

## **Legal-Constitutional Framework and Practice of Referendums in Hungary after the Democratic Transition**

Referendum is a political and constitutional device by which the electorate can influence decisions on public issues. The constitutional relevance of this device greatly varies from country to country. In some democracies it is a regular means of state decision making, in others it is quite exceptional, seldom used political instrument. Hungary belongs to this second category of political system, in which national referendum is regarded a non-regular expression of democracy, invited to remedy a particular social or political problem, or, to justify a special political alternative.

In this short presentation I try to exhibit the legal-constitutional background of the referendum device by describing the initial model at the time of the democratic transition from a state socialist party state to a pluralistic democratic parliamentary form of democracy. It is well known that this social-political transition had upset/transformed all the important segments of the political system and a new constitutional model had been introduced in 1988-89, that was modified or fine-tuned and reaffirmed in 1990 just after the first competitive, multi-party parliamentary election. It is a commonplace that in the framework of an authoritarian regime, in which the political powers is not subject to real popular vote, hence, there is no functioning political market, and there is no active parliament, the direct democracy is also missing, or, even if the legal declaration on direct democracy in the constitution does exist, it is an empty legal formula, which is not practiced in the actual political life.

There was not a single occasion following the year of 1945 when a referendum was held, in spite of the fact that the device was incorporated into the text of the constitution. The stipulation of the referendum device was merely formal, which can be illustrated by the fact that there was no regulation whatsoever on how to initiate and conduct a popular vote. The text of the constitution contained only the following wording: "The Presidential Council of the Hungarian Republic may order the holding of a referendum on a matter of nationwide importance."<sup>1</sup> The procedural rules were completely missing.

Hence, in Hungary the institution of referendum was not used in the period of state-socialism, although in 1972 the constitution formally included it. The systemic change naturally brought about the need to enliven/vitalise the institution of direct democracy. During the constitutional transformation this regulation has been modified in early 1989. According to the new text the launching of a referendum was the right of the national assembly (hereinafter: parliament).<sup>2</sup> The detailed rules of different types of referendums were devised in an act, which was accepted by parliament in the course of constitutional transformation in the year of 1989. In this course the basic political institutions of a democratic state, as well as civic rights and freedoms were established together with their legal guarantees, such as the defence of the scope of authority of Parliament, restoration of the constitutional principle of rule of law, the establishment of a genuine constitutional court to defend constitutionalism against the over-politicised Parliament, establishment of the right to strike, the institution of no-confidence vote to create the political responsibility of the government vis-à-vis parliament, freedom of association, freedom of assembly, and freedom of speech. In this loaded package the Act XVII of 1989 on the referendum and popular initiatives was accepted by Parliament. Later, when the old constitution was thoroughly revised by the act XXXI of 1989 the new text established the right of the newly instituted president of the republic to initiate a nationwide referendum. In this new constitutional framework the role and scope of the referendum device was not defined. The sovereignty was formulated in a blurred semantic formulation as follows: "In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights through elected representatives and directly."<sup>3</sup> No more details on how to realize the dual function was mentioned in the constitution.

The relationship of the two basic forms of democratic exercise of political power is not detailed in the constitution, and the details, as well as the guarantees have been incorporated to the basic law as late as in 1997. In the period between 1990 and 1997 the relationship of the two democratic forms –direct and indirect - was not regulated. The act XVII of 1989 on referendum and plebiscite did not deal with this highly theoretical, albeit very important issue. The introduction (preamble) of this act however stipulates the political function of direct democracy stating that "In Hungary it is a basic constitutional

principle that the people is the holder of power; its authority is exercised through elected representatives. However, to complete the efforts to improve the effective functioning of representative bodies, it is a necessary requirement that the people be able to exercise their power in social-political or other matters of high priority in order to promote the democratic evolution of political institutional system; the people should be an actor, catalyst and active participant in the taking of most important state decisions on the central and local level.”

In this definition the referendum is a supplementary form of democracy, but the legislators acknowledged its constitutional importance. By regulating the details of practical implementation of the referendum it was shaped as an easily realisable political device to influence and bind the legislation in a wide range of issues.

