

## TENDENCIES OF DIRECT DEMOCRACY IN HUNGARY – REFERENDUMS IN THE NEW BASIC LAW

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“This is not the end, it is not even the beginning of the end, but it is perhaps the end of the beginning” – said Churchill in his famous speech of November 1942. The situation is much the same at the renewal of the Hungarian legal order. Since the governing party gained supermajority at the parliamentary elections of 2010, the Parliament has adopted new statutes in nearly every field of life. Yet it is not the end of the process, not even the beginning of the end. There are still some important issues to legislate, as for one, the referendums. Furthermore, the jurisdiction of the new regulations is unclear, in most cases one can hardly define what the correct interpretations of the new laws are. Consequently, whatever one says on a new statute it is at best an educated guess before we see the actual judicial case law built on it.<sup>1</sup>

In this short essay I do not evaluate the detailed regulations of referendums. Instead, first I briefly focus on the constitutional bases of the institution, then I aim to point out the tendencies of direct democracy in Hungary and finally I evaluate certain regulations the new Basic Law introduced.

### 1. Roots of democracy

According to the basis of democracy itself, one might recall the phrase of the US Declaration of Independence of 1776. The well-known passage is often quoted: “We hold these truths to be self evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted

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<sup>1</sup> András JAKAB: Foreword. In: Lóránt CSINK – Balázs SCHANDA – András Zs. VARGA (eds): *The Basic Law of Hungary – A first commentary*. Dublin, Clarus Press, 2012. v.

among Men, deriving their just powers from the consent of the governed”. Although there are many other famous declarations on democracy, I prefer the Declaration of Independence as it best summarises the aim of the state (i.e. to secure the rights of the people) and the roots of its powers that is the “consent of the governed”.

Governments often say that some measures they take are based on the “will of the people” or, as the declaration states, on the “consent of the governed”. Such an argument is misleading or, at least, suspicious. In a constitutional sense the people are the political community of a country. The political community can hardly have unanimous will on anything. The single individuals have will but not the community. Therefore, in democracies the “will of the people” is not a political fact but a *political process* in which every member of the community may participate.<sup>2</sup> As a result, the phrase “consent of the governed” is rather a fiction than a fact. It is true that the people are the legitimacy of the acts of governments; such acts are rooted in the people from whom the powers of the government derive.<sup>3</sup> But it is most true that government decisions are obligatory because of their nature and not because that the governed agree with them.

Consequently, people seldom exercise their sovereignty directly via the institution of referendum. But the question arises: do they really *make decisions* in such occasions or is it just an illusion of power?

In a common sense in case of referendums people resume public power from their representatives and make a decision that is binding to the legislation. But is it really the case? I presume it is not. There are two kinds of referendums. On the one hand, several referendums are initiated by public authorities (by the President or the Government). Hungarian experiences show that they do not initiate referendums because they cannot decide the matter on their own but because they need the direct legitimisation of the people. This was the case regarding the accession to NATO<sup>4</sup> or to the EU;<sup>5</sup> nearly all political parties agreed that it was worth proceeding with the accession to these organs. The decision on the accession was already made by the time of the referendum; it would have been unlikely to turn back the procedure of the accession.

On the other hand, some other referendums are initiated by the community of the voters. In this case the referendum is initiated to restrict the representative powers, like in the case of the referendum of 2008. One might easily come to the conclusion that such a kind of referendum is the “real one”, as the right to decide is in the hands of the people. However, a statistical survey attracted the attention to some sociological facts that are worth considering in the legal regulation of referendum.

<sup>2</sup> Herbert KÜPPER: A közvetlen demokrácia Magyarországon és Németországban [Direct democracy in Hungary and in Germany]. *Jura*, 2009/1. 72.

<sup>3</sup> See Decision 38/1993. (VI. 11.) of the Constitutional Court of Hungary (henceforth abbreviated: CC).

<sup>4</sup> Referendum of 16 November 1997.

<sup>5</sup> Referendum of 12 April 2003. In this case the Constitution explicitly declared both the date and the question put to referendum.

Namely, before the referendum of 2008 Medián polls surveyed the voters on the questions of the referendum. People were asked whether they agreed to *abolish* the compulsory fee for medical attendance, and a huge majority responded that they did. But when they were asked if they wanted to *maintain* the same fee rather than finance them by taxes, they also answered positively.<sup>6</sup> Obviously, the two possibilities excluded each other, so it had a great importance how the question was formed.

Upon this information one might conclude that in this case it was not the people who were in position of the sovereign but the one who formed the question.

These circumstances are out of the scope of legal sciences in a narrow sense but they grant important information to evaluate and to develop the regulation on referendums.

## 2. Hungarian tendencies

According to the tendencies of direct democracy, only the different attitudes concerning referendum are pointed out in the present document.

Referendum is quite a new institution of Hungarian public law. Although the Constitution of 1949 mentioned national referendum (the Presidential Council had the competence to order it), it was quite obvious that no referendum could take place. The Parliament exercised *all* powers deriving from the people's sovereignty; there remained no place for direct democracy.

- 1) It was a significant change in January 1989 when the Parliament amended the Constitution and in June it adopted the first Act on Referendums. It is noteworthy that the referendum was regulated well before the first free elections and also prior to proclaiming the republic on 23 October 1989.

The regulation of 1989 considered national referendum as a way of exercising powers. As such, it focused rather on the outcome of the referendum and not on the voters participating in it. This first stage of the regulation lasted until 1997, when the Constitutional Court established a legislative omission due to the lack of procedural rules.<sup>7</sup> The Constitutional Court accepted a different approach; it emphasised the *fundamental right* characteristic of the right to referendum. As a consequence of the decision, the institution had to be protected already before the initiation, at the phase of collecting signatures.

