides for national and local referendums. The Slovak Constitution was adopted by the Slovak National Council (*Národná rada Slovenskej republiky*) on September 1, 1992, during the last few months of the existence of the Common State of Czechs and Slovaks, namely Czechoslovakia. Even before the demise of the Federal Republic (CSFR), the Slovak Republic disposed, on a federal, constitutional level, of only one remarkable

<sup>61</sup> See T. LEBEDA, "Referendum o přistoupení ČR k Evropské unii. Několik různých pohledů na první všelidové hlasování v Česku", p. 222.

<sup>62</sup> See C.H. DE VREESE, H.A. SEMETKO, *Political Campaigning in Referendums: Framing the Referendum Issue*. London-New York, Routledge, 2004, p. 18.

<sup>63</sup> See M. ILLNER, D. ČERMÁK, T. KOSTELECKÝ, J. STACHOVÁ, "EU Accession and the Public Sphere in New Member States: the Case of the Czech Republic", in L. GIORGI, I. VON HOMEYER, W. PARSONS (eds.), *Democracy in the European Union. Towards the Emergence of the Public Sphere*, New York, Routledge, 2006, p. 158.

<sup>64</sup> See E. KUZELEWSKA, "Referendum in the Czech Republic and Slovakia", cit., p. 103.

<sup>65</sup> See M. LONG, *Making History: Czech Voices of Dissent and the Revolution of 1989*, Lanham, Rowman & Littlefield, 2005, p. 151.

<sup>66</sup> See P. SWIANIEWICZ, "An Empirical Typology of Local Government Systems in Eastern Europe", *Local Government Studies*. 2014, Vol. 40, No. 2, pp. 292-311.

<sup>67</sup> See P. JÜPTNER, P. VALUŠOVÁ, I. KRUNTORÁDOVÁ, "Participation and Elements of Direct Democracy in the Czech Republic: Part II", cit., pp. 284-285.

constitutional law, which deserves special attention. The law at issue is the Constitutional Law No. 327, adopted by the CSFR Assembly in July 1991 under the simple name 'On referendum'. A reference to this constitutional law – which for various political reasons was never applied – is necessary both for its intended (or actual) consequences and (in some respects) clear wording. This concerns especially article 3, para. 3, which states that “unambiguous” and “intelligible” questions must be posed in case of the referendum so that the President of the CSFR could, within the fixed 15 days term (article 3, para. 1 and 2), reject the proposal to call the referendum if questions were not worded in such a manner. However, if the legislative assembly insisted on the same questions, the President would call a referendum within 15 days after the repeated proposal. The above-mentioned requirement of unambiguous and intelligible questions to be examined by the President remains very pertinent. Unfortunately, the Slovak Republic did not draw on this important formula of the CSFR constitutional law on referendums for inspiration. As already mentioned, this law was never applied. Although it had been conceived to draw the attention on the legitimacy question of the common federal state, with major consequences for its further existence or demise, this issue of great importance was not eventually solved, which will be shortly discussed as follows.

**36.** The constitutional law at issue stated that some principal questions concerning the structure of the state and its legal organization could be submitted to the citizens (article 1, para. 1). Since the citizens of Czech and Slovak Republic were considered at the same time citizens of the CSFR according to the constitutional law of the Czechoslovak Federation which became effective on January 1, 1969, the Constitutional Law on Referendum of July 8, 1991, stated that suffrage in the Czech Republic belongs to the citizens – electors of the Czech National Council – as well as to the citizens of the Slovak Republic – electors of the Slovak National Council (article 1, para. 3). The purpose of this scenario was to allow the electorate of both nations to express their will or at least to allow one of them to know whether the CSFR acted in a legitimate way based on a bi-national consensus or not (article 6, para. 2, even virtually envisaged the possibility of a one-sided consensus, that is given by only one nation, on its secession from the federation. This could also potentially interest consequences therefrom resulting – the demise of the federal state and the creation of two sovereign states within one year after the announcement of the results). The President was obliged to call a referendum upon the proposal of the Federal Assembly of the Czech or Slovak National Council (article 3, para. 1 and 2). Such proposals were to be accepted if more than 50% of the total votes were positive in both republics (article 5, para. 1) or one of them (article 5, para. 2). Eventually, a referendum on the same issue could not be held before five years after the referendum date (article 5, para. 5). Thus, a referendum to decide whether the Czech or Slovak Republic could withdraw from the CSFR or not could not be arbitrarily repeated.

**37.** Although the question of the secession of the Slovak or Czech Republic from the CSFR could be solved only through a referendum and despite the huge petition activities of citizens who pressed the Federal Assembly to accept the proposal which should have led to a referendum being called by the President of the CSFR, the demise of the CSFR came into force on January 1, 1993, based on the above mentioned constitutional law, No. 542/1992 (without any ratification through a referendum). It results that the federal constitutional law on referendums was roughly put aside in former Czechoslovakia as concerns this crucial matter that affected a considerable part of the electorate and had significant future consequences.

**38.** The national referendum is mentioned in Chapter 5 concerning legislative power in the Slovak Republic. While the first section of this chapter deals with the National Council of the Slovak Republic, the second discusses the topic of national referendums. That being said, one may conclude that legislative power in Slovakia belongs both to the National Council and to the citizens. This complies also with other parts of the constitution, especially with article 2, para. 1, which provides state power to originate from the citizens, who exercise it either through elected representatives or directly. Unfortunately, the popular initiative – according to which citizens can initiate laws or constitutional amendments upon which the National Council should decide within the legislative process – is not clearly discussed in the articles of the constitution.

**39.** The direct democracy tradition in Slovakia is not very strong, it can be rather considered as just a constitutional opportunity providing three different referendum tools, albeit in a very limited form. In the constitution, other forms of direct democracy are mentioned (especially at the municipal level) such as petitions, people's initiatives, plebiscites, and, lastly, participatory budgeting, though they all are not strong nor successful forms of direct democracy in the Slovak Republic. As concerns referendums, there are limitations on issues related to fundamental human rights and economic ones (taxes or State budget). In a European comparative view, a comparison can be drawn with Finland, where referendums always have the power of recommendation and there is no limitation on the subject matter. Contrarily, referendums in Germany can be held only to discuss changes concerning national borders, while in Belgium, due to the ethnic composition of the State, the referendum tool is hardly implemented at the national level. Estonia, as an exemplar country of e-democracy, provides a *quorum* in the form of a simple majority, regardless of the overall participation<sup>68</sup>.

**40.** The first Slovak referendum option is the referendum for important topics of public interest<sup>69</sup>. Particularly, the approved Slovak referendum of May 17, 2003, on accession to the EU enjoyed the parliamentary consensus based on this constitutional provision. However, the results of the referendum are valid provided the absolute majority of eligible voters (*quorum*) who participated in the vote.

**41.** The second and third referendum options are the parliamentary initiative and the people's initiative<sup>70</sup>. The percentage of required signatures for the people's referendum initiative is quite high (around 7%); from a comparative viewpoint, it emerges that the country with the lowest percentage of required signatures is Ecuador with around 0.25%. In Italy, only 0.8% of voters (half a million) or five regional councils are enough to call a referendum, while other countries that facilitate the referendum initiative are Albania (1.8%), Serbia (1.5%) and Hungary (2%)<sup>71</sup>.

**42.** The most recent referendum votes in Slovakia were the three question referendums on banning same-sex marriage and related issues; the referendum took place in Slovakia on 7 February 2015. It was initiated by the Alliance for Family (*Aliancia za rodinu*), which gathered 400,000 signatures. Ultimately, the referendum occurred to be invalid as the turnout did not reach the required threshold of

<sup>68</sup> See P. HORVÁTH, J. MACHYNIAK, "The Practical Dimension of Civic Participation in Slovakia after 1989", in M. MARCZEWSKA-RYTKO, K. AKSIUTO, D. MAJ, M. POMARAŃSKI (eds.), *Civic Participation in the Visegrád Group Country after 1989*, cit., pp. 190-191.

<sup>69</sup> Article 93 (1 and 2), Const., in conjunction with Article 98 (1), Const. Article 93, Const.: «(1) A referendum is used to confirm a constitutional law on entering into a union with other states, or on withdrawing from that union. (2) A referendum can be used to decide also on other important issues of public interest. (3) Basic rights and freedoms, taxes, levies, and the state budget may not be the subject of a referendum». Article 98, Const.: «(1) The results of the referendum are valid if more than one-half of eligible voters participated in it and if the decision was endorsed by more than one-half of the participants in the referendum. (2) The proposals adopted in the referendum will be promulgated by the National Council of the Slovak Republic in the same way as it promulgates laws».

