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Referendum in the Slovak Legal Order: Many Questions, Few Answers?

Referendum w słowackim porządku prawnym. Wiele pytań, mało odpowiedzi?

ABSTRACT

The author of this paper deals with the issue of the referendum in the Slovak legal order, which has long been the subject of numerous professional debates in the Slovak Republic. It is a legal institution that is relatively problematic in Slovakia because the legal regulation concerning the referendum is written in many respects vaguely and raises many questions from a practical-application point of view. For this reason, in the first chapters, the author examines the legal regulation of the referendum in the Slovak Republic in general and outlines the questions to which Slovak legal science does not have clear answers. At the same time, the author analyses the latest decision of the Constitutional Court of the Slovak Republic, which has enriched the issue in question with some new and necessary answers.

Keywords: referendum; Slovak Republic; Slovak legal order; Constitutional Court of the Slovak Republic

INTRODUCTION

Direct democracy representing the participation of citizens in the political life of society is often considered an indispensable and essential condition for democracy itself. It allows citizens to make direct decisions about public life issues. At present,

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direct democracy cannot be understood as a comprehensive system of governance, but as individual elements incorporated into the decision-making mechanism of a largely indirect (representative) democracy. Although the state guarantees citizens the right to participate in the administration of public affairs, the idea of deciding on all essential matters of public interest in the form of direct democracy is practically impossible in the modern state. However, the direct participation of citizens in the administration of the state is maintained in modern democracies, as it is not only a reference to a certain ideal, but also because it benefits the democratic political system in terms of the legitimacy of important societal decisions. Moreover, in countries where the direct democracy is supported by a huge majority of citizens, it has led to remarkable political stability.[1]

One of the preserved methods of direct democracy is the referendum. The referendum is undoubtedly one of the most important legal instruments in any state governed by the rule of law, enabling the immediate participation of the people in the exercise of public power. In legal science, it is referred to as "a supplement to the representative democracy".[2] By enshrining the institution of referendum in the legal orders of states governed by the rule of law, the principle of people's sovereignty is effectively reflected.[3] There is no dispute in Slovak legal science about the meaning, purpose or goals of the referendum. Nevertheless, this is not a field that is without problems. The aim of this paper is to introduce the reader to the legal regulation of the referendum in the Slovak Republic and to outline some of the most problematic aspects that arise from the constitutional regulation, as well as to formulate the author's own legal opinion on some problematic issues. Last but not least, based on the analysis of the latest decision of the Constitutional Court of the Slovak Republic, the author wants to point out that Slovak legal theory already has relatively convincing answers to many questions that have been asked for many years. The basic materials used for elaboration of the paper are legislative sources, including the legislation relating to the referendum and direct democracy. These legislative sources are the sources of different legal force – mainly constitutional sources and legal sources. The legislative sources of the highest legal force used in the paper include, of course, the Constitution of the Slovak Republic no. 460/1992 Coll. *de lege lata*. The main legislative legal source is the Act no. 180/2014 Coll. on the conditions of electoral law and change and completion of certain laws. The used materials also include available domestic and foreign literature relating to the

[1] M. Perkowska, *Popular Initiative as an Instrument of Migration Policy in Switzerland*, "Studia Iuridica Lublinensia" 2020, vol. 29(1), p. 181.

[2] K.M. Ujazdowski, *Raymond Carré de Malberg: The Unknown Inspirer of the Fifth French Republic*, "Studia Iuridica Lublinensia" 2020, vol. 29(5), p. 333.

[3] According to this principle the state power comes exclusively from citizens, and they exercise it through elected representatives or directly.

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issue in question. Finally, materials used for elaboration of the paper include also the most important case law of the Constitutional Court. As regards the methodology, the paper uses traditional and exerted methods of legal science (jurisprudence) research – general scientific methods as well as special methods of legal science (jurisprudence). The general scientific methods used in the paper are predominantly logical methods, namely the method of analysis, the method of synthesis and the method of analogy. Used special methods of legal science include dominantly methods belonging to a group of interpretative methods, namely the teleological method and the systematic method.

REFERENDUM AS AN INSTRUMENT OF DIRECT DEMOCRACY IN THE SLOVAK REPUBLIC

A number of definitions of the institution of referendum can be found in the Slovak scientific literature. Regardless of the specific form of the relevant definition, it can be stated that each of them emphasizes the crucial role of the people in this form of deciding issues of public interest. It should be added that besides the professional literature, a definition of the institution of referendum can also be found in the decision-making activity of the Constitutional Court of the Slovak Republic itself, which is relatively rich in connection with referendum. In connection with the definition of the institution of referendum, the Constitutional Court argues that the referendum is "a constitutional institution the purpose of which is to ensure the citizens of the State to participate directly in the creation of the state will".[4] The Constitutional Court further adds that in the referendum, citizens exercise this right by voting, which has legal effects. Citizens' voting without legal effects is a popular initiative, the plebiscite. In one of its other decisions, the Constitutional Court also considers the referendum to be a kind of "insurance retained by the holder of the original power – the citizen – against the holders of derived power – the parliament and its deputies".[5]

As regards the referendum classification, on the basis of the criterion of initiation method, referendum in the conditions of the Slovak Republic can be divided into mandatory referendum and optional referendum.[6] However, the term "mandatory" may be associated with a different legal content. The mandatory nature of a referendum may express the obligation of a state authority to declare a referendum initiated by citizens that meets all the legal conditions for the preparation of ref-

[4] Decision of the Constitutional Court of the Slovak Republic no. II. ÚS 31/97.

[5] Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 42/95.

[6] J. Ondrová, *The Direct Exercise of State Power by Means of Referendum under the Slovak Republic Conditions*, "Štát a právo" 2019, vol. 6(1), p. 4.