Three forms of referendum were stipulated: affirmative, mandatory and consultative. The affirmative referendum was devised to confirm an act decided by Parliament, the consultative device was stipulated to make possible the consultation on an important public issue, and the mandatory form was instituted to make possible for the people to oblige Parliament in questions belonging to its scope of authority, such as initiation of a bill, definition of principles of future laws and in matters of national importance which do not need the legal form of an act. The result obliged Parliament. This meant that if the bill was not supported by the people, its promulgation was blocked. In the second type of referendum Parliament had to act according to the wording and content of the referendum. However the Act defined some matters in which referendum was out of question. These topics were: the state budget, the centrally stipulated and levied of taxes and duties, act on central conditions of local taxes, personal decisions (appointments) in the scope of authority of Parliament, fulfilment of obligations defined by international agreements, and acts on publication of international treaties. The act defined the actors entitled to initiate a referendum: these actors were: the Presidential Council (later the head of state, the president) the council of ministers (later the government), at least 50 MPs, and at least 50 thousand citizen. The wording of the question to put to referendum was the right and obligation of the initiator. The text of the referendum had to be presented to the speaker of the house, who was entitled

to reject the initiation if it was not conform with the act. Within two months Parliament had to decide on the referendum by a two-thirds majority. Parliament was obliged to launch a referendum if it was backed by 100 thousand citizens. Consultative referendum could have been held in the matters defined in case of the mandatory one, the difference was only that the result was not mandatory to Parliament.

It is important to note that regulation on referendum stipulated that the constitution must be accepted or confirmed by a referendum. Later this requirement was dropped out of the regulation and was not included into the constitution.

The outlined regulation of referendum can be regarded rather liberal in the atmosphere of radical social and political changes. The new revised constitution did not reflect this liberal view, it mentioned only that the people exercise their sovereign rights through elected representatives and directly; it stipulated that referendum can be ordered by parliament and defined the right of the president to initiate the use of this device.

Soon after the acceptance of the new act on referendum the new regulation was tested in the real practice. Even before the enactment of the democratic transitory constitution of 1989 a referendum was initiated by liberal party politicians to block the election of the president of republic prior to the coming general elections. The liberals refused the roundtable agreement on the smooth constitutional transformation and they wanted a more radical change. They put four questions to referendum: the election of the president after the general election, the ban on functioning of political parties at workplaces; the dissolution of the workers' guard, the obligation of the ruling socialist party to make a balance on its assets. The referendum was held in November 1989. The Hungarian Democratic Forum (HDF) - then a centre-right populist party - announced a boycott of the referendum and this move meant the victory of the liberals' proposal - if only by a narrow margin. In three of the four questions the result was a decisive yes vote. The timing of the election of president was a sensitive issue, the public was divided, because the real question was the form of the election of the president and not the timing. The liberals were in favour of an indirect form, the election by Parliament. They reasoned that

this was in full conformity with the principles of parliamentarism. The socialists wanted to introduce the direct election to the office, election by the people, to place the president above Parliament, and to give the post a wider legitimacy. Finally the yes vote won by a very narrow margin (50,07 versus 49,93 percent, which meant that the difference was a mere 6101 vote) and the liberals could block the election of the president prior to national elections to be held in spring 1990.

This result had a long term impact on the form of government in Hungary; the weak presidency model could no longer effectively be challenged in party elite circles. But the immediate effect was that the Parliament in office decided to introduce the direct election of the president because the ruling socialists had a comfortable constitution amending 2/3 majority in Parliament. The referendum postponed the actual election of the head of state the decision after the transitory elections at which the democratic opposition have won almost 90 percent of the seats. The right parties formed a government, but they devised a constitutional compromise in order to make changes in the transitory constitution. One of the many issues was the election of the president: the indirect election to the post was incorporated into the basic law.

After this change the socialists represented in Parliament tried to use an extra parliamentary means to achieve their goal, they initiated a referendum to change the form of election of the president. After the collection of the required number of supportive signatures Parliament put the question before the people. The governing elite decided to hold the referendum during the summer holidays in July, and this proved to be decisive: the turnout was very low, only 13,9 percent, partly because of the timing, partly because the public accepted the existing political situation and the majority of the people was not inclined to upset the political equilibrium just after the election of transition. The referendum was declared void, because the effective law required the participation of the simple majority of the eligible voters. It has to be noted that the yes vote was overwhelming among those who participated, it was 85.9 percent.

This was the first and the last occasion after the political system transformation that a special constitutional problem was tested through a referendum. The explanation of this phenomenon lies in the constitutional interpretation of the function of direct democracy in a parliamentary system. With the interpretation we have to go back to the birth of the new democratic system in 1989-1990. The institutionalisation of referendum assumed a substantial change in the interpretation of popular sovereignty after the conclusion of the exclusive and formal representation that prevailed during the one-party rule. Before the democratic transition people had never had the right to express their political will directly. Until 1997, the constitution remained laconic in this respect leaving the details to be regulated by law.