<sup>70</sup> Article 95, Const., in conjunction with Arts. 96 (1) and 98 (1), Const. Article 95, Const.: «(1) The referendum is called by the President of the Slovak Republic if requested by a petition signed by a minimum of 350,000 citizens, or on the basis of a resolution of the National Council of the Slovak Republic, within 30 days after the receipt of the citizens' petition, or the resolution of the National Council of the Slovak Republic. (2) The President of the Slovak Republic may, before calling a referendum, file with the Constitutional Court of the Slovak Republic a petition for a decision whether the subject of the referendum, which should be called on the basis of a citizens' petition or a resolution of the National Council of the Slovak Republic pursuant to paragraph 1, is in compliance with the Constitution or a constitutional law. If the President of the Slovak Republic files with the Constitutional Court of the Slovak Republic a petition for a decision whether the subject of the referendum which should be called on the basis of a citizens' petition or a resolution of the National Council of the Slovak Republic is in compliance with the Constitution or a constitutional act, the period pursuant to paragraph 1 shall not continue from filing of a petition by the President of the Slovak Republic until the decision of the Constitutional Court of the Slovak Republic becomes effective». Article 96, Const.: «(1) The motion to pass a resolution of the National Council of the Slovak Republic on calling a referendum may be introduced by Members of Parliament, or by the Government of the Slovak Republic. (2) A referendum shall be held within 90 days from the day it was called by the President of the Slovak Republic».

<sup>71</sup> See S. BAGNI, *Il popolo legislatore*, Bologna, Bononia University Press, 2017, p. 224.

50%, with only around 21% of voting citizens<sup>72</sup>. However, the initiative was not only specious and extremely deceptive, but also useless, since, on June 4, 2014, the National Council of the Slovak Republic adopted an amendment to the Constitution to define marriage as «the unique bond between one man and one woman»<sup>73</sup>. The explanatory memorandum that accompanies the law explicitly states that same-sex couples will not have the possibility to enter into a marriage. The amendment, specifically, denies same-sex couples the legal protections associated with marriage by specifying that «it will be impossible for the rights and duties associated with marriage to be conferred in any way other than a legally recognized union between a man and a woman»<sup>74</sup>.

**43.** Indeed, over the last decades in Central-Eastern Europe, the referendum has become an implementing tool of policies and laws dealing with important questions, such as the issue of LGBTI's rights or linguistic minorities (Croatia, Romania, Slovakia, and Slovenia)<sup>75</sup>. The majority decides on the rights of minorities with the risk of creating greater discrimination. That is how the issue of human rights referendums emerges. Firstly, it is fundamental to highlight the necessity to address this issue to the ECHR and CJEU. Secondly, the following question arises: which role do both courts play in these cases (i.e. which approach should they adopt?). It is difficult to draw any general conclusion about the effects of referendums on human rights<sup>76</sup>. The counter-majoritarian mechanisms make it possible to deal with the brutality of proposals submitted to vote while respecting democratic values<sup>77</sup>. Nevertheless, the fact that such referendums still take place and deal with the human rights of certain minorities cannot be changed. What could and should be changed, instead, is the response of the ECtHR. Indeed, the ECtHR should definitely take a clear stand, since failing to protect human rights could possibly lead to a gradual erosion of democracy and pluralism, followed by totalitarianism and dictatorship. The happy ending is not guaranteed<sup>78</sup>.

**44.** The Slovak referendum held on September 18, 2010, is likewise worth to be mentioned. The referendum topic was worded through six ballot questions: *a)* abolition of the concession fees for broadcasting and TV; *b)* limitation of the parliamentary immunity; *c)* reduction of the number of parliamentary seats; *d)* ceiling price for official vehicles; *e)* online elections; *f)* removal of politicians' automatic right of reply in the Press Code. The referendum occurred to be invalid as the turnout did not reach the required threshold of 50%, with only around 23% of voting citizens<sup>79</sup>.

<sup>72</sup> The three questions of the referendum on family issues were worded as follows: «Do you agree that the concept of marriage denotes solely the legal bond between one man and one woman and that it cannot not denote any other form of cohabitation of two individuals?»; «Do you agree that it should not be allowed to couples or groups of persons of the same sex to adopt and subsequently raise children?»; «Do you agree that schools should not require participation of children in the field of sexual education or euthanasia if their parents or the children themselves do not agree with the content of such education?». The referendum was approved respectively by 95.80%, 94.34%, and 92.48% votes, but with an insufficient turnout of 21.41%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>73</sup> Article 41, para. 1, Const.: «Marriage is a unique union between a man and a woman. The Slovak Republic protects marriage in all of its aspects and supports its welfare. Marriage, parenthood, and family are under the protection of the law. Special protection of children and juveniles is guaranteed».

<sup>74</sup> Constitutional Law No. 490/2014 which entered into force on September 1, 2014. See R. DOBROVODSKÝ, *National Report: Slovakia*, in COMMISSION ON EUROPEAN FAMILY LAW, 2015, p. 4, available at: <http://ceflonline.net/wp-content/uploads/Slovakia-IR.pdf>.

<sup>75</sup> See F. RATTO TRABUCCO, *The Human Rights Referendums in Central-Eastern European Union under the ECHR Protection*, Lecce, Libellula University Press, 2019, *passim*.

<sup>76</sup> *Ibid.*, pp. 136-137.

<sup>77</sup> See M. FATIN-ROUGE STEFANINI, «Referendum, Minorities and Individual Freedoms», in L. MOREL, M. QVORTRUP (eds.), *The Routledge Handbook to Referendums and Direct Democracy*, London-New York, Routledge, 2018, pp. 383-384.

<sup>78</sup> See E. KUZELEWSKA, «Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe», *Białostockie Studia Prawnicze*, 2019, Vol. 24, No. 1, pp. 13-27.

<sup>79</sup> The six referendum questions were worded as follows: «Do you agree that the National Council of the Slovak Republic repeals by law the duty of natural and legal persons to pay a fee for services provided to the public by Slovak television broadcasting and Slovak radio broadcasting?»; «Do you agree that the National Council of the Slovak Republic extends by law the possibility to hear a performance of a National Council's member as a misdemeanor in all cases as stated by the Act on misdemeanors?»; «Do you agree that the National Council of the Slovak Republic by constitutional law decreases the number of its members to 100 as of the next term?»; «Do you agree that the National Council of the Slovak Republic enacts that the public

45. As mentioned above, only one referendum in the Slovak history has ever crossed the participation *quorum*: the 2003 vote on EU membership<sup>80</sup>. All five remaining referendums on eight ballot questions were declared invalid due to insufficient turnout: a) 1994: privatization financial details disclosure<sup>81</sup>; b) 1997: NATO accession, nuclear weapons, foreign military bases and direct presidential election<sup>82</sup>; c) 1998: strategic companies privatization<sup>83</sup>; d) 2000: early parliamentary elections<sup>84</sup>; e) 2004: early parliamentary elections<sup>85</sup>.

46. The Slovak Constitutional Court held in its decision of May 21, 1997, No. 139, that it is not possible to directly change the constitution by means of referendum results; through referendums – in a constitutionally relevant manner – citizens can only express their will to change the Constitution of the Slovak Republic. Without commenting on this ruling, it seems that merely giving an opinion on some constitutional articles hardly justifies placing referendum under “legislative power”. However, this decision can be considered inadequate because its interpretation is contrary to the combined effect of articles 72 and 99, para. 1, Const.: on the one hand, the National Council shall be the sole constitutional and legislative body of the Slovak Republic. On the other hand, the ruling adopted in the referendum and published in the Collection of Laws is protected for three years against changes deriving from decisions taken by the National Council. Moreover, the exclusion of the possibility to introduce constitutional changes through referendums is an exception in the Western European tradition, as strongly criticized by Slovak legal scholars<sup>86</sup>. In addition, the same problem was interpreted in a contradictory manner by

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administration bodies can procure personal motor vehicles up to the maximum price of 40 thousand Euro?»; «Do you agree that the National Council of the Slovak Republic provides the possibility to vote online the members of the National Council and the European Parliament?»; «Do you agree that the National Council of the Slovak Republic exempts by law the public officers from the right of reply as stated by the Act on press law?»; The referendum was approved respectively by 90.62%, 98.21%, 96.01%, 93.51%, 76.02%, and 84.79% votes, but with an insufficient turnout of 22.84%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>80</sup> The question of the referendum on the EU membership was worded as follows: «Do you agree to the proposal that the Slovak Republic should become a member state of the European Union?»; and was approved by 93.71% votes with a turnout of 52.15%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>81</sup> The question of the referendum on the privatization financial details disclosure was worded as follows: «Do you agree to a law on proof of funds used for auctioning and privatization?»; and was approved by 93.64% votes but with an insufficient turnout of 19.96%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>82</sup> The four question of the referendum were worded as follows: «Are you in favor of Slovakia's entry into NATO?»; «Are you in favor of placing nuclear weapons within the territory of Slovakia?»; «Are you in favor of locating foreign military bases within the territory of Slovakia?»; «Do you agree that the President of the Slovak Republic should be directly elected by the citizens of the Slovak Republic according to the enclosed proposal for constitutional law?». Referendum results are unknown with an insufficient turnout of 9.53%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>83</sup> The referendum question on the privatization of strategic companies was worded as follows: «Do you agree that the National Council of the Slovak Republic should adopt a constitutional law banning the privatization of the following strategic enterprises: Západoslovenské energetické závody of Bratislava, Stredoslovenské energetické závody of Žilina, Východoslovenské energetické závody of Košice, Slovenský plynárenský priemysel of Bratislava, Slovenské elektrárne of Bratislava, Transpetrol of Bratislava?». The referendum was approved by 84.3% votes, but with an insufficient turnout of 44.06%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>84</sup> The referendum question on the early parliamentary elections was worded as follows: «Do you agree with the fact that the National Council of the Slovak Republic should adopt a resolution on the Electoral Act: the electoral period of the National Council of the Slovak Republic elected in 1998 will be finished by the day of the election to the NC SR which will be performed up to 150 days after the day of referendum results announcement?». The referendum was approved by 95.07% votes, but with an insufficient turnout of 20.03%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>85</sup> The referendum question on the early parliamentary elections was worded as follows: «Do you agree with the fact that the deputies of the National Council of the Slovak Republic are to pass a resolution that would shorten the 3rd electoral period of the National Council of the Slovak Republic so that the election to the National Council of the Slovak Republic will take place in the year 2004?». The referendum was approved by 87.90% votes but with an insufficient turnout of 35.86%. Source: Statistical Office of the Slovak Republic (Štatistický úrad Slovenskej Republiky, SUSR).