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erendum. However, the mandatory nature of referendum can also express a more important feature – the obligation of the State to give citizens some questions to decide. Because this feature is more important than the obligation of a state body to declare a citizen-initiated referendum, a mandatory referendum can be defined as a referendum by which parliament must have the citizens approve its fundamental decision, which is of a constitutional nature. It depends on each State which set of decisions is determined for approval by citizens. In contrast, an optional referendum is a referendum that can be exercised at the discretion of a state authority or when a designated number of voters decides to request a referendum. The optional nature of the referendum thus means that it is a matter of the citizens to decide directly on a matter of public interest, and this possibility is determined by the public interest in the people's decision-making on a certain matter.

In the conditions of the Slovak Republic, the classification of the referendum on the basis of the territory affected by the direct decision-making of the people is also relevant. According to this criterion, a referendum can be divided into national, regional and local referendum. All the above forms of referendum have their roots directly at the constitutional level, in the Constitution of the Slovak Republic no. 460/1992 Coll., as amended. This paper will only address the issue of the national referendum.[7]

In terms of the system of the Constitution, the institution of the national referendum is regulated together with the National Council of the Slovak Republic in the Title 5 of the Constitution of the Slovak Republic collectively referred to as "Legislative Power".[8] It follows from the above that the legislative power in the Slovak Republic is regulated in two ways. This power belongs not only to the National Council of the Slovak Republic, but also directly to the citizens. Citizens can exercise this power directly through the institution of referendum. It can be added that the Constitutional Court also commented on the method of legislative and technical incorporation of the referendum, stating that "the systematic inclusion of the referendum section in Title 5 of the Slovak Constitution (which regulates the legislature), is particularly important. It is clear from this that the Constitution considers decision-making via referendums (if it is of a general nature and regulates

[7] In connection with other types of referendum, it should only be noted that the local referendum is, in terms of the constitutional regulation, associated with voting at the municipal level (as the basic unit of territorial self-government). The concretization of the issues of the local referendum is contained in the Act no. 369/1990 Coll. on municipalities (§ 11a). The regional referendum is associated with the vote of the people at the level of a higher territorial unit (self-government region). The issues associated with its execution are specified in the Act no. 302/2001 Coll. on self-government of higher territorial units (Act on self-governing regions) (§ 15).

[8] *In concreto*, the legislator laid down the basic conditions for declaring and holding a referendum in the Section 2 of Title Five, Articles 93 to 100 of the Constitution.

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rights and obligations), to be one of the two ways of exercising legislative power".[9] The above statement of the Constitutional Court thus points to the importance and function of referendum in the State.

The Constitution in Article 93 recognizes two forms of national referendum – the mandatory referendum and the optional referendum. The basis for the mandatory referendum is created in Article 93 (1), which states that "a constitutional law on joining a union with other states or the secession from it, shall be confirmed by a referendum". In view of the nature of this type of referendum, it can be stated that the determining feature of a mandatory referendum is the obligation of the state authority to submit to people for decision precisely defined questions of joining a union with other states or the secession from it.[10] The mandatory referendum, as can be seen, confirms the constitutional law, the subject of which is exhaustively determined (entry into a state union with other states, secession from this union). However, the confirmation of the constitutional law in the cases stipulated by the Constitution cannot be identified with the obligation of citizens to express their consent to the adopted constitutional law.

When confirming a constitutional law, citizens consider a positive and negative answer, and thus decide whether they will give rise to the legal effects of the previous vote of the National Council of the Slovak Republic on the constitutional law. The Constitution thus explicitly creates a legal basis for citizens to decide on the adoption of constitutional law. J. Drgonec notes on the issue of mandatory referendum that mandatory referendum is not secured in terms of legal effects. Voters are not obliged to take part in any referendum. If the right to vote in referendum is not exercised by a qualified majority of eligible voters, the constitutional law on joining or leaving a state union with other states will not be capable of producing a constitutionally relevant effect.[11] The decisive factor is the will of the voters and their interest/lack of interest in the subject of referendum.

The basis for optional referendum is Article 93 (2) of the Constitution, according to which "a referendum may also be used to decide on other crucial issues of the public interest". It follows from it that the subject of the vote of citizens does not necessarily has to be only a change of the constitutional law (obligatory referendum). Thus, a referendum, optional, may also take place on other important issues of public interest in accordance with the constitutional provisions.[12] In one of its recent decisions, the Constitutional Court has stated that without the need for a more

[9] Decision of the Constitutional Court of the Slovak Republic no. IIII. ÚS 31/97.

[10] M. Domin, *Krátke zamyslenie nad potenciálnym referendom o vystúpení Slovenskej republiky z Európskej únie,* "Justičná revue" 2017, vol. 69(8–9), p. 1042.

[11] See J. Drgonec, *Ústava Slovenskej republiky. Komentár*, Šamorín 2012, p. 1062.

[12] It should be emphasized that the term "public interest" is a vague legal concept (changing in time and space) and Slovak legal system introduces only its partial definitions applied for the purposes of specific legislation (e.g., Article 3 (2) of the Constitutional Act no. 357/2004 Coll. on the protection

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or less precise definition of the term "public interest", the fact that at least 350,000 citizens agree with the declaration of referendum (on the basis of a petition) must be taken into account. The fact that 350,000 or even more citizens are calling for a referendum on a particular issue is a strong indication that this issue is taking the form of an important public interest issue.[13] However, in connection with the question of defining the content of the term "public interest", it is appropriate to focus primarily on the Constitutional Act no. 357/2004 Coll. on the protection of public interest in the discharge of functions of public officials, which generally defines the concept of public interest, namely (a) by introducing the institute of utility and (b) by defining the concept of personal interest as opposed to the concept of public interest. In this context, the public interest can be defined on the basis of two criteria: (a) benefit (proprietary or other) and (b) the entity to which this benefit is intended (to all, or at least the majority of citizens).[14] The public interest is thus defined at the constitutional level primarily by a combination of the factor of quantity and the factor of utilitarianism.