After the mentioned 1989 and 1990 referendums until 1997 only invalid or futile initiatives and failed attempts characterised the constitutional history because of the contradiction between the under-regulated conservative constitution and the liberal regulation of referendum on the level of act of Parliament. This constitutional gap was filled out by the only authorised organ, the Constitutional Court after an unsuccessful attempt in 1993, that have set in motion the interpretative machinery when some social organisations announced their intent to initiate a referendum to dissolve the existing parliament. Then the constitutional committee of parliament proposed a constitutional court procedure on the viability of a referendum with respect to constitutional changes. The question was whether the referendum device can or cannot be used to restrict the activity of parliament, and what are the limits of such a restrictive direct democracy move. The Constitutional Court, interpreting the existing constitution, its spirit and its wording, ruled that - within the given constitutional framework and parliamentary government in Hungary - direct democracy is subservient to representative democracy. The Court reasoned that the primary form of sovereignty in the existing parliamentary system is the representative function of Parliament, and the direct democracy has only a supplementary function. The judges also ruled that a referendum should not include a hidden constitutional amendment. This highly debated decision was based on the structure of the Constitution and the theory of parliamentarism. The decision of the constitutional court argued that the liberal regulation of the referendum did not correspond either to the notion of popular sovereignty as determined in the

Constitution, or the restrictive interpretation of the Constitutional Court itself. Thus the court declared that a constitutional fault prevailed due to the fact that parliament neglected its legislative duties. The Court ruled that a new regulation should have been made because the then existing law on referendum had been accepted prior to the basic constitutional reform in 1989, and this decision obliged the general assembly to accept the new law no later than the end of 1993. This interpretation restricted the use of referendum because it outlawed any attempt to change the constitution as a result of a referendum initiated by citizens. Parliament did not fulfil the court's decision, and in the absence of any sanction this happens very frequently. Up to the end of 1997, the Hungarian parliament was unable to fulfil this complex task, which would have an impact on the position of the political class and the very essence of political power alike. Only in 1997 was accepted the modification of the Constitution incorporating the basic stipulations into the basic law. The law on referendum was enacted in the following year.

The referendum initiative of the Workers Party in autumn 1995 on the entry to NATO was a turning point in this short referendum history. Although this initiative was in conformity with the laws and also proved to be successful at the collection of supportive signatures, the parliament violated law and vetoed the initiative on political grounds. The Constitutional Court - referring to judicial gaps created by itself was reluctant to do anything about this evident violation of the Constitution. Although this case was a spectacular failure for political democracy, since a peripheral political party was affected the political class did not consider the event important.

When the referendum became a tool in the fight between parliamentary political forces, that is, between the government and opposition, however the institution became upgraded and the Constitutional Court could not remain neutral. The conflict was triggered by the initiative of the opposition to collect signatures for a referendum on the privatisation of arable land in August 1997. With the referendum the right wing opposition wanted to prevent the replacement of the property structure established in 1994 and based on the private property of private individuals with a mixed system, in which foreigners could also acquire land under certain conditions through economic

corporations registered within the country. Obviously two economic philosophies collided: the idea of domestic small farms on the one hand and the concept of a mixed agriculture built on large capitalist entrepreneurs and wage workers on the other. It is almost impossible to find a middle course between the two concepts, which explains the intensified political atmosphere around the referendum initiative. In the meantime, another referendum, about the NATO entry, became due, which was originally planned by the government to be a consultative referendum. This situation further complicated the political and constitutional struggle between right wing national-civic and centre-left socialist-liberal forces. The Constitutional Court, without its own intention, became a participant, what's more a key actor in the events. Referendum, as a political device, was also upgraded because the centre-left government began the constitutional arrangement of the issue. Accordingly, first the basic law was modified in July 1997. As a result, the most important regulations were put into the Constitution, and some of the guaranties were also formed. Then the reworking of the referendum law should have followed. The political fights with respect to NATO and land property swept away the cabinet's plans, however. The political conflict intensified due to a governmental step, which seemed clever first but then it proved to be a failure: when the government noticed that the referendum initiative of the opposition could successfully mobilise large groups of the population in the countryside, it chose to hold a referendum on its own questions, which were difficult to answer with a no vote. Governmental experts argued that - according to an earlier decision of the Constitutional Court - referendum is subservient to parliamentary representation and thus the parliamentary majority has the right to act as an initiator on its own values in a referendum case, which although had been started but legally has not been successfully initiated yet. The opposition immediately asked constitutional interpretation through the parliamentary commissioner of citizens' rights (actually an ombudswoman). As a result, in October the Constitutional Court found the government's attempt to neutralise the citizen's referendum initiative unconstitutional. Thus the Court revised its earlier restrictive interpretation and sought to balance the two forms of popular sovereignty, that is representation and direct democracy. With the interpretation of the constitution, which already contained the new regulations on referendums, the Court declared that although exercising direct power is an exceptional form of exercising popular sovereignty, it has precedence over representation in the exceptional cases when it occurs. The