<sup>86</sup> See P. HORVÁTH, J. MACHYNIÁK, “The Practical Dimension of Civic Participation in Slovakia after 1989”, cit., pp. 192-193.

leading political figures in the legislative process<sup>87</sup> and governmental statements<sup>88</sup>. In order to solve the problem, the issue should be redefined as follows: if the subject of the referendum was the Constitution or constitutional law, the proposal approved through a referendum and published in the collection of laws would have binding power like a constitutional law. Although this new definition is perhaps closely connected with another point that will be discussed in this paragraph, the necessity to overcome the present referendum definition has already been mentioned. Such a definition, indeed, does not endow the referendum with the possibility of bringing about constitutional changes.

47. Furthermore, within the context of Slovak direct democracy, it can be pointed out that a distinction is made between national and local referendums, on the one hand, and people's vote on the recall of the President on the other. This was introduced in the Slovak legal system in 1999 after a national referendum on the direct election of the President was thwarted in 1997. Both levels of constitutional law and ordinary public law coexist. As to the first one, it has some far-reaching consequences. Constitutional Law No. 9, adopted by the National Council on January 14, 1999, not only introduced the procedure of direct election of the Slovak President (amendment to article 101 of the Constitution which formerly provide indirect election), but also the procedure of people's vote for presidential recall. According to this amendment, the President can be recalled through a popular vote initiated by the National Council. Thus, after its resolution (adopted by a three-fifths majority of its members), the chairman of this legislative body will be required to call a people's vote on the recall (amendment to article 106 of the Constitution, which formerly ascribed the competence to recall the President solely to the National Council). Despite some similarities, it is obvious that Constitutional Law No. 9/1999 sharply distinguishes between referendum and people's vote on the recall of the President. Thus, in article 111 of the Constitution, which attributes to the Constitutional Court decision-making competence over complaints against the result of referendums, it is stated that this competence also concerns complaints against the results of the people's vote on the recall of the President. Nevertheless, there are also some similarities between the two tools, as the binary yes/no form of the ballot shows<sup>89</sup>.

48. The Slovak so-called recall referendum<sup>90</sup> is supposed to serve as a safety valve for the whole juridical system in the event of a contrast between the electorate and its parliamentary representatives. The people play not only an arbitral role, but they can also legitimate the power, not to mention their participation while settling political conflicts<sup>91</sup>.

49. In Slovakia, the recall referendum was envisaged by the constitutional revision of 1999 which introduced the direct election of the Head of State. According to article 106, Const., the President can be revoked from office before the expiry of the mandate by means of a people's vote. The vote is called by the President of the Parliament based on a resolution, provided that a majority of at least three-fifths of the deputies are given, within thirty days of the deliberation, so that the popular vote takes place within 60 days of its announcement. The President is revoked only with the absolute majority out of the total of all people entitled to vote. Similarly, article 43, Weimar Const., provided that the referendum should take the form of a no-confidence vote against one of the two bodies, President or Parliament,

<sup>87</sup> See: *Vláda pozastavila distribúciu referendového lístka*, April 23, 1997, available at: <http://www.sme.sk/c/2072277/vlada-pozastavila-distribuciu-referendoveho-listka-o-priamej-volbe-prezidenta-kym-nerozhodne-us-sr.html>; *Referendom občania záväzne radia parlamentu a nie nahrádzajú jeho činnosť*, May 14, 1997, available at: <http://komentare.sme.sk/c/2074328/referendom-obciana-zavazne-radia-parlamentu-a-nie-nahradzaju-jeho-cinnost.html>.

<sup>88</sup> NATIONAL COUNCIL OF THE SLOVAK REPUBLIC, Stenographic Report, May 25, 1994-June 9, 1994, p. 32, available at: <http://www.nrsr.sk/dl/Browser/Document?documentId=71580>.

<sup>89</sup> Introduced by para. 42.1b of Law No. 46 of March 18, 1999: «I am for the recall of the President of the Slovak Republic from his office. I am against the recall of the President of the Slovak Republic from his office».

<sup>90</sup> See Y. WELP, "Recall Referendum around the World: Origins, Institutional Designs, and Current Debates", in L. MOREL, M. QVORTRUP (eds.), *The Routledge Handbook to Referendums and Direct Democracy*, cit., pp. 451-463.

<sup>91</sup> See F. RATTO TRABUCCO, "The Latvian Direct Democracy Tools in a Comparative European Context", *Oñati Socio-Legal Series*, 2020, Vol. 11, No. 4, p. 25.

whose decision-making role was no longer approved by the voters<sup>92</sup>. Thus, it should be highlighted that letting all the people decide on the near future of the incumbent president and the duration of the parliamentary sitting<sup>93</sup> was an essential part of the Weimar Constitution<sup>94</sup>.

**50.** The arbitration role of referendums – in case of a conflict between Parliament and Head of State – is proved by the fact that the failure to revoke the President entails the dissolution of the Slovak National Council by the Head of State within thirty days of the announcement of the results of the popular vote. In this case, a new presidential mandate begins. The President of the Parliament announces the election of the National Council within seven days of its dissolution. The Constitutional Court is called to decide on a potential appeal against the result of the popular vote revoking the presidential office (article 129, Const.)<sup>95</sup>. However, the possibility to hold a presidential recall referendum in Slovakia has not had any concrete implementation up to now<sup>96</sup>.

**51.** Act November 19, 1992, No. 564, was adopted under the following title: «On the manner of executing referendums». It tries to solve the problem of the qualitative features of referendum questions, which must be adequate for the «manner of execution of the referendum», i.e. “clear yes-no questions”. Unfortunately, the requirement of “unambiguous” and “intelligible” questions implies a certain discretion in terms of presidential bias towards their approval, yet the president can also reject referendum questions and public reactions are not anticipated (such a procedure could easily be obtained by merely transcribing the appropriate part of the first federal constitutional law on the above-mentioned referendum of 1991).

**52.** Law No. 564/1992 has been amended on five occasions from 1994 to 2011<sup>97</sup>. This law was adopted after the second fall of the Mečiar government, perhaps to prevent his People's Party – Movement for a Democratic Slovakia (Ľudová strana – Hnutie za demokratické Slovensko, ĽS-HZDS) to keep playing an active role within the Slovakian political framework. After the victorious post-electoral comeback of the ĽS-HZDS, the second amendment of Law No. 564/1992 was adopted in the National Council of the Slovak Republic in 1995. The political struggle between the President and anti-ĽS-HZDS political parties and movements on the one hand, and the HZDS and its allies on the other, continued this time under the guise of Law No. 269/1995. The law at issue, indeed, made of the President somewhat an outsider who could only wait for the chairman and the Slovak Parliament to take their decisions (the petition should no longer be delivered to the President but to the chairman, who establishes which “organ or institution” should decide whether the petition meets the requirements or not). However, the President turned to the Constitutional Court, objecting, amongst other things, to article 1 of Law No. 269/1995 which altered the previous wording of para. 1c and made the President a mere outsider concerning the referendum<sup>98</sup>. Consequently, on May 2, 1996, the Slovak Constitutional Court ruled that para. 1c of Law

<sup>92</sup> See S. BALDIN, “I referendum arbitrali fra teoria e prassi applicative”, *Federalismi.it*, 2012, No. 19, p. 5.

<sup>93</sup> See P. HAUNGS, *Reichspräsident und parlamentarische Kabinettsregierung*, Köln, Westdeutscher, 1968, p. 30.

<sup>94</sup> See Y.-C. SHEN, “The Anomaly of the Weimar Republic's Semi-Presidential Constitution”, *Journal of Politics and Law*, 2009, Vol. 2, No. 3, available at: <http://www.ccsenet.org/journal/index.php/jpl/article/view/2107>.