It follows from the above that the existence of public interest is clearly necessary for the holding of an optional referendum. An issue which is not a matter of public interest at all or does not have the nature of an important issue of public interest cannot be the subject of referendum.[15] The guarantor of fulfilment of this condition is the President, who examines whether the citizens' petition complies with the Constitution and the special law and whether it has the prescribed requirements. An optional referendum must be held if the National Council of the Slovak Republic or a group of citizens so requests.[16] It should be added that some legal experts in the Slovak Republic consider the optional referendum as an opportunity for more fundamental changes in individual constitutional norms than can be considered reasonable. Even further, some legal experts are of an opinion that every change to the Constitution is available in a referendum, because the Constitution does not specify the conditions that must be met when changing it, nor does it establish values or relationships that must not be changed by the procedure prescribed for amending the basic law.[17] However, this statement is only the opinion of a part of

of public interest in the discharge of functions of public officials, or § 108 (2) of the Act no. 50/1976 Coll. on land-use planning and building order).

[13] Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 24/2014.

[14] *Komentár k Ústave Slovenskej republiky*, eds. M. Čič [et al.], Žilina 2012, p. 533.

[15] J. Ondrová, *op. cit.*, p. 5.

[16] In accordance with the conditions set out in Article 95 of the Constitution. A request of citizens has the form of petition, a request of the parliament has the form of resolution.

[17] *Komentár k Ústave Slovenskej republiky…*, p. 1063.

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the scientific community; the possibility of changing the Constitution by referendum has long been the subject of debate in Slovakia in legal science.[18]

It can be concluded that optional referendum can be held on any issue of public interest, unless it is an issue that the Constitution explicitly excludes from referendum. Issues that are explicitly excluded from referendum are contained in Article 93 (3) of the Constitution. This provision identifies issues that undoubtedly belong to important issues of public interest and yet are absolutely excluded from the referendum. These are fundamental rights, freedoms, taxes, duties or state budget.[19] In this context, it should be noted that many legal experts have long believed that all other issues that are not subject to the exhaustive enumeration of Article 93 (3) of the Constitution, may be the subject of an optional referendum if they are of an important public interest.[20] Such issues may include, for instance, changes in the criminal system in relation to evidence,[21] new mechanisms against organized crime interest,[22] even ways of fighting against pandemic,[23] etc. However, the Constitutional Court in its latest decision expressed a legal opinion, which is rather surprising and controversial for many legal scholars. That is to say, its decision is based on a rather extensive interpretation of mentioned Article 93 (3).

I am of the opinion that a broad interpretation of the issues excluded from the referendum is not the right approach. As a result of the above-mentioned ruling of the Constitutional Court, a certain degree of interpretive uncertainty is induced among the citizens. On the basis of an extensive interpretation of the issues excluded from referendum, each referendum is exposed to the risk of banning the referendum question for implicit reasons. The President of the Slovak Republic, in accordance with his duty to ensure the proper functioning of constitutional bodies by his decisions,[24] will probably have to have each referendum tested by a Constitutional Court to determine the potential inconsistency of the referendum question with implicit constitutional prohibitions and limits. I consider this to

[18] For example, see D. Lipšic, *Referendum o zmene ústavy a priama voľba prezidenta*, "Justičná revue" 1997, vol. 49(2), p. 31; R. Fico, *Je možná zmena Ústavy Slovenskej republiky referendom?*, "Justičná revue" 1997, vol. 49(2), p. 41.

[19] If certain issues, by their nature, fall into one of these categories and are important issues of public interest, they are not subject to a mandatory referendum (in the sense of the current wording of the Constitution) nor may they be the subject of an optional referendum.

[20] Decision of the Constitutional Court of the Slovak Republic no. II. ÚS 171/05.

[21] See J. Čentéš, A. Beleš, J. Šimonová, *Crown/Material Witness in Central Europe: Slovak Republic, Czech Republic and Austria. Part 1*, "Archivio Penale" 2020, vol. 72(1), p. 1.

[22] See J. Čentéš, A. Beleš, *Regulation of agent as a tool for combating organized crime*, "Journal of Security and Sustainability Issues" 2018, vol. 8(2), p. 29.

[23] See A. Čajková, I.B. Šindleryová, M. Garaj, *The COVID-19 pandemic and budget shortfalls in the local governments in Slovakia*, "Scientific Papers of the University of Pardubice. Series D" 2021, vol. 29(1), p. 1.

[24] Article 101 of the Constitution.

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be superfluous and, in a way, also burdensome for constitutional authorities and bringing uncertainty for citizens.

In connection with the negative definition of the subject of the referendum, a number of controversial issues arise in legal practice. One of the problematic issues is the question of "fundamental rights and freedoms". Too broad interpretation of this constitutional norm can lead to malfunctioning of the institution of optional referendum, because there are not many issues that at least partially affect fundamental rights and freedoms. On the other hand, it is clear that the legislator did not want to subordinate the issue of fundamental rights and freedoms solely to the will of the majority.

SELECTED PROBLEMS RELATED TO THE REFERENDUM IN SLOVAKIA

For many years, there have been discussions in Slovak jurisprudence regarding the validity of the referendum results. The conditions for the validity of national referendum are generally defined in Article 98 (1) of the Constitution. Two basic conditions for the validity of the referendum results follow from this provision: 1) referendum must be attended by an absolute majority of eligible voters (i.e., 50% of all eligible voters + 1 other eligible voter), and 2) the decision must be taken by an absolute majority of referendum participants. The conditions of validity of the referendum results defined in this way have been the subject of discussions in Slovakia for a long time. The question is whether the existing qualified majority of citizens designated by the Constitution is not disproportionately high. This fact has long been reflected in a negative way in practice, in the form of regularly invalid referendums. Due to the low interest of citizens in direct democracy, or public affairs as such, holding referendums in Slovakia is a costly public opinion poll rather than what it really should be. It applies also to local referenda which allow citizens to vote on important issues of life and development of certain community.[25] For this reason, the question arises as to whether it would not be appropriate to reduce the number of voters entitled to exercise their fundamental right to participate in governance.

