Theoretical and Legal Base for Referendum

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Abstract

The article deals with the theoretical and legal base of the referendum, where the author looks at the reasons behind existence of the referenda, from the historical point of view, but also from the reasoning from the point of view theoretical division of power. Also, author tries to explain existence of this institute based on the theories of the originating power. Very important part of the work is also comparison of different legal ways of enabling execution of referenda. Some countries do have this instrument only on theoretical basis, where it is allowed to use this means of decision making, like Czech Republic, but almost do not use it at the state level, some countries which are completely allowing this institute are not using it in practice.

Specific legal base is referenda without direct legal power, like the UK – what is actually today’s biggest case. Then there are countries, like Switzerland, which are using the referenda on regular basis and the decisions adopted in this process are compulsory transferred to the law.

Introduction

“Referenda is the constitutional institute, which main purpose, is to secure citizens of the state, to co-interacts at first hand at creation of the state will. Citizens in referenda enforce their title by voting, which has legal effect ... Voting of citizens without legal effect is popular initiative, popular voting.”*

Theoretical base for referendum

From theoretical point of view, it could be said, that “referendum is politically neutral way of deciding, which favour current public opinion” [1]. In broader sense, the referendum does represent call of nation to
the immediate action, mainly law-making. That is basic institute of direct democracy. However, it is irregular institute only completing other forms of power execution. On the other side in the narrow meaning this really means deciding of the people [2].

Exactly connection with the concept of “current public meaning” is connected with seeing referendum negatively. “Primarily hysteria of mass decision making and irrational behavior of the crowd, but also non-ability of all community to consider complicated questions with national importance” [3], are considered as the worst. It is based also on the negative experience from the misuse of any of the instruments of democracy from the side of totalitarian regime.

But as stressed in the previous sentence, by the same way, were misused also institutes of representative democracy. Lexicologically it is expected, that the word “referendum” is originating from the expression “referred ad populum” what does mean submit matter for decision to people [4]. This institute was developed from antic people gatherings as were “agora” or “forum” [5]. The name on its own started be used, through the use within the territory in Switzerland, where originally was the people’s vote, but more hearing of the opinions from the village, about which delegates then refer at higher gathering. From the Latin name of this procedure “ad audiendum et referendum” then this institute got its name. “Citizens through their constitution are deciding, if they will be executing purely through parliament, or will be in some cases executing directly. Both forms on the administration of public matters are equal; when is which of them applied and the conditions of their applicability are regulated exhaustively in Constitution.”**

Following Bröstl this is the desirable supplement of “election democracy” [2], Sadly, just theoretically in comparison with representative democracy, this form has higher level of legitimity as representative democracy [6]. Dahl, maybe influenced by geographical determinism, claims that referendum is more appropriate for small units [7].

In his opinion the large units are more complicated in praxis for applicability of the referenda. There are several types of referenda. The main division is the state or local level referenda (within local we mean also municipal level of referenda – sometimes there is a problem to divide between local as on the for example federal state or municipal referenda in literature). Also, the division of referenda can be for referenda ex post (cancelation of already existing legal act) or ex ante (before acceptance of the legal regulation) also the same applies for active or passive referenda, depending on who initiate the referendum. Usually there are only options for either citizens or parliament (with several national exceptions). Also, sometimes, the referenda can be classified for obligatory and facultative [8], if the law constitutes an obligation to do the referendum, before any further action will be taken, or the referendum and its declaration is purely in the will of the citizens. Hloušek and Kope?ek dived referenda also based on their content to – constitutional, law-making, financial and so on [9].

Special institute are then also so called demonstrative referenda in non-democratic regimes as “a demonstration of support of majority” [7, p. 117] Usual in these cases is extremely high turnaround (not usual for the region), often supported by the legal obligation to attend. “Mechanism of referendum initiated by citizens serves as a “gun in deposit”, which leads stubborn politicians to that, that while creating public politics, they shall respect will of the people” [10]. “Facultative referendum is referendum, which could be called based on the consideration of the state organ, or also when set number of voters decided to request the call for referendum.”*** On the other side “obligatory referendum might be defined as referendum, which parliament must give to the citizens to approve, when deciding about essential decisions, which have character set by the Constitution.”*** Usually is this institute set to the constitutional documents of given state, regarding the character of the law, as the highest law, originating from the originators of all power of
the given state [11]. “Execution of state power directly by citizens is individual form of application of the state power by the citizens, who are original bearers of power.”**** Within Latin legal proverb “Nemo plus iuris ad alium transferre potest quam ipse habet” (no one can transfer more power than he or she has) could people not transfer their power to the elected representatives if they had not power on their own. In any referenda, there should be applied the rule of subsidiarity. If any question is not possible to deal with at the representative levels (there is no will or it is legitimate), the question shall be dealt with at the level of power originators – citizens, who shall make the final decision. Or from experience I would dare to say, also shall this decision not take. Referendum on the state level shall be also some sort of insurance of the state power originators, in the meaning of theory of counterbalance, during not appropriate behaviour of elected representatives, citizens holding the power in hands, may use it, without using the representatives [12].

Rosputinský divides functions of referenda to this subcategory [13]:
1. Law-making – it is a certain type if allowance for the citizens create, change or annul valid law, by the allowance to break the law-making monopoly given to the elected representatives. Law acts shall be created not only by parliament but also by citizens in referendum. When the difference is in formal expression of the result of law making process and it the process on its own (for example “Act” and “referendum result”).
2. Participating – which at the first hand relates with law making function and represents sharing of the citizens on the public administration by direct voting, through which citizens enter to the active position and are not only passive recipients of decisions of representatives.
3. Corrective – issuing from the basic rules of referendum – the rule of subsidiarity of referendum and a rule of counterbalance. The substance is in the possibility of citizens entering to the deciding of the way of execution of public power administration also in the time between elections to the parliament or other elected body of representatives and also by that correct the deciding of parliament.
4. Articulatory – referendum gives possibility to express own interests or aims also to minorities and interest groups, not directly represented in parliament.
5. Opposing function – which serves as an instrument of eventual disagreement with the execution of state power by the opposition (either by opposition represented or not in parliament). Referendum shall be used only when there is no chance for reaching an agreement in parliament.
6. Thematizing – notifying on the serious problems of the society and themes urgently needing attention, or potential popularization of the certain ideas.
7. Legitimatize – via which is confirmed legitimacy of certain parliament decisions directly by citizens. Through this function is strengthened the authority and power of the parliament.
8. Avoiding function – use when the referendum is initiated by the public organs in the cases when the public organs are trying to avoid responsibility for “not popular decisions”.

Legal base for referendum
“Incorporating referendum in constitutional document is usually a sign of the level of democracy of given political system, though on the suitability of the use of referendum, there may be different views, taking into consideration also its functionality” [12, p. 11]. Referendum is regulated also in documents issued by United Nations. In International Covenant on Civil and Political Rights in Article 25, where is set the right to participate on the power execution, directly or indirectly through elected representatives. Article 25 of “International Covenant on Civil and Political Rights”, declares: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
b) to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
c) to have access, on general terms of equality, to public service in his country.

To this Article is connected “General Comment to the Article 25” Human Rights Committee from the year 1996, containing 28 articles, referring to referendum in three articles. Besides others it says, that this principle shall be observed without differences under form of constitutions or forms of governing state. It does also refer to the Article 2 of above quoted Covenant in relation with non-discrimination. Any limitations or restrictions shall be objective and reasoned. First of the articles, which are directly referring to the referendum is Article 6, which in relation with referendum states in the third sentence, that: “Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b)”. Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government.

Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed. Also, directly related to the referendum refers Article 10 and it says: “The right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.”

And at the end Article 19 directly referring to referendum states: “In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector’s will.

Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.”

Referendum is not unusual even in the case of autocratic regimes, in the form of voting confirming, through manipulated results, the will of the governing elite. Margaret Thatcher considered referendum as
an instrument of demagogy and dictatorship. And in reality, there are with referendum connected only negative connotation, in relations with influenceability of public opinion. Additionally, in many really democratic systems it is missing, or it has only consultative function for parliaments or it’s variations. There is no need to go too far – close example to Slovakia is Czech Republic, copying the pre-war Czechoslovakia constitutional existence of referendum but missing specific Act, setting the details. The same applies in Germany, most likely based on the negative experience of misuse from the nazi era. In Germany does exist only one form of whole German referendum, in the case of change of the division of the territorial division. The same apply for USA (in exception of California), which is most common example of the democratic state. Within USA is this institute not even legally set at the federal level, however individual state level is different story. Many states (though not all) are using this instrument really broadly – even on the municipal level (with in some of them long history of use) [6]. Legal norms within states are however even less harmonized than within the states in Europe. Calling states not using referendum at federal level or state level “not democratic” would be unfair. Referendum is not a sign of the maturity of the democracy of the state or extent of the application of democratic freedoms. Referenda, as elections are often applied in non-democratic regimes for confirmation of the power and are there as a sort of marketing instrument to confirm the non-existent legitimacy of the establishment. Strong positive result can lead to the feeling, that the regime has strong support and convince opposing parties to reconsider their attitude. Moreover, other authors are adding that referendum as such within the system of constitutional institutes of the state, or frequency of its acting, is not a sign of the democratic establishment of such country [14]. Legislation of different states related to the referenda are considerably varying and not only within the world, but also within Europe, or states participating in European union project. As it is a part of sensitive constitutional law, it is not expected, that there would be any harmonization [11, p. 85] There are different approaches who can initiate referendum. Either it could be done only by parliament; some countries are allowing initiation to come from citizens. In France for example, referendum can be initiated even by the president of the state. Between the states with highest share of decisions coming directly from citizens, though only something about ten percent will end up successfully and will reach the binding form. Switzerland is followed by Australia and France, as the other countries with highest share of decision taken by citizens [15]. Generally, Europe and countries under influence of European legal heritage (in the meaning colonial states) are using this instrument most often.

On the top in Europe, the numbers are blown up by referenda organized in relation to the European Union [16] and also Eastern European countries are contributing after the fall of the socialism, quite well to the number of referenda. Though in here is first hand enthusiasm very often spoiled by very low turnover. On the