<sup>95</sup> See F. RATTO TRABUCCO, “The Latvian Direct Democracy Tools in a Comparative European Context”, cit., p. 26.

<sup>96</sup> See S. BALDIN, “Il referendum revocatorio del Presidente della Repubblica romana: circolazione e adattamento di un singolare istituto”, *Diritto Pubblico Comparato ed Europeo*, 2008, No. 1, p. 66.

<sup>97</sup> Laws No. 158/1994 Coll., 269/1995 Coll., 515/2003 Coll., 192/2007 Coll., and 204/2011 Coll.

<sup>98</sup> Article 1, Law No. 269/1995: «The National Council of the Slovak Republic shall verify whether the petition derives from the Constitution or a special law (the law on petition rights). The National Council of the Slovak Republic shall designate a relevant state organ or another institution to review whether the petition includes all envisaged requisites. The National Council is also obliged to announce its findings concerning the number of valid signatures gathered to review the petition. The National Council of the Slovak Republic shall announce its findings, subject to clause, to the President of the Slovak Republic within 20 days after receiving notice of the submission of the petition. The President of the Slovak Republic shall call the referendum after the statement of the National Council of the Slovak Republic, confirming that all conditions are fulfilled; if not, the President cannot call the referendum and is obliged to inform the petition committee».



No. 269/1995 is in contradiction with several statements of the Slovak Constitution<sup>99</sup>, amongst others with article 95, Const.

### 1. The instrumentalization of national referendum tools in Slovakia

**53.** The Slovak legal system does not use the formal word “plebiscite”. Furthermore, from an international public law viewpoint, overall consensus, even in theoretically sophisticated works, concerns the fact that plebiscite should be intended as a popular vote on the status of a demarcated territory. Both context and tradition play a key role in this issue. Thus, sometimes plebiscite and referendum occur to share the same or a very similar meaning. Similarly, plebiscites may occur to be connected with a certain personalization of public power, initiated by an individual. From this point of view, the initiative is – at least in the present Slovak legal system – divided between two branches of power, the state, and the citizens.

**54.** The system of parliamentary democracy as conceived in the Slovak Republic implies that the referendum is intended only as a complementary form of democracy. Slovakia is a consolidated parliamentary and representative democracy, to some extent based on former CSFR traditions. The 1992 Constitution provides a single-chamber, 150 members forming the legislative assembly elected by universal suffrage for a four-year office. The President, and simultaneously the Head of State, has been directly elected since 1999, for a maximum of two consecutive five-year offices. The President also appoints the Prime Minister, who in turn appoints a cabinet. The Parliament approves and controls the executive bodies, which are responsible for the legislative ones. This classical division of powers was mediated by the first Czechoslovak constitution of 1921. Elections are held every four years by universal suffrage. The election system is proportional – each party gets seats in the Parliament according to the percentage of votes they get. Political parties that would like to run for elections have to declare either 10,000 members or 10,000 supporters (or 100,000 votes in the last elections). The threshold for entering the Parliament amounts to 5% for political parties. Parties that do not reach this limit do not get any seat and their votes are divided among the other parties which accessed the Parliament after the so-called second scrutiny. If exceptionally, any political party reaches the amount of 5% out of the total votes, the threshold is reduced to 4%. The President entrusts the formation of a new government to the leader of the winning party. This government must enjoy the majority in the Parliament. This usually leads to some kind of coalition with other parties. After the formation of the government, the list is presented to the President, who has the right to reject the government completely or partially. When the President appoints the new government, its members start to prepare a program declaration that must be approved by the majority of Parliament members.

**55.** The relation of the political system with the referendum tool can be analyzed by retracing the history of the foundation of the independent state of Slovakia. Slovak independence was not legitimized through a referendum. The most important decision in the history of the nation was taken without a referendum. The independent state and democracy in Slovakia were not established in a sufficiently legitimate way and the later development of the political system proves this hypothesis: uncertainty about its statehood and uncertain democracy influence each other, giving rise to certain dynamics that may bring about negative consequences in the process of democratization. The recent Slovakian referendum history seems to confirm this hypothesis.

**56.** In terms of participation or turnout, the national referendum in Slovakia seems to be very weak. This is confirmed by data provided by the Central Commission on Referendum. There were huge disputes over the composition of the 1997 referendum questions. Ballots were distributed omitting question No. 4 which was formulated based on a petition submitted by the citizens. Some district commissions did not receive any ballot at all. This resulted in the ‘zero’ turnout declared by the Central Commission on Referendum and had further consequences including criminal investigations and the

<sup>99</sup> Judgment No. 153/1996 Coll., available at: <http://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1996/153/>.

proposition of holding a new referendum with complete ballots submitted by the President of Slovakia on February 20, 1998. In that period, incidentally, the presidential office became vacant and the majority of his powers were exercised by the Prime Minister.

**57.** It may be concluded that while the national referendums of 1994 and 1998 may be simply held invalid, it is widely considered that the national referendums of 1997 were not only invalid but thwarted by competent administrative authorities (which is an offense, though it should be also taken into account the hypothesis of presumption of innocence until appropriate judicial decision).

**58.** Before the referendum of 1994 on the obligatory transparency of financial sources for auctions and privatization – popularly called Lupták's referendum, from the name of the head of the Association of Workers of Slovakia ZRS, who was its main supporter – there was no certainty that the resolution would be adopted by the Parliament, so ZRS started to collect petition signatures. Eventually, the referendum was approved through a resolution of the National Council. During the campaign, the main mobilization methods were TV and newspaper ads. The campaign was not persistent, in fact nonexistent.

**59.** The 1997 referendum on NATO's membership and the direct election of the President became the object of several political debates between coalition parties – the above-mentioned People's party-movement for a Democratic Slovakia (ĽS-HZDS), the Association of Workers of Slovakia (*Združenie robotníkov Slovenska*, ZRS), the Slovak National Party (*Slovenská národná strana*, SNS) – and the opposition, which arose for this specific circumstance – the Christian Democratic Party (*Kresťanskodemokratické Hnutie*, KDH), the Democratic Union (*Demokratická únia*, DÚ), the Democratic and Christian Union – the Democratic party (*Slovenská demokratická a kresťanská únia – Demokratická strana*, SDKÚ-DSDS), the Hungarian Coalition (*Strana maďarskej komunity*, SMK-MKP), the Social-democratic Party of Slovakia (*Sociálnodemokratická strana Slovenska*, SDSS). The whole campaign was addressed to the NATO question, only to a small extent to the direct election of the President. Mobilization methods were very broad and effective. They can be divided into two groups – those used by political parties and those used by non-governmental organizations. Moreover, the NATO accession referendum was hypothetical as, under the government of the Prime Minister Mečiar, Slovakia had progressively become a “pariah state”<sup>100</sup>, so that NATO was unlikely to issue an invitation<sup>101</sup>.

**60.** By holding the referendums on the same day, President Kováč sought to increase the chance of overcoming the 50% *quorum* for the vote to be legally binding<sup>102</sup>. However, the government interpreted a ruling by the constitutional court tendentiously, stating that, since the referendum couldn't be binding as to constitutional changes and the appendix to the fourth question did not contain its detailed explanation as referendum law No. 564/1992 requests, the presidential election vote should be canceled: despite the court's ruling stating that this interpretation cannot have any influence on this referendum and that referendums already accepted by the President could not be canceled for this reason<sup>103</sup>. The government distributed ballot papers without the fourth question, yet some district electoral commissioners refused to accept ballot papers without it<sup>104</sup>.

**61.** The *quorum* required for the validity and the approval of Slovak referendums are very high, i.e. the absolute majority of the voters and the absolute majority of the referendum participants, *ex* article 98, para. 1, Const.

<sup>100</sup> See A. SZCZERBIAK, P. TAGGART, *Opposing Europe? The Comparative Party Politics of Euroscepticism*, Vol. 1, Oxford, Oxford University Press, 2008, p. 285.

<sup>101</sup> See K. HENDERSON, *Slovakia: the Escape From Invisibility*, London-New York, Routledge, 2002, p. 47.

<sup>102</sup> *Ibid.*

<sup>103</sup> See M. BELKO, L. KOPEČEK, “Referendum in Theory and Practice: the History of the Slovak Referendums and their Consequences”, *Středoevropské politické studie/Central European Political Studies Review*, 2003, Vol. 5, No. 2-3, available at: <http://journals.muni.cz/cepst/article/view/3946/5319>.

<sup>104</sup> See J. BARTL, D. SKVARNA, *Slovak History: Chronology & Lexicon*, Wauconda, Bolchazy-Carducci, 2002, p. 179.

**62.** The nature of this type of referendum by popular initiative is not specified in the constitution, but a systematic reading of the article suggests that it is a form of people's participation in the exercise of legislative power<sup>105</sup>. However, it is not the case of proactive referendums, that is, they are not provided with any bill of popular initiative nor confirmation. In other words, any draft bill under discussion or approved but not yet promulgated come both into play. The practice, moreover, has shown how the questions are not necessarily bound to a legal text in force. They can, therefore, have a repealing effect, but they are essentially consultative referendums.