An issue that has also been very controversial in the Slovak legal literature for a long time is the question of the binding nature of the referendum. The problems stem mainly from the wording of Article 98 (2) of the Constitution, according to which "the National Council of the Slovak Republic shall promulgate the proposals adopted by a referendum as a law". The wording of this provision raises

[25] See T. Alman, J. Volochová, *Transparentná samospráva – právo verejnosti na informácie ako forma priamej demokracie*, "Scientific Papers of the University of Pardubice. Series D" 2020, vol. 28(1), p. 5.

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a fundamental question concerning the referendum, namely whether the results of referendum are legally binding or not. There have been very conflicting views in the professional community in this context. To put it simply, there are supporters of the binding nature of referendum results on the one hand and its opponents on the other. Proponents of the binding results of the referendum are mainly based on legal-theoretical arguments implying that state power belongs to the people, and the people can exercise it equally either indirectly (elected representatives) or directly (referendum). Opponents of the referendum's binding nature argue primarily by the principle of prohibition of the imperative mandate,[26] which is a standard in the states governed by the rule of law, and which stipulates that representative of the people is not bound by anything or anyone in the exercise of the mandate. It should be noted that the principle of prohibition of imperative mandate and other principles belonging to the rule law are the foundations of the legal regulations which set the impassable limits of the legislative, judicial and executive authority.[27]

Regardless of the above, the reality is that significant problems result from the wording "the National Council of the Slovak Republic shall promulgate the proposals as a law". However, the constitutional wording "as a law" cannot, in my view, be interpreted in a way implying that a proposal adopted in a referendum is declared by law.[28] Nor can it be interpreted in a way that a proposal adopted in a referendum is a generally binding piece of legislation with the force of law. This provision should be understood rather than establishing a procedure immediately after a referendum with a valid result. This provision thus defines two basic constitutional facts. Firstly, the proposal adopted in referendum is to be promulgated in a manner exactly as the laws are promulgated in the Slovak Republic at the time of the adoption of the proposal.[29] Therefore, a proposal adopted in referendum has to be promulgated in the Collection of Laws. However, is must not be promulgated in the form of a law, but only to the extent of the result of a valid referendum. Second, the Constitution explicitly specifies the constitutional body that has the obligation to promulgate a proposal adopted in the referendum. It is the National Council of the Slovak Republic.[30] Therefore, it should be emphasized that it is clear that in the case of valid referendum being promulgated in the Collection of Laws of the Slovak Republic, the National Council of the Slovak Republic must ensure without undue

[26] See K. Marczyová, *Referendum – eventualita rozvoja verejnej správy*, Bratislava 2012, p. 48.

[27] T. Biernat, *On the Lawmaking Policy, Discretion and Importance of the Rule of Law Standards*, "Studia Iuridica Lublinensia" 2020, vol. 29(3), p. 80.

[28] After all, this was confirmed by the Constitutional Court of the Slovak Republic in its latest decision, which will be the subject of analysis in the last chapter.

[29] This includes the obligation to sign the text of the proposal adopted in the referendum in the form in which it is to be published in the Collection of Laws of the Slovak Republic, and the obligation to perform the usual acts used to publish the text in the Collection of Laws of the Slovak Republic.

[30] B. Balog, *Charakter návrhu prijatého v referende*, "Právny obzor" 2015, vol. 98(5), p. 506.

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delay that the proposals adopted in the referendum cause legal effects. However, the question is what the legal effects are?[31] The Constitution does not define them, nor do they implicitly follow from it.

In this context, we can use the case law of the Constitutional Court of the Slovak Republic, which is on the one hand relatively rich, on the other hand relatively contradictory, controversial and ambiguous. In relation to the legal effects of referendum, the most important decision can be considered the decision of the Constitutional Court of the Slovak Republic no. II. ÚS 31/97 and the decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 42/95. Let's look at PL. ÚS 42/95. In this decision, the Constitutional Court notes that "in a theoretical position, a referendum is a kind of safeguard of the citizen against the parliament to get advice from the citizens on fundamental issues or that the citizens take the responsibility in a referendum that the parliament does not want or cannot hold". In the same decision, the Constitutional Court further states that "even if citizens delegate their rights to parliament, they still have – as the holder of primary original power – the right to decide on certain fundamental issues concerning the public interest. The right of citizens to petition for a referendum gives them the opportunity to exercise primary, non-derived power even in cases where the parliament would not act in accordance with the ideas of the citizens". In connection with the effects of the referendum, the Constitutional Court in its decision II. ÚS 31/97 also states that "the adoption of the proposal in the referendum is of constitutional relevance in the sense that the citizens participating in the vote will order the parliament to change the part of the constitution that was the subject of the announced referendum in accordance with the proposal adopted in the referendum".

It follows from the cited decisions that the Constitutional Court of the Slovak Republic is considerably inconsistent in its opinions on the legal effects of referendum; it grants referendum in many ways incompatible effects. In this context, M. Buzinger speaks of the threefold legal effects of the referendum – advisory legal effects, ordering legal effects and, finally, legislative legal effects.[32] The advisory effects of the referendum, in the sense of the cited decisions, mean that the referendum is only a consultative instrument for members of parliament, which provides them with some guidance on how to deal with matters of public interest. Ordering effects of the referendum, on the other hand, cause that a citizen voting in the referendum is giving an order to the relevant state body (National Council of the Slovak Republic) to adopt, amend or repeal a generally binding legal regulation in accordance with the proposal adopted in the referendum. Finally, the legislative effects of referendum, in the sense of case law, mean that citizens can create or

[31] See J. Šeliga, *Efemérny ľud za plentou. K právnym účinkom referenda*, "Justičná revue" 2016, vol. 68(11), p. 1203.