- 2) As a result of the decision, the Parliament amended the Constitution and adopted a new Act on National Referendums in 1998. These two documents focused mainly on the initiation procedure, i.e. how to raise a question to referendum, how it should be examined and so on.

Therefore the emphasis was laid on the human right characteristic in the

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<sup>6</sup> Survey of the Medián 6 September 2007. [www.origo.hu/itthon/20070906-median-kilencigenes-nepszavazas-varhato.html](http://www.origo.hu/itthon/20070906-median-kilencigenes-nepszavazas-varhato.html).

<sup>7</sup> Decision 52/1997. (X. 14.) CC

second stage of the regulation.<sup>8</sup> The right to participate and to initiate a referendum was in focus, instead of the institution itself.

- 3) The third stage of the development of the institution started in 2006. This change was not of public law but of sociological nature; the political and social perception of referendum changed. These changes manifested in the drastic increase of the number of the initiations and the characteristic of the proposals. Several initiations raised flippant issues in which nobody seriously wanted to organise a referendum. However, the phenomenon led to unsolvable problems for the organs dealing with the initiations, namely the National Electoral Committee and the Constitutional Court. It was clear that the procedural rules that had been satisfactory for years became useless when the organisers misused the institution.
- 4) Although the number of initiations was reduced after the referendum of 2008, there remained several topics to reconsider at the creation of the new Basic Law.

### 3. New elements of referendum

It is quite unusual that a new national constitution be debated throughout the world by political organs as much as the Basic Law of Hungary. Nonetheless, our new constitution does bring unusual solutions. Although the topic of direct democracy was out of the most frequently debated ones, the Basic Law certainly introduced novelties concerning referendums. The most apparent alteration seems to be that the Basic Law terminated the consultative referendum and the referendum on confirming a statute. However, these two institutions did not have important roles in the Hungarian legal system. Neither is it so significant that Members of Parliament are no longer entitled to initiate referendum.

It is much more important that the Basic Law introduced a validity threshold for a successful referendum. Furthermore, the Basic Law does not mention the popular initiative; this does not necessarily mean the cessation of the institution but it is in fact likely that the institution will be terminated. Finally, the Basic Law expanded the list of topics that cannot be challenged by referendum with a new element: no referendums can take place on electoral issues.

Evaluating the current state of direct democracy seems to be a rather difficult task. The problem is that the Act on Referendum of 1998 is still in force but it is not compatible to the Basic Law. Although the government submitted a Bill on the new Act on Referendum, the Parliament has not adopted it yet. Consequently, I focus only on one topic: namely, whether the validity threshold expands or restricts the use of national referendum.

<sup>8</sup> Péter PACZOLAY – Lóránt CSINK – Diána MECSEI: Fields of competence of the Constitutional Court. In: Péter PACZOLAY (ed.): *Twenty years of the Hungarian Constitutional Court*. Budapest, Alkotmánybíróság, 2009. 31.

The previous Constitution in force until the end of 2011 stated: “referendum is successful if more than half of the voters have cast a valid vote and more than at least one quarter of all persons entitled to vote have given the same answer to the given question.” Practically, the Constitution set two criteria. As for one, there should practically be more “yes” answers than “no”. And for the other, the amount of “yes” answers had to reach 25 per cent of all voters. If these two criteria were fulfilled one did not have to consider how many voters voted *against* the proposal. Technically, it made no difference whether the opponents of the referendum voted against the referendum or simply refused to participate in it.

The Basic Law has an utterly different approach. According to Article 8 paragraph 4: “The national referendum shall be valid if more than half of all voters cast a valid vote, and it shall be successful if more than half of the voters who voted validly have given the same answer to the question.” Consequently, the electoral organs have to consider first, whether half of all voters participated at the referendum. If not, the result of the referendum is out of scope.

What are the consequences of the regulation? Logically, the opponents of the proposal are interested in the boycott of the referendum instead of forcing their supporters to vote against the proposal. In this case it is more likely that the referendum is invalid. Therefore, the supporters of the proposal can only be sure in their success if more than half of all voters vote in favour the referendum. There is no need to say: there has not been a single referendum that has enjoyed such a majority since 1990. Not even the referendum of 2008 when the supporters had an enormous majority.

To conclude, until 2011 the supporters needed 25 per cent of all voters, now they need 50 per cent. Mathematically, it is twice as difficult to put through a referendum as it was upon the Constitution. Knowing that the events of real life do not follow the laws of mathematics – no boycott can be entirely successful – it is most true that the opponents have no interest in forcing their supporters to take part in the referendum; and this will not help the development of direct democracy.<sup>9</sup>

#### 4. Conclusion

Referendum is not an essential element of democracy. There are countries that prefer the institution (e.g. Switzerland, France, Ireland) and there are some others which rarely use the institution or no referendum takes place at all (e.g. Germany, the United Kingdom, the Netherlands). Whether to institute referendum or not is the decision of the constitutionalising power. But if it does institute, both scholars and the legislator have to find the correct place of referendums in the state organisation.

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<sup>9</sup> Furthermore, it is hard to find a legal sense for the fact that while the Parliament *introduced* validity limit for referendums, it also *terminated* the validity limit for parliamentary elections.

Referendums have a dual nature. On the one hand, they are the most basic element of direct democracy ensuring the people's direct participation in decision-making. On the other hand, initiating a referendum is a fundamental right. I find that the regulation has emphasised the latter since 1998; both the forthcoming and the previous regulation focus on *how* to initiate a referendum. But the role of referendum in society is still not clarified.

I believe that direct democracy and representation do not exclude each other. One has to differentiate the issues that can be better decided by referendums from the ones that should rather be decided by the representative powers. However, jurisprudence has not found the answer yet.