**63.** However, some problems concerning the effects of the referendum arise at this point. The legal effectiveness of the popular consultation, additionally, appears to be compromised by constitutional provisions. Referendum results are confirmed by ordinary laws (article 98, para. 2)<sup>106</sup>, yet, to change the legal framework, the Parliament must proceed based on constitutional law not before three years have passed since the referendum (article 99, para. 1)<sup>107</sup>. Thus, the risk of undermining the concrete implementation of referendums is strongly evident. It follows that, if the two constitutional conditions are fulfilled, the result of the referendum is no longer constitutionally protected from the intervention of the Slovak National Council and it may be amended or repealed by the Parliament<sup>108</sup>. Likewise, it is not possible to re-propose a referendum on the same subject before three years have passed since its realization<sup>109</sup>. By analyzing the expression «to hold a referendum», it can be argued that it is not only the case of a referendum with the participation of the required absolute majority of voters since the turnout requirement was not fulfilled, thus the referendum was considered illegitimate<sup>110</sup>.

**64.** As concerns the electoral campaign, there are no transparency obligations. The referendum campaign is exclusively in the hands of private people and companies who have free access to the media. Resorting to contributions from foreign foundations and parties is also allowed. Thus, in the Slovak system, the referendum competition is free between the parts two involved as regards gathering people's consensus<sup>111</sup>. Therefore, there are serious risks that both private individuals and foreign legal entities may influence the referendum campaign.

**65.** The conclusive evaluation of the Slovak referendum experience is very negative. Firstly, turnout is always very low and, consequently, referendums are invalid and then useless (except the EU membership vote). Secondly, national referendums are tools in the hands of political parties and are systematically used by politicians to discredit the political opposition<sup>112</sup>. As a result, the referendum becomes a sort of parody of direct democracy and not only a simple caricature, as already stated<sup>113</sup>. Slovakia is a very exceptional example, a similar (but less spectacular) situation can be observed in Poland, where the protagonists of referendum initiatives are exclusively the Diet and the President with the approval of the Senate. Indeed, they hold the power to initiate a general referendum on «matters of particular impor-

<sup>105</sup> See A. TORNIC, "Direct Democracy in the Slovak Republic", *C2D Working Paper Series*, 2012, No. 41, p. 1, available at: <http://dx.doi.org/10.5167/uzh-94334>.

<sup>106</sup> Article 98, para. 2, Const.: «The National Council of the Slovak Republic shall promulgate the proposals adopted by a referendum as a law».

<sup>107</sup> Article 99, para. 1, Const.: «The result of a referendum may be amended or repealed by a constitutional law adopted by the National Council of the Slovak Republic once a period of three years since effectuality of the results has elapsed».

<sup>108</sup> See B. ŠRAMEL, "The Legal Basis of Civic Participation in Slovakia after 1989", in M. MARCZEWSKA-RYTKO, K. AKSIUTO, D. MAJ, M. POMARAŃSKI (eds.), *Civic Participation in the Visegrád Group Country after 1989*, cit., p. 186.

<sup>109</sup> See E. LÁŠTIC, "Referendum Experience in Slovakia: a Long and Winding Road", in Z.T. PÁLLINGER, B. KAUFMANN, W. MARXER, T. SCHILLER (eds.), *Direct Democracy in Europe. Development and Prospects*, Wiesbaden, VS Verlag, 2007, pp. 189-198.

<sup>110</sup> See B. ŠRAMEL, "The Legal Basis of Civic Participation in Slovakia after 1989", cit., p. 186.

<sup>111</sup> See S. BAGNI, *Il popolo legislatore*, cit., pp. 230-232.

<sup>112</sup> See E. LÁŠTIC, *V rukách politických strán Referendum na Slovensku 1993 – 2010*, Bratislava, Comenius University of Bratislava, 2011, available at: [http://fphil.uniba.sk/fileadmin/fif/katedry\\_pracoviska/kpol/Publikacie/Publikacie/Lastic\\_V\\_rukach\\_politickych\\_stran.pdf](http://fphil.uniba.sk/fileadmin/fif/katedry_pracoviska/kpol/Publikacie/Publikacie/Lastic_V_rukach_politickych_stran.pdf).

<sup>113</sup> See E. KUŹELEWSKA, "Direct Democracy in Slovakia", in M. MARCZEWSKA-RYTKO (ed.), *Handbook of Direct Democracy in Central and Eastern Europe after 1989*, cit., pp. 281-282.

tance for the State»<sup>114</sup>. The concentration of decisional power in the hands of the political majority may lead to the risk that referendum turns into a plebiscitary tool (for example the announced presidential referendum of 2018, then rejected by the Senate, on issues related to EU and NATO participation). Last but not least, the Slovak distortion was strongly emphasized by lobby activities, such as Catholic organizations that interfered with the 2015 referendum, in turn, influenced by political interests.

## 2. The Slovak national referendum tools and lobbies indoctrination

66. Speaking about national referendums in Slovakia, it is necessary to consider a typical aspect of referendum campaigns, that is the latent presence of political, economic, and social lobbies within referendum institutions that may exercise a significant influence. This is a transversal element of modern pluralist democracies that, in this paper, is analyzed in the specific case of Slovakia, but also in the general context of neoliberalism<sup>115</sup>.

67. The lobbies issue can also influence the government by balancing the relationship among constitutional bodies that exercise the power of political direction. In fact, «the principle on which such a typology is based is that to understand pressure groups, one needs to look not only at the behavior of the groups themselves but also at the behavior of the government»<sup>116</sup>.

68. Turning now to technical details such as means of financing and possible forms of exploitation, precisely referendums plead in favor of a critical approach towards direct democracy tools in «complicated and fragile democracies»<sup>117</sup> like Slovakia. The risk, indeed, is that the rights of the few end up being controlled by the many beyond the forms of control typical of a constitutional state. All the situations above discussed make it perfectly clear that the need for greater responsibility from supervisory bodies is a matter of top priority. The role of the Parliament as a qualified authority is likewise fundamental not only for a shared and well-balanced debate but also in terms of public consensus. Referendums are particularly exposed to manipulations due to their “zero-sum” nature (which means that winners take all as much as losers lose all) [...]. Since referendums rely on the majority principle [...], it follows that both needs and values of minority groups typically end up being set aside»<sup>118</sup>.

69. At the same time, it is necessary to prove whether in Slovakia there are opposing attitudes towards the political system or towards the delegitimation of the current political system. Consequently, it is necessary to ascertain the evolution of referendum tools from a dialectical opposing function for the political-party system (external balancing role) to a condition in which referendum tools can be absorbed or “co-opted” by the same system (internal role). Such a change may have been determined in various countries by the prevalence of the political party system, which theoretically acted “in defense” due to the substantial lack of an institutional entity capable of managing the initiative and the referendum outcome, absorbing it without any trauma for the governmental system.

70. The existence of *quorum* rules is a crucial aspect that many democracies, where referendums and popular initiatives are constitutionally permitted, have in common. These rules are generally intended as a way to prevent active minorities from imposing their will or to exploit them as a means to counteract the *status quo*: thus, the need to ascertain their presence and effects on individual governance systems.

<sup>114</sup> Article 125, para. 1, Const. Poland.

<sup>115</sup> See D. DELLA PORTA, F. O'CONNOR, M. PORTOS, A. SUBIRATS RIBAS, *Social Movements and Referendums from Below. Direct Democracy in the Neoliberal Crisis*, Bristol, Policy Press, 2017.

<sup>116</sup> See W. GRANT, *Pressure Groups and British politics*, London, Palgrave Macmillan, 1999, p. 17 ff.

<sup>117</sup> See G. SARTORI, “Tecniche decisionali e sistema dei comitati”, *Rivista italiana di scienza politica*, 1974, No. 1, p. 39.

<sup>118</sup> See A. DI GIOVINE, “Referendum e sistema rappresentativo: una difficile convivenza”, *Il Foro Italiano*, 1979, Vol. 102, No. 7-8, p. 158.

71. Furthermore, it is necessary to analyze the critical aspects of referendums, particularly the influence on the electorate based on informational asymmetries<sup>119</sup> and the importance of (good “equipped” in terms of financial resources) lobbies that can take advantage of electoral campaigns for or against a specific legislative set of rules. The question is if lobbies can have a direct impact on the governmental system, being a balancing element in the relationship between the constitutional bodies exercising the policymaking role. Thus, it is necessary to prove whether Slovak lobbies exploit regulations that could discourage the so-called politics of malfeasance, to which lobbying belongs.