[32] M. Buzinger, *Referendum a jeho právne účinky*, "Justičná revue" 2010, vol. 62(10), p. 1116.

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abolish the law directly in the referendum, without the need of some form of cooperation with the National Council of the Slovak Republic. It should be emphasized that all three types of legal effects raise certain problems and can be questioned. On the basis of the above, it would be appropriate for the legislation to specify what legal effects the legislator has in mind.

The above-mentioned fact therefore raises a fundamental questions. What is the legal nature of the proposal adopted in the referendum? Is it a generally binding legal act or just an order of the people to act in a certain way? If it is a generally binding legal act, what is its legal force? B. Balog is of the opinion that the proposal adopted in the referendum is not a law. It is a separate, original formal source of law. Its strength is derived from its source. In referendum, the citizens exercise their power without representatives, and the outcome of this procedure must therefore be distinguished from the results of the exercise of legislative power by the citizens' representatives. The distinction can be seen in the higher degree of legal force that the proposals adopted in referendum have (compared to ordinary laws). Such a hierarchy is the fulfilment of the principle of the sovereignty of the people. The results of the referendum, given their direct connection to the source of power, enjoy the highest degree of democratic legitimacy. Therefore, the results of the referendum should have the highest legal force of all sources of law.[33] The considerations of other authors in the field of constitutional law direct to a very similar conclusion.[34] In the light of these views, the proposals adopted in referendum are considered to be a special form of law, different from ordinary laws or constitutional laws. It is a *sui generis* form of law. The adopted proposal is also a normative legal act, which is a concept used also in connection with constitutional laws, laws and even with this special form of law.[35] It can be said that although the argumentation of legal science is convincing in many respects, only the legislator (or the constitutional court) can give a definitive answer.

As can be seen, Slovak legal science has been ambiguous for many years. I believe that the referendum should certainly produce the ordering legal effects. It means that in the event of valid referendum, the parliament should act and ensure the adoption of a law reflecting the proposal adopted in the referendum. The adoption of the law should be ensured by setting a deadline within which the National Council of the Slovak Republic should be obliged to act. Like some other authors,[36] I am in favour of a six-month period within which the National Council of the Slovak Republic should ensure that the results of the referendum are reflected in the form

[33] B. Balog, *op. cit.*, p. 507.

[34] For example, see R. Procházka, M. Káčer, *Teória práva*, Bratislava 2019, p. 158.

[35] M. Domin, *Formálno-právna povaha výsledku referenda*, "Justičná revue" 2010, vol. 62(11), p. 1254.

[36] B. Balog, L. Trellová, *Povinnosť parlamentu prijať zákon?!*, "Právny obzor" 2012, vol. 95(1), p. 33.

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of a generally binding legal regulation. At the same time, the fulfilment of this obligation by the parliament should be ensured by the threat of a sanction, which in the case of the parliament would be its dissolution. I base this proposal again on the theory of the sovereignty of the people, according to which the people are the only source of state power and even a legislative body the power of which is only derived cannot disrespect this will.[37]

DECISION OF THE CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC NO. PL. ÚS 7/2021: DEFINITIVE ANSWER TO PROBLEMATIC QUESTIONS CONCERNING THE REFERENDUM?

In terms of clarifying many controversial issues concerning referendum in the Slovak legal system, the decision of the Constitutional Court of the Slovak Republic issued in July 2021 can be considered extremely important. The proceedings were initiated by the President of the Slovak Republic Zuzana Čaputová herself due to doubts about the compliance of the proposal for a referendum, which was delivered to her by the Committee on Petitions.[38] The question that was to be the subject of the referendum was this: "Do you agree with the shortening of 8th term of the National Council of the Slovak Republic so that the new elections to the National Council of the Slovak Republic take place within 180 days of the promulgation of the results of this referendum?". The reason for the President's motion to the Constitutional Court was her attempt to dispel doubts about the constitutional conformity of the referendum issue, as well as the next steps if the proposed issue was adopted in a referendum. The specific grounds for initiating proceedings were divided into the following areas:

1. Doubts about the legal force and effects of referendum.
2. Doubts about the compliance of the subject of referendum with the principles of representative democracy applied in the Slovak Republic.
3. Doubts about the compliance of the subject of referendum with the principle of legality.
4. Doubts about the compliance of the subject of referendum with the principle of legal certainty, protection of the legitimate confidence of citizens in the legal order, generality of law and the right to vote freely.
5. Doubts about the compliance of the subject of referendum with the constitutional regulation of the length and end of the term of the National Council of the Slovak Republic.

[37] M. Giba, *Referendum o predčasných voľbách je protiústavné*, "Právny obzor" 2021, vol. 104(3), p. 198.

[38] Opposition political parties stood in the background of the Committee on Petitions.

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6. Doubts about the compliance of the subject of referendum with the constitutional regulation of referendum itself.

The analysed decision of the Constitutional Court can be considered an extremely important contribution to solving many problematic issues concerning the referendum in the Slovak Republic. Due to the limited possibilities of this paper, I will not deal in detail with all aspects of this decision. I will analyse only those parts of the decision that directly address the issues outlined in the previous chapters of this paper. In connection with resolving the constitutionality of referendum question, the Constitutional Court considered it necessary to answer the questions asked by the petitioner (president) concerning the legal force, binding force and effects of the referendum in the Slovak Republic. The answer to those questions was a necessity for a decision on the substance.