interpretation in question has been based on the new constitutional stipulation of the referendum device accepted by parliament in 1997. The new constitutional regulation seemed to create a completely different situation by giving a special force to the mandatory referendum initiated by the citizens. The law precisely listed the cases in which mandatory referendum could not be proposed. Based on this new constitutional regulation the Constitutional Court ruled (Ruling 52/1997) that "direct exercise of political power is an exceptional form of popular sovereignty, but if it is exceptionally exercised it is above the representative power". Thus, according to the Constitutional Court, obligatory has precedence over discretionary referendum, which contains the elements of both representative and direct democracy. The Court also ruled that mandatory referendum initiated by the people precedes the facultative referendum that can be initiated by Parliament. In this decision the Court sharply criticised Parliament because it did not create the new law on referendum, and to put some emphasis to its commitment the Court annulled the whole act by the end of 1997. Since Parliament did not accept the new law until February 1998, there was a time during which a basic right of the citizens has been suspended.

This decision did not touch the problem of constitutional modification, and many thought that the Court has reinterpreted its own, very restrictive interpretation. Two years later it turned out that this was not the case. In a decision taken in July 1999 the Constitutional Court declared that "the modification of the Constitution can be made only in the procedural form stipulated in the basic law; a referendum initiated by the citizens in order to modify the Constitution is not viable." According to the interpretation of the Court the presently valid Constitution does not explicitly allow the change of the basic law directly by the public, and therefore mandatory national referendum initiated by the citizens as a legal means cannot be used to attain this political aim. The Court interpreted the basic law in a very narrow conservative way and stated that only the modification of the basic law by Parliament could be tested through a mandatory national referendum. This court decision was regarded controversial by many, and some prominent experts - for example a former court member - voiced their differing opinion which classified the decision as totally mistaken.

The court decision was made in a concrete matter: a group of citizens initiated a referendum on an evergreen topic: the form of election of the president of republic. The formulation of the question was necessarily tested by the National Election Committee before the collection of signatures based on the stipulations of the Act C of 1997 on Electoral Procedure. The Committee have taken into consideration the fact that the Constitution was amended in 1997 (Act XCVIII of 1997 on the modification of 'the Constitution of the Republic of Hungary) in order to create the guaranties of the referendum as a basic element of popular sovereignty.

This new regulation did not mention the possibility of amendment of the basic law through a referendum, but had given a definite list on the subjects in which mandatory referendum initiated by 200 thousand citizens were explicitly excluded. The list has contained ten items: "1) content of acts regulating the budget, the execution of the budget, national tax items and duties, custom duties; 2) obligations originating from valid international agreements and the content of acts regulating these obligations; 3) the regulations on the referendum and plebiscite of the Constitution; 4) national conditions of local taxes; 5) personal and organisational questions in the competence of the national assembly; 6) the dissolution of Parliament; 7) the programme of the government; 8) declaration on state of war, emergency or extraordinary situation; 9) dissolution of representative body of local government; 10) general amnesty.

The Committee referred to the item 3) and reasoned that the basic law itself excluded the possibility of constitutional amendment with regard to a special constitutional matter and "a contrario" all other constitutional norms not falling under other specially defined prohibitive regulations can be put to referendum. The Court did not accept this formal logic and referred to its earlier decision of 1993, in which the Court ruled that "Exercise of rights originating in the popular sovereignty by the national assembly or via referendum can only be realised according to the regulations of the Constitution. Question put to referendum cannot contain indirect modification of the Constitution". The Court reasoned that the legislation is defined as the function of the national assembly and the modification of the constitution is also defined as a exclusive parliamentarian right in the Constitution. Since Hungary

has a parliamentary constitutional system, referendum can only be a supplementary means with regard to the parliamentary representation, as explicitly stated in the 1993 Court decision.

The decision of the Court has been debated ever since, but the decision is mandatory to everybody and therefore has a far-reaching effect on the importance of the referendum in Hungary: it cannot be used as a grass roots correctional form or political means in order to change the constitution via public action. This situation can only be changed by modifying the Constitution explicitly opening the way before a special form of referendum, initiated by the people, that can result in the modification of the existing Constitution.