72. With this in mind, I will focus on how referendum tools are used by economic groups that represent the interests of the majority of the society (e.g. trade union organizations, business, professional and financial associations); groups of people such as lobbies of citizens who work together to achieve a particular goal, most of the social interest (e.g. voluntary, scientific and cultural organizations); institutional groups of public or private nature that, to protect their own interests, interact in the decision-making process (e.g. public bureaucracies, local authorities, religious bodies, public service entities such as hospitals and universities). Referendums, due to their nature, allow *latu sensu* lobbies (opposition policies, economic, third sector, etc.) to affect the policy-making government<sup>120</sup>.

73. The analysis on connections between lobbies and referendum tools is also relevant in consideration of reasons motivating the actions of parliamentary minorities and interest groups, not always and necessarily ethical because they are often biased and do not operate in the public interest<sup>121</sup>. These groups use referendum tools to support and prioritize their interests and this may also apply to the opposition activity of the parliamentary minority<sup>122</sup>.

74. Slovakia is witnessing rapid economic growth characterized by high dynamism in terms of attractiveness of foreign investments; countless multinationals, indeed, have relocated to Slovakia. However, in spite of this peculiarity which recalls the need to ensure transparency as regards the activities of market players about public institutions, the Slovak legal system lacks legal regulation for professional lobbying activities, i.e. economic activities that influence the country's decision-making process. There is, in other words, no specific legislation on lobbying, any code of conduct for lobbyists nor a related register. Moreover, the example of advanced economies in the world shows how deficit can lead to non-transparent and unethical behavior by companies in terms of market dynamics.

75. *De lege ferenda*, the Ministry of Justice, has published over the last years several draft laws on lobbying, but none of them has ever been approved. Furthermore, there have been parliamentary initiatives to regulate the activity of lobbying: the latest in chronological order is the *Sme Rodina* (We Are Family Party) bill abandoned at the end of May 2018 due to a lack of interest from the political parties. It was only approved Constitutional Law No. 357/2004 on the protection of the public interest by public officials, defining the concept of public interest in a general way. The law at issue provides the establishment of a public utility institution; personal interest, in this way, is intended as opposed to the concept of public interest. Public interest is thus defined primarily by the combination of both quantitative and utility factors at a constitutional level<sup>123</sup>.

<sup>119</sup> See A.S. KESSLER, “Representative Versus Direct Democracy: the Role of Informational Asymmetries”, *Public Choice*, 2005, Vol. 122, No. 1-2, pp. 9-38.

<sup>120</sup> See J. ASIMAKOPOULOS, *Social Structures of Direct Democracy: on the Political Economy of Equality*, Chicago, Haymarket Books, 2015.

<sup>121</sup> See G. JORDAN, W.A. MALONEY (eds.), *Democracy and Interest Groups: Enhancing Participation?*, Basingstoke-New York, Palgrave Macmillan, 2007.

<sup>122</sup> See S. REILLY, *Design, Meaning, and Choice in Direct Democracy: the Influences of Petitioners and Voters*, Farnham, Ashgate, 2010.

<sup>123</sup> See B. ŠRAMEL, “The Legal Basis of Civic Participation in Slovakia after 1989”, cit., p. 176.

**76.** The lobby industry in Slovakia appears to be highly dynamic and, with the establishment of countless corporations in the country, many related activities thrive unchecked, creating a “wild undergrowth” that have a significant influence in the public relations sector. As a result, politicians and public officials build extensive networks and useful connections in the fields in which they respectively hold power.

**77.** The main targets of lobbying activities in Slovakia are the government, independent administrative authorities, the Parliament as well as the Head of State, as concerns the legislative-administrative and regulatory activity of the country. Thus, for example, it is very common for former members to become lobbyists thanks to networks they had built during their office. In other words, they take advantage of the knowledge they acquired as well as of connections they built in the “right” places. Furthermore, they usually operate in complete autonomy without any connection with formal lobbying or public relations agencies, giving rise to a genuine clientele that can degenerate into corrupt illegality as well as ties with criminal organizations, including foreign ones, as in the case of the recent murder of the journalist Kuciak, in the context of the Slovak agricultural mafia<sup>124</sup>. One example is the sprawling ‘*ndrangheta*, the Calabrian mafia, in Slovakia. Connections were proved to exist with the heads of the country’s establishment, up to the former Prime Minister Fico, and the largest party in the National Council (*Smer – sociálna demokracia*, Direction – social democracy).

**78.** While analyzing referendums in different countries worldwide, it is inevitable to deal with thorny questions linked with the state system, guarantee tools, protection, and promotion of basic human rights, but also the relationship among various sources of law. The Slovak case stands for a good example of the risk to embitter hostility towards a minority group that referendums may entail. Indeed, it seems that legislative referendums in Slovakia merely emphasized legislations already enshrined in the Constitution, especially in the case of the anti-homosexual referendum of 2015.

**79.** Rational implementation of the referendum institution necessarily requires clear limits to respect within a given constitutional system: indeed, «direct and representative democracy are not mutually exclusive, yet they can complement each other»<sup>125</sup>, in a harmonic and synergetic view among institutions guaranteeing people’s sovereignty.

**80.** Sticking first of all to the form of state, then to the form of government, represents the fundamental prerequisite for the proper development of democracy, given that the duo popular sovereignty/safeguard of everyone’s rights is likewise envisaged<sup>126</sup>.

## VI. Conclusive remarks

**81.** In the Czech and Slovak legal systems, representative democracy is the main form of exercising power. Both countries are representative democracies, but there is no rule without exceptions. Direct democracy tradition is not very strong, it only represents a constitutional opportunity provided with different referendum tools in a comparative view<sup>127</sup>.

<sup>124</sup> 1<sup>st</sup> International Slovak Conference against all Mafias, Trnava, November 11-12, 2019. See C. REINICKE, “In the European Union, Farming Subsidies have Enriched those in Power and Created an ‘Agricultural Mafia’”, *Markets Insider*, November 3, 2019, available at: <http://markets.businessinsider.com/news/stocks/european-union-farm-subsidies-are-misused-new-york-times-reports-2019-11-1028653570>.

<sup>125</sup> See N. BOBBIO, “Democrazia rappresentativa e democrazia diretta”, in G. QUAZZA (ed.). *Democrazia e partecipazione*, Torino, Stampatori, 1978, 32.

<sup>126</sup> See C. MORTATI, “Art. 1-12: Principi fondamentali”, in G. BRANCA (ed.). *Commentario della Costituzione. Art. 1-12: Principi fondamentali*, Bologna-Roma, Zanichelli-Foro Italiano, 1975, p. 1 ff.

<sup>127</sup> See S. BAGNI, *Il popolo legislatore*, cit., p. 106.

**82.** From the legal perspective, the constitutions of both countries recognize national referendum tools. However, there are some important differences. The Czech Constitution does not provide for mandatory referendums, while the Slovak (and Hungarian) one provides for obligatory referendums regarding access to international unions (or leaving them, according to the Slovak Constitution). Apparently, the Slovak constitutional reference model is not one of the communist period, but rather the Constitution of Czechoslovakia of 1920 (see the above-mentioned article 46).

**83.** While in Czech Republic the President can initiate referendums, in Slovakia (and Hungary), both the Parliament and the citizens have the power to do so. Similarities can also be noticed as to referendum validity depending on the turnout since in all examined countries referendums have to meet certain turnout requirements to be valid. That being said, there are some exceptions such as the situation when a referendum cannot be held again on the same subject matter. It can be held only after three years have passed from the first referendum in Slovakia and two years in the Czech Republic<sup>128</sup>.

**84.** Referendum tools have not enjoyed a particularly active role in the history of Slovakia so far, neither in Czech Republic, where only one referendum was held at the national level in the case of EU accession. Basically, in both countries, except for the EU accession issue, national referendum tools have been virtually non-existent.

**85.** Surely, the referendums regarding the accession to international organizations, namely EU and NATO, represent the most recent fruitful ground for the development of referendum tools<sup>129</sup>.

**86.** In both countries, the majority of politicians are unwilling to make use of national referendum tools and to adopt further regulations on the referendum topic. Only the Czech Social Democratic Party (Česká strana sociálně demokratická, ČSSD) and the Green Party (*Strana zelených*) referred to the need of adopting precise regulation as regards national referendums. Nowadays, it has turned into a sought-after position appropriated by populist and eccentric movements in the Czech political scene like the above mentioned Okamura's SPD party. Their attitude results from negative experiences connected with direct elections of the Czech Republic's President, which polarized the country and the political scene for many years. It is highly likely that Czech politicians are afraid of a potential repetition of the Slovak negative experience with national referendums, which, instead of solving problems, multiplied them and caused reluctance among the voters.

**87.** In the Czech Republic and Slovakia, the implementation of direct democracy tools at the national level while exercising power is not so significant as to political consciousness in both respective societies. In Czech Republic, such an approach was not changed after accession to the EU, which "forced" the carrying out of the referendum on EU membership, after the introduction of proper changes in the constitution. However, it is incorrect to state that it has influenced the development of direct democracy either in the formal-legal or practical dimension<sup>130</sup>.