In terms of the effects, binding force and legal force of the results of the referendum, the Constitutional Court referred to its previous decision-making activities, in which it has expressed the legal opinion that the legislative power can be exercised in two ways. According to the Constitutional Court, the exercise of this power belongs not only to the National Council, but also directly to the citizens in a referendum. These are two equal ways of exercising legislative power, which originally belongs to the citizens of the Slovak Republic.[39] The Constitutional Court deduced the equivalence of two forms of legislative power from the wording of Article 2 (1), as well as Article 30 (1) of the Constitution, which stipulate that the holders of state power are citizens who exercise this power either directly or through their elected representatives. The Constitutional Court also states that equally important is the systematic division of the Constitution, where the regulation of the position and powers of the National Council and the regulation of the referendum are jointly contained in Title 5 of the Constitution, called "Legislative Power". In response to the petitioner's argument, the Constitutional Court added that Title 5 of the Constitution is a reflection of the principle of separation of powers, not a determination of the legal force of the standards adopted by the National Council.

In the opinion of the Constitutional Court, the equivalence of the two forms of exercise of legislative power implies that if the National Council may amend the Constitution, then the amendment of the Constitution may also be the subject of a referendum. This is also confirmed by decisions of the Constitutional Court issued in the past.[40] The Constitutional Court also stated that the exercise of legislative power understood in this way is not even in conflict with Article 72 of the Constitution, according to which the National Council is the only constitutional and legislative body. In a referendum, citizens exercise legislative power besides

[39] See decisions of the Constitutional Court no. PL. ÚS 24/2014, PL. ÚS 42/95 and II. ÚS 31/97.
[40] See decisions of the Constitutional Court no. II. ÚS 31/97 and PL. ÚS 24/2014.

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the National Council directly, i.e., not in the form or through a state body.[41] The President's doubts about the legal force of the referendum results were therefore not supported by the relevant decisions of the Constitutional Court.

The Constitutional Court agreed with the President that in the decision no. PL. ÚS 24/2014 the Constitutional Court admitted that the results of the referendum may have the force of law or constitutional law. At the same time, the already stated equivalence of the exercise of legislative power could indicate this. Thus, like the National Council, citizens could pass laws in a referendum. However, such an understanding of the dual legal force of the referendum results would not respect the provision of Article 99 (1) of the Constitution, according to which "the result of the 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". This constitutional provision indirectly stipulates that the result of the referendum has the force of a constitutional law, thus precluding the President's interpretation that the legal force of the referendum result is at the level of "ordinary" law. The Constitutional Court added that the duration of the effects of the referendum for at least 3 years also underlines the conclusion that a referendum may result in a binding legal norm that regulates a certain range of social relations with a vision of permanence. The legal force of the referendum result at the level of constitutional law is also supported by the democratic legitimacy of the referendum, when the validity of its result requires the participation of an absolute majority of all eligible voters.

In this connection, the Constitutional Court stated that the requirement of an absolute majority of eligible voters and the adoption of a decision by an absolute majority of referendum participants indicate that the referendum result always has the same legal force, as the Constitution recognizes only one way of adopting a valid referendum result. Again, this can be compared with the National Council, where a lower number of deputies is required to pass a law than is required to pass a constitutional law.

The Constitutional Court thus concluded that the referendum is an equal, but not exactly the same exercise of legislative power as in the case of the National Council, when the result of the referendum has exclusive legal force at the level of constitutional law. This is not, strictly speaking, about overcoming the previous case law of the Constitutional Court, as the possibility of changing the constitution through a referendum has always been present. In addition, the Constitutional Court has already ruled[42] that the result of referendum has the power of the constitutional law, which was also reflected in the statement on the existence of immutable parts of the Constitution, in which it is not possible to intervene even by referendum.

[41] See also decisions of the Constitutional Court no. II. ÚS 31/97 and PL. ÚS 24/2014.

[42] In its decision no. PL. ÚS 24/2014.

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The Constitutional Court also stated in its latest decision on referendum that the main reason for which the petitioner claimed that the result of the referendum had the legal force of the law was the wording of Article 98 (2) of the Constitution, according to which "the National Council of the Slovak Republic shall promulgate the proposals adopted by a referendum as a law". This constitutional norm, however, according to the Constitutional Court, represents only the determining of technical way of referendum result promulgation, not the determining of its legal force.

In addition to the above mentioned, as an extremely important part of the decision of the Constitutional Court can be considered the ruling on the constitutional limits of the referendum, i.e., issues excluded from referendum. In this case, it is a ground-breaking decision which, beyond all expectations (even in the field of legal science), the Constitutional Court has interpreted the constitutional limits of referendum in a rather extensive way. Just to repeat, the Slovak legal scientists have for many years believed that only four issues cannot be the subject of referendum – fundamental human rights and freedoms, taxes, duties and the state budget. However, the Constitutional Court goes further in its decision and expands this area with a number of other issues related to the so-called "material core of the Constitution".

Such a broad interpretation of the limits of the referendum by the Constitutional Court is based on the fact that it is the duty of the Constitutional Court to protect the material core of the Constitution. According to the Constitutional Court, this obligation follows not only from Article 124 and Article 93 (3) of the Constitution, but also from Article 95 (2) and Article 125b (1) of the Constitution. They stipulate that the role of the Constitutional Court is to examine the compatibility of the subject of the referendum with "the Constitution or constitutional law". Therefore, the Constitution itself does not limit the Constitutional Court. The role of the Constitutional Court is to identify a possible discrepancy between the subject of the referendum and all articles of the Constitution and to prevent such interventions that would disrupt the material core of the Constitution.

In connection with the issue of material core, the Constitutional Court refers to its earlier decision.[43] Here, the Constitutional Court stated that the material core of the Constitution is not just an academic construction without meaning or without functions in a state governed by the rule of law. The material core of the Constitution protects a state governed by the rule of law. Protecting a democratic state regime and preventing its legal change to a non-democratic regime is therefore a fundamental function of the material core of a modern constitution. According to the Constitutional Court, the material core of the constitution represents a barrier for the legislator in the sense that it prevents the legislator from removing the existing constitutional order and its democratic essence in a formal-legalist way, establishing an undemocratic regime and legalizing it in the same way. The Constitutional Court further emphasized that

[43] Decision of the Constitutional Court no. PL. ÚS 21/2014.