The impact of the Court's interpretation of the political system cannot be precisely estimated so far. Nevertheless we can acknowledge the fact that the activity of the Court as a whole is the most important development in our modern constitutional history. It has a very powerful impact on the functioning of the executive branch, especially the government, and on the legislature as well. In the longer run constitutional control would be a powerful counter-balance to the combined, party-dominated centre of power, the Parliament-government angle. Without such a control political elite power would not be effectively limited and only subsequent "punishment voting" would establish political responsibility. In unstable democracies in which the informal rules are weak this solution does not seem to fulfil the requirements and expectations.

As a result of the Constitutional Court's restrictive and conservative interpretation it is almost impossible to launch a referendum based on civic initiative. Although the constitution does not forbid the change of the basic law as a result of a popular initiative, every affirmative decision taken by the National Election Committee is without exception rejected by the Constitutional Court if the Committee's decision is appealed. To be sure, these decisions, involving intense public interest, are without exception challenged by private citizens to hide the intentions of political forces. The Court, when facing a question theoretically leading to a constitutional change, automatically rejects the first instance decision. There are some borderline issues in case of international agreement, and the Court

has to decide whether the actual problem affects an existing international treaty or not. There are also ambiguities in some issues concerning budgetary relevance of the question. The act on referendum does not allow to put question to referendum if the result affects the budgetary structure. Nevertheless it is hard to find an issue which does not involve some monetary, hence budgetary aspect.

The result of the analysed conservative interpretation the referendum device is rarely used in Hungary. It is used mainly at the initiative of the government in office. This was the case in the NATO membership in 1997. The validity rules were modified just before the referendum because there was a well based fear of low participation under 50 percent. The new regulation nullified participation requirement of validity, instead it stipulated that at least 25 percent yes or no vote of the eligible population was needed. In case of the NATO referendum – the question was: "Do you agree that the Hungarian Republic provide the security/safety of the country by joining to the NATO?" - the participation fell short under 50 percent - it was actually 49,2 percent, but the proportion of Yes votes of the actual voters was as high as 85,3 percent, which represented 41,5 percent in the eligible population. The numbers show that the opponents of the issue boycotted the referendum.

The other example for the referendum initiated by the government is the country's joining to the European Union held in April 2003. The question was worded by the government in the following form: "Do you agree that the Republic of Hungary be a member of the European Union." The participation was again relatively low, it has fallen under 50 percent, actually it was 45,6 percent. The proportion of "YES" votes in the eligible public was 38 percent, and 83,8 percent of the citizens who have participated, and thus the result was valid.

Since 2003 there were only one mandatory referendum held at the wish of the people, after the approval of the National Election Committee, and the successful collection of the required 200 thousand signatures. Two different questions were put to vote in December 2004. One on the issue of privatisation of public health institutions, hospitals and a second on the issue of the Hungarian citizenship to be granted to Hungarians leaving outside Hungary. Both questions were initiated by

nongovernmental organisations, political parties in opposition and out of parliament, civic organizations and by the Global Alliance of Hungarians. The proposals were tested and approved by the authorised organ, the National Election Committee and by the Constitutional Court. None of the proposals were successfully supported by the people, mainly because of the low turnout, formally because the yes votes did not reach the required proportion of the eligible voters. The turnout was 37,5 percent. In case of the referendum on health institutions the yes votes got 23,9 percent of the voters, under the validity limit of 25 percent. In the case of the Hungarian citizenship the initiation was also legally unsuccessful, because it did not meet the legal requirement, that of the 25 percent of all the eligible voters; the result was as low as 18,9. Among the participants the proportion of yes votes represented 65 percent and 51,6 percent respectively.

Since the restriction introduced by the Constitutional Court in 1997 the number of popularly initiated referendums has sharply decreased, and among those raised by the public the number of successfully supported is even smaller as a result of the filtering role of the National Election Committee and the Constitutional Court. It also often happens that the approved initiation dies out under the procedure of collecting supporting signatures. On the other hand, counterbalancing this negative trend, the number of popular initiatives has sharply increased. The explanation for this turn is that popular initiatives - which may be proposed for the purpose of forcing the parliament to place a subject under its jurisdiction on the agenda - requires only 50 thousand voting citizens. To conclude I have to close my short presentation by stating that in the Hungarian constitutional framework the referendum is a very exceptional device being in full harmony with the theoretical principles of the parliamentary system of governance.

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<sup>1</sup> Text of the paragraph 20, section 1, subsection d) of the original constitution (Act 20 of 1949).

<sup>2</sup> "National Referendum may be ordered by the national assembly. The rules of referendum shall be stipulated in the form of an act." Paragraph 19, section 4 of the Constitution.

<sup>3</sup> Article 2, section 2.