**88.** Slovak referendums were mainly examples of the political struggle between the government and opposition parties. The Slovak experience demonstrates also that national referendum initiatives were supported by opposition parties (1997, 2000, 2004, and 2010) and only in one case by the majority party (1998). Nevertheless, referendums have become one of the most misused tools by parties in terms of political competition. Consequently, the Slovak voters did not perceive referendums as influential instruments to express their opinions, but rather as a convenient tool for policy-makers in the political stru-

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<sup>128</sup> See E. KUŹELEWSKA, "How Far Can Citizens Influence the Decision-Making Process? Analysis of the Effectiveness of Referenda in the Czech Republic, Slovakia, and Hungary in 1989–2015", *Baltic Journal of European Studies*, 2015, Vol. 5, No. 2, p. 179.

<sup>129</sup> See P.V. ULERI, *Referendum e democrazia: una prospettiva comparata*, Bologna, Il Mulino, 2003, pp. 274-278.

<sup>130</sup> See E. KUŹELEWSKA, "Direct Democracy in Czechia", cit., p. 93.

ggle. Indeed, national referendums in Slovakia are preceded by a plebiscitary form of decision-making, so that opposition political parties have repeatedly taken advantage of it against the government<sup>131</sup>. Only the Slovak EU membership referendum was successful because it was supported by all political parties. Moreover, the high *quorum* is a meaningful barrier, particularly because it is not connected with the low Slovak general electoral participation (averagely 68% from 1992, but only 60% in the last 3 votes and just 18% in the EU Parliament elections).

**89.** Last but not least, it is worth analyzing the problem of post-communist societies. The communist experiment from 1948 to 1989 sabotaged the value of citizenship as well as political and civil rights and freedoms. The reconstruction of political and civil institutions with the transformation from centralized economies to market economies was crucial in both Czech and Slovak Republic. As a result, there were significant consequences in terms of civic participation in the fundamental process of transformation and modernization of both Czech and Slovak social, economic, and political systems<sup>132</sup>.

**90.** The significantly low turnout of Slovak referendums results from a few factors. Firstly, some of the questions posed were too difficult for common people as a sort of “renationalization” process of the society took place in Slovakia. Referendums, as a result, were not considered by the electorate as an element of communication and consultation between the authorities and society. The voters realized that Slovakian policy-makers were likely to hold referendums to achieve their political interests against the opposition. Secondly, all Slovak referendums were held in an antagonistic atmosphere between the governmental coalition or the parliamentary majority and the opposition parties<sup>133</sup>. The most crucial referendum concerning accession to NATO in 1997. The reliability of referendums was discredited as a result of the aspirations of Prime Minister Mečiar<sup>134</sup>. The Slovak Constitutional Court confirmed that the government acted unconstitutionally as regards the calling procedure of referendums and ordered the Minister of Interior (who was technically responsible for it) to delete from the ballot paper the question proposed by opposition parties concerning direct presidential elections<sup>135</sup>.

**91.** That being said, what became the object of general criticism was no more than a misinterpretation. Lipšic, for example, demonstrated that the Constitutional Court overstepped its authority as the Constitution did not enable it to present the interpretation of “ordinary” law<sup>136</sup>. The systems analyzed in this paper are all constitutional systems, entailing that a fundamental role (yet destined to increase) is played by the constitutional courts, especially in the activation phase of the referendum in which they are called upon to rule on the admissibility of referendum questions<sup>137</sup> (it is mandatory in Czech Republic as well as in Albania, Bulgaria, Poland, and Slovenia; it is instead possible in Slovakia as well as in

<sup>131</sup> See E. KUZELEWSKA, “How Far Can Citizens Influence the Decision-Making Process? Analysis of the Effectiveness of Referenda in the Czech Republic, Slovakia and Hungary in 1989–2015”, cit., p. 190.

<sup>132</sup> See J. BARDOVIC, J. MIHÁLIK, “The Determinants of Civic Participation in Slovakia”, in M. MARCZEWSKA-RYTKO, K. AK-SIUTO, D. MAJ, M. POMARAŃSKI (eds.), *Civic Participation in the Visegrád Group Country after 1989*, cit., pp. 162-163.

<sup>133</sup> See: E. KUZELEWSKA, “Referendum in the Czech Republic and Slovakia”, cit., p. 105; M. PODOLAK, *Instytucja referendum w wybranych państwach Europy Środkowej i Wschodniej (1989–2012)*, Lublin, Maria Curie-Skłodowska University Press, 2014, p. 352; T. HAUGHTON, “Facilitator and Impeder: the Institutional Framework of Slovak Politics During the Premiership of Vladimír Mečiar”, *The Slavonic and East European*, 2003, Vol. 81, No. 2, p. 276; G. PRIDHAM, “The European Union’s Democratic Conditionality and Domestic Politics in Slovakia: the Mečiar and Dzurinda Governments Compared”, *Europe-Asia Studies*, 2003, Vol. 54, No. 2, pp. 212-213; T. HAUGHTON, “Vladimír Mečiar and his Role in the 1994–1996 Slovak Coalition Government”, *Europe-Asia Studies*, 2002, Vol. 54, No. 8, p. 1331.

<sup>134</sup> See R. GLAJCAR, *Instytucja Prezydenta w Polsce, Czechach i Słowacji w latach 1989–2000: analiza porównawcza*, Toruń, Adam Marszałek, 2004, p. 309.

<sup>135</sup> See M. KUSÝ, “Does the rule of law (Rechtsstaat) exist in Slovakia?”, in J. PŘIBÁŇ, J. YOUNG (eds.), *The Rule of Law in Central Europe: the Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries*, Dartmouth, Ashgate, 1999, p. 108.

<sup>136</sup> See J. DRGONEC, J. KVASNIČKOVÁ, *Mutácie ústavnosti. Vybrané ústavné inštitúty na Slovensku*, Bratislava: Inštitút pre verejné otázky, 2000, p. 32.

<sup>137</sup> See A. CIAMMARICONI, A. DI GREGORIO, “Il referendum nei nuovi Stati membri dell’Unione europea”, *Diritto pubblico comparato ed europeo*, 2005, No. 3, p. 1424.



Croatia, Hungary, and Serbia). Particularly in Slovakia, before the calling itself, the President may ask the Constitutional Court for assessment of the presented ballot question as regards the constitutionality of the subject of the referendum. This option was added to articles 95, para. 2, and 125b, Const., based on the constitutional reform of 2001 motivated by the controversial constitutionality of some referendums<sup>138</sup>. However, the Slovak system, by envisaging the direct election of the President since 1999, is closed to the so-called apparent semi-presidentialism<sup>139</sup> (as Austria, Iceland, and Ireland), based on a parliamentary interpretation of the government system. Most legal scholars who rely on Duverger's definition exclude all three countries from the list of semi-presidential regimes<sup>140</sup> and, similarly, the same can be inferred for Slovakia.

**92.** In both Czech and Slovak Republic, there are two types of referendum tools it is mainly resorted to those concerning international relations and constitutional ones. This trend aims to consolidate the legitimacy of these “new” democracies in the supranational context. Therefore, while in Western Europe the referendum is often used to oppose a political decision (for example, the European Constitution with the rejected referendums in France and the Netherlands of 2005)<sup>141</sup>, in former socialist countries it represents, on the contrary, a tool to overcome a possible parliamentary opposition, seeking consensus in the electorate. Furthermore, the transition from a long-term experience of non-existent sovereignty in the SSSR to a new form of compressed sovereignty in the EU, the will to safeguard the respective constitutional systems strongly emerged. Resorting to referendum tools, therefore, appears to be evidence of the will to guarantee exceptional protection of fundamental assets<sup>142</sup>.

**93.** This situation clearly shows that Mečiar's political party effectively used democratic procedures to obtain benefits that discredited democracy. The unsuccessful referendum on NATO membership resulted in the exclusion of Slovakia from the group of countries invited to the Madrid summit of 1997 on new NATO memberships<sup>143</sup>. In the Visegrád group countries (V4), the unsuccessful referendum on NATO membership also resulted in negative attitudes in Hungary towards referendum for important political questions<sup>144</sup>. Among all Slovak referendums, four of them were initiated by those political parties which had lost their support during parliamentary elections. The goal of these parties was to rebuild their strong position by collecting propositions in various ways, including calling a referendum<sup>145</sup>.

**94.** The last Slovak referendum of 2015 concerning controversial moral issues – same-sex marriages, same-sex adoption, and sex education at school. Before the referendum, in 2014, the Parliament added the definition of traditional marriage (a union between a man and a woman) to the Constitution (article 41). The 2015 referendum was initiated by the Alliance for the Family (*Aliancia za rodinu*) and supported by the Conference of Slovak Bishops. Thus, the 2015 referendum was useless and unnecessary because the Slovak law does not allow same-sex marriages nor civil unions. Secondly, it did not fit the constitutional requirement according to which a referendum can be held on important issues of public

<sup>138</sup> Amendment no. 90/2001 coll. See A. DI GREGORIO, “Riforme istituzionali ed avvicinamento all'Europa dei Paesi dell'Est: il caso della Slovacchia”, *Nomos*, 2001, No. 3, p. 120.