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an amendment to the Constitution made by a qualified majority can therefore only be made if it respects the implicit material core, that is, if the parliamentary majority does not change the constitutional norms that make up the implicit material core.[44]

The question, then, is what can be included in the so-called implicit material core. In answering this question, the Constitutional Court proceeds from the purpose of the protection provided to the Constitution by the implicit material core and subsequently states that it is a matter of protecting the basic principles on which a modern European state stands and exists. In this context, in the opinion of the Constitutional Court, the basis of the material core of the Constitution are, above all, fundamental rights and freedoms. The Constitutional Court argues that the elimination of the catalogue of fundamental rights and freedoms in its standard form could mean a gradual erosion of democracy and pluralism towards totalitarianism and dictatorship. The image of a democratic state in the European area after the Second World War is based on respect for fundamental rights and freedoms, and European constitutional systems use various constitutional instruments to guarantee this commitment.[45]

The decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 21/2014 clearly states that the principles of a state governed by the rule of law belong to the implicit material core of the Constitution. As regards the specific content of the concept of "principles of a democratic and rule of law", it is necessary to point out the constant case law of the Constitutional Court, in which the Constitutional Court has referred to individual constitutional principles falling within this concept. These are mainly the following principles:

- principle of freedom,[46]
- principle of equality,[47]
- principle of human dignity,[48]
- principle of sovereignty of the people,[49]
- principle of democracy,[50]

[44] The Constitution ceases to be powerless against the possible arbitrariness of a parliamentary majority of 90 votes.

[45] R. Funta, L. Golovko, F. Jurš, *Európa a Európske právo*, Brno 2020, p. 152.

[46] See decisions of the Constitutional Court of the Slovak Republic no. II. ÚS 94/95, PL. ÚS 12/01 and PL. ÚS 10/2013.

[47] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 4/97, PL. ÚS 12/01, PL. ÚS 10/02, II. ÚS 5/03, II. ÚS 249/04, PL. ÚS 8/04, PL. ÚS 16/08, PL. ÚS 12/2014, and I. ÚS 404/2016.

[48] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 12/01, PL. ÚS 10/06 and PL. ÚS 16/09.

[49] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 42/95, I. ÚS 76/97, PL. ÚS 19/98, I. ÚS 238/04, PL. ÚS 6/08, and PL. ÚS 105/2011.

[50] See decisions of the Constitutional Court of the Slovak Republic no. I. ÚS 76/97 and I. ÚS 60/97.

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- principle of legality,[51]
- principle of sovereignty of the constitution and laws,[52]
- principle of (democratic) legitimacy,[53]
- principle of protection of human rights and fundamental freedoms,[54]
- principle of legal certainty,[55]
- principle of the protection of legally acquired rights and legitimate expectations,[56]
- principle of prohibition of retroactivity,[57]
- principle of protection of citizens' trust in the legal order,[58]
- principle of justice (rule of law),[59]
- principle of prohibition of arbitrariness (prohibition of abuse of power),[60]
- principle of proportionality,[61]
- principle of division of power, including the checks and balances system,[62]
- principle of transparency of the executive power exercise.[63]

It should be noted that the above enumeration of the principles of state governed by the rule of law is not definitive. This, after all, follows from the decision of the

[51] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 6/01, PL. ÚS 6/04, PL. ÚS 17/2014, and PL. ÚS 30/2015.

[52] See decisions of the Constitutional Court of the Slovak Republic no. III. ÚS 2/00, III. ÚS 100/02, PL. ÚS 49/03, PL. ÚS 6/04, PL. ÚS 9/04, IV. ÚS 154/05, PL. ÚS 12/05, PL. ÚS 19/05, and PL. ÚS 10/2014.

[53] See decisions of the Constitutional Court of the Slovak Republic no. I. ÚS 238/04, PL. ÚS 14/06, PL. ÚS 105/2011, PL. ÚS 4/2012, and PL. ÚS 24/2014.

[54] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 49/03, PL. ÚS 1/04, PL. ÚS 12/01, and PL. ÚS 24/2014.

[55] See decisions of the Constitutional Court of the Slovak Republic no. II. ÚS 48/97, PL. ÚS 37/99, PL. ÚS 49/03, PL. ÚS 25/00, PL. ÚS 1/04, PL. ÚS 6/04, and PL. ÚS 17/2014.

[56] See decisions of the Constitutional Court of the Slovak Republic no. I. ÚS 30/99, PL. ÚS 10/04, PL. ÚS 12/05, PL. ÚS 10/06, and PL. ÚS 53/2015.

[57] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 37/99, PL. ÚS 28/00, PL. ÚS 49/03, I. ÚS 238/04, and PL. ÚS 9/2013.

[58] See decisions of the Constitutional Court of the Slovak Republic no. II. ÚS 48/97, PL. ÚS 37/99, PL. ÚS 49/03, PL. ÚS 25/00, PL. ÚS 1/04, PL. ÚS 6/04, and PL. ÚS 17/2014.

[59] See decisions of the Constitutional Court of the Slovak Republic no. I. ÚS 10/98, I. ÚS 54/02, I. ÚS 24/03, I. ÚS 10/00, I. ÚS 84/02, PL. ÚS 49/03, IV. ÚS 47/03, III. ÚS 142/03, I. ÚS 73/03, PL. ÚS 6/04, and PL. ÚS 42/2015.

[60] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 52/99, PL. ÚS 49/03, PL. ÚS 1/04, PL. ÚS 12/05, PL. ÚS 102/2011, PL. ÚS 4/2012, II. ÚS 298/2015, and PL. ÚS 27/2015.

[61] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 52/99, PL. ÚS 3/00, I. ÚS 4/02, I. ÚS 193/03, PL. ÚS 3/04, PL. ÚS 29/05, PL. ÚS 67/07, and OJ. 106/2011.

[62] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 16/95, PL. ÚS 29/95, PL. ÚS 38/95, PL. ÚS 25/00, PL. ÚS 105/2011, and PL. ÚS 24/2014.

[63] See decisions of the Constitutional Court of the Slovak Republic no. PL. ÚS 4/2012, II. ÚS 29/2011, II. ÚS 298/2015, and I. ÚS 298/2015.

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Constitutional Court of July 2021, in which the Constitutional Court also included the principle of the generality of legal norms (generality of law) to these principles. The generality of a legal norm is to be understood as its generality in relation to the object of the legal regulation and in relation to the subject (addressee) of the legal norm. Generality in relation to the object of a legal regulation means that a legal norm generally defines its merits, which otherwise means that it can never deal with a specific case. If a law did so, such a provision would not be a legal norm.

CONCLUSIONS

The Slovak referendum regulation contained in the Constitution of the Slovak Republic is extremely strict and incomplete. For a long time, this fact has raised many questions in legal theory and application practice. These issues include the legal force and effects of referendum. Although the Constitutional Court has already commented on the legal effects and legal force of referendum results in the past, its decisions were contradictory and ambiguous. The Constitutional Court, i.a., stated that the subject of referendum may also be a change in the Constitution. However, the citizens cannot change the Constitution directly by referendum, so the result of the referendum should be adopted by the National Council in the form of a constitutional law.[64] Under Article 72 (3) of the Constitution, however, the deputies of the National Council are not bound by orders, i.e., they are not bound by the result of the referendum, they do not have to accept it, and therefore the effects of the referendum are questionable. In another decision, the Constitutional Court stated that the result of referendum is a special source of law, i.e., it is legally binding.[65]

Still, the question of its legal force raises doubts. The Constitutional Court did not state unequivocally whether the result of the referendum had the force of law or constitutional law, when it accepted both options. In legal science, therefore, opinions differed on whether the result of the referendum is binding and what its legal force is.

The latest decision of the Constitutional Court of July 2021, which finally clarified many controversial issues, and which provided interesting answers, has an important role in resolving problematic issues. In addition to confirming the binding nature of referendum, its legal force (constitutional law) and its effects, the Constitutional Court unexpectedly provided an extensive interpretation of the referendum's limits. In connection with this question, it states that Article 93 (3) of the Constitution does not exhaustively define prohibited referendum issues. On the contrary, the Constitutional Court has found other implicit limits in the constitutional text as a whole. However, such an understanding of the limits of the referendum may lead to very negative

[64] Decision of the Constitutional Court of the Slovak Republic no. II. ÚS 31/97.
[65] Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 24/2014.

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consequences in the future. In particular, the consequence of the decision is a certain degree of interpretive uncertainty. In the future, every referendum will be exposed to the risk of its prohibition for implicit reasons. It should be noted that the legislation exercised before the analysed decision was issued was already very strict. It caused the referendum to be banned or unsuccessful in most cases. Referendum could be banned if it did not meet the following strict formal and material conditions: (a) a petition of at least 350,000 citizens, (b) compliance of the question with Article 93 (2) and (3) of the Constitution, (c) assessment by the President, (d) optional assessment by the Constitutional Court, (e) an absolute majority of all voters as an extremely strong condition for its validity, and (f) the possibility of holding a referendum on the same matter at the earliest three years after its holding. I believe the only material limitation of the direct legislative power of citizens follows from Article 93 (3) of the Constitution of the Slovak Republic. If the Constitutional Court extends the limits of the referendum by an extensive interpretation beyond the scope of Article 93 (3) of the Constitution, it means that the explicit restriction of the possibility of holding a referendum provided for in Article 93 (3) of the Constitution is meaningless. In reality, it was replaced by the opinion of the majority of the plenum of the Constitutional Court which says that in addition to explicit exhaustive ("immutable") restrictions, there are other restrictions that the Constitutional Court can find in any article of the Constitution of the Slovak Republic. However, the citizens themselves recognize their limitations in the exercise of direct legislative power by the Constitution. The subject of the exercise is not the executive or the judiciary – the citizens decide on an issue that is reserved for the legislative power.

As a result of the analysed decision, the President of the Slovak Republic, in accordance with his duty to ensure the proper functioning of constitutional bodies both externally and internally, will probably have to have each referendum tested by the Constitutional Court for the purpose of finding a potential incompatibility of the referendum with implicit constitutional limits. This consequence will represent not only a burden for the constitutional bodies. Moreover, it will cause a loss of certainty about the possibility or impossibility of holding a referendum on a certain issue in the future. The problem is that an extensive interpretation of issues excluded from referendum may result in the practice that every important question of state law will be linked to the principles of a state governed by the rule of law.[66]

[66] If there is such a will of the interpreting body – the plenum of the Constitutional Court.

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Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 12/05.

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Decision of the Constitutional Court of the Slovak Republic no. PL. ÚS 105/2011.

ABSTRAKT

Autor niniejszego artykułu zajmuje się kwestią referendum w słowackim porządku prawnym, która od dawna jest przedmiotem licznych debat specjalistów w Republice Słowackiej. Jest to instytucja prawna, która na Słowacji jest stosunkowo problematyczna, ponieważ regulacja prawna dotycząca referendum jest pod wieloma względami napisana niejasno i rodzi wiele pytań z punktu widzenia praktycznego jej stosowania. Z tego powodu w pierwszych częściach artykułu autor analizuje ogólnie regulacje prawne dotyczące referendum w Republice Słowackiej i stawia pytania, na które słowacka nauka prawa nie daje jasnych odpowiedzi. Jednocześnie analizuje ostatnie orzeczenie Trybunału Konstytucyjnego Republiki Słowackiej, które wzbogaciło omawiane zagadnienie o kilka nowych i niezbędnych odpowiedzi.

Słowa kluczowe: referendum; Republika Słowacka; słowacki porządek prawny; Trybunał Konstytucyjny Republiki Słowackiej