<sup>139</sup> See: M. VOLPI, *Il semipresidenzialismo tra teoria e realtà*, Bologna, Bononia University Press, 2014, pp. 23, 26-32; R. ELGIE, *Semi-presidentialism: Sub-types and Democratic Performance*, Oxford, Oxford University Press, 2011, pp. 21-22.

<sup>140</sup> See A. STEPAN, C. SKACH, “Constitutional Frameworks and Democratic Consolidation: Parliamentarianism versus Presidentialism”, *World Politics*, 1993, Vol. 46, No. 1, p. 9.

<sup>141</sup> See: E. GROSSMAN, *France and the European Union. After the Referendum on the European Constitution*. London-New York, Routledge, 2008; G.G. FLORIDIA, “La chatedrale engloutie”, *Diritto pubblico comparato ed europeo*, 2005, No. 3, pp. 13-19; K. STERN, “Europäische Verfassung und Grundrechte-Chartanach dem Nein der Franzosen und Niederländer”, *Teoria del diritto e dello Stato*, 2005, No. 1, pp. 97-109.

<sup>142</sup> See A. CIAMMARICONI, A. DI GREGORIO, “Il referendum nei nuovi Stati membri dell'Unione europea”, cit., pp. 1424-1425.

<sup>143</sup> See P. HACKER, *Slovakia: on the Road to Independence: an American Diplomat's Eyewitness Account*, University Park, Pennsylvania State University Press, 2010, p. 167.

<sup>144</sup> See S. BOWLER, T. DONOVAN, J.A. KARP, “Enraged or Engaged? Preferences for Direct Citizens Participation in Affluent Democracies”, *Political Research Quarterly*, 2007, Vol. 60, No. 3, p. 352.

<sup>145</sup> See E. ZIELIŃSKI, “Referendum w Czechach, Słowacji, Słowenii i na Węgrzech”, cit., p. 67.

interest. The discriminatory character of this referendum should be also highlighted since the European Court of Human Rights (ECtHR) has clarified that sexual orientation cannot represent a discriminatory factor, as stated in Article 14 of the European Convention of Human Rights (ECHR). Indeed, in the case *Schalk and Kopf v. Austria* the ECtHR emphasized that the reference to «men and women» in the ECHR no longer means that «the right to marry enshrined in article 12 should be limited to marriages between two persons of the opposite sex»<sup>146</sup>. However, according to the referendum's initiators, the voters confirmed the conservative approach of the Slovak society in terms of defending traditional family values<sup>147</sup>.

**95.** When talking about the relationship between political systems and referendums, it can be noticed that the independence of both Czech Republic and Slovakia was not legitimized by a referendum. Similarly, the later development of the political system before EU accession seems to confirm this hypothesis, particularly in the case of Slovakia with the “Mečiarizmus” autocracy period from 1992 to 1998<sup>148</sup>.

**96.** The absence of a clear conception regarding the implementation of national referendum tools may, in some cases, be partially related to the low expertise of the proposers or the pragmatism of political parties. Indeed, such a pragmatism inhibits the framing of a clear policy towards referendums and direct elections. The political parties find themselves mostly in a conflict of interests regarding their role because the implementation of national referendum tools restrains their power<sup>149</sup>.

**97.** Moreover, not only the Czech strong parliamentary tradition should be mentioned, but also the fear of plebiscitary drifts and the recent history of the country, particularly related to the dissolution of the Czechoslovak Federation<sup>150</sup>. Indeed, the Czech-Slovak separation was confirmed by the ruling parties without consulting the population. The parliamentary opposition supported the referendum<sup>151</sup> although, according to opinion polls, over 80% of the respondents declared their support for the calling of a referendum to vote on the independence of the country<sup>152</sup>. Particularly, Constitutional Law No. 327/1991 on referendums provided that any decision concerning fundamental questions directly related to the state system should be submitted to the citizens of Czechoslovakia. In particular, the withdrawal from the Federation of one or the other Republic should be decided through a referendum. However, the consensus required to call such a referendum was never reached and the dissolution was decided by the Federal Assembly itself. As a consequence, the Assembly called it, instead of withdrawal, self-dissolution. In that way, the *fictio iuris* bypassed the referendum law<sup>153</sup>. Ultimately, the Dissolution Constitutional Act No. 542/1992 was adopted to avoid a referendum on the Czechoslovak dissolution<sup>154</sup>.

**98.** The Czech and Slovak national referendum experience confirms the weak function of this tool. In total, 9 referendums (18 ballot questions) were organized in both countries over the past 26

<sup>146</sup> ECHR, *Schalk and Kopf v. Austria*, case 30141/04, June 24, 2010.

<sup>147</sup> See E. KUZELEWSKA, “How Far Can Citizens Influence the Decision-Making Process? Analysis of the Effectiveness of Referenda in the Czech Republic, Slovakia and Hungary in 1989–2015”, cit., p. 182.

<sup>148</sup> See: L. HANULOVÁ, “Fascinoval ju mečiarizmus, americká politologička rozpráva, prečo aj u nás uspeli populistí”, *Dennikn*, March 7, 2019, available at: <http://dennikn.sk/1403036/fascinoval-ju-meciarizmus-americka-politologicka-rozprava-preco-aj-u-nas-uspeli-populisti/>; I. ŠIMKO, *Ako sme si nasadili červené nosy a vyhňali Mečiara. Dramatický príbeh porážky mečiarizmu*, Žilina, Artis Omnis, 2018, p. 331 ff.; M. LEŠKO, *Meciar a meciarizmus: politik bez skrupul, politika bez zabran*, Bratislava: VMV, 1996, p. 239 ff.

<sup>149</sup> See P. JÜPTNER, P. VALUŠOVÁ, I. KRUNTORÁDOVÁ, “Participation and Elements of Direct Democracy in the Czech Republic: Part II”, cit., p. 288.

<sup>150</sup> See A. CIAMMARICONI, A. DI GREGORIO, “Il referendum nei nuovi Stati membri dell’Unione europea”, cit., p. 1414.

<sup>151</sup> See M.Z. BOOKMAN, “War and Peace: the Divergent Breakups of Yugoslavia and Czechoslovakia”, *Journal of Peace Research*, 1994, Vol. 31, No. 2, p. 176.

<sup>152</sup> See L. HOLY, *The Little Czech and the Great Czech Nation. National Identity and the Post-Communist Social Transformation*, Cambridge: Cambridge University Press, 1996, p. 198.

<sup>153</sup> See A. DI GREGORIO, “La transizione in Cecoslovacchia: principali profili di diritto costituzionale”, in S. GAMBINO (ed.), *Costituzionalismo europeo e transizioni democratiche*, Milano: Giuffrè, 2003, pp. 245-284.

<sup>154</sup> See T. LEBEDA, “Referendum o přistoupení ČR k Evropské unii. Několik různých pohledů na první všelidové hlasování v Česku”, cit., pp. 207-208.

years, but only one of them in the Czech Republic. This is apparently a small number, especially for the Czech Republic, where it could be considered a *unicum* in the EU framework. However, it should be stressed that there are no expectations from Central European countries to increase the forms of direct democracy. Both Czechs and Slovaks believe in a representative democracy. Particularly in Slovakia, the very poor participation in referendums confirms also that national referendum tools have very low credibility among electors, who perhaps consider them as a mere expensive means to gather nation-wide opinions on given topics (from 7,2 to 2,7 Euro millions respectively for the referendums held in 2010 and 1998)<sup>155</sup>. As a result, referendums are deemed to be ineffective in the process of Slovak democratic consolidation. The voters usually underestimate their influence on decisions taken by public authorities. Last but not least, it should be reminded that referendums affected the consolidation of democracy in Slovakia in quite a negative way<sup>156</sup>. It follows that both Czech and Slovak Republic do not enjoy a rich tradition in terms of national referendum tools nor remarkable experiences. National referendums play an accessory role in the politics of both countries, from which it derives that they are not at all a panacea for solving the problems such young countries have to deal with<sup>157</sup>.

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<sup>155</sup> See P. HORVÁTH, J. MACHYNIÁK, “The Practical Dimension of Civic Participation in Slovakia after 1989”, cit., pp. 191-196: 1994: not available data; 1997: 4,6 Euro millions; 1998: 2,7 Euro millions; 2000: 2,8 Euro millions; 2003: 6,5 Euro millions; 2004: 2,8 Euro millions; 2010: 7,2 Euro millions; 2015: 6,3 Euro millions.

<sup>156</sup> See M. BELKO, L. KOPEČEK, “Referendum in Theory and Practice: the History of the Slovak Referendums and their Consequences”, cit., p. 7.

<sup>157</sup> See E. KUŽELEWSKA, “How Far Can Citizens Influence the Decision-Making Process? Analysis of the Effectiveness of Referenda in the Czech Republic, Slovakia and Hungary in 1989–2015”, cit., p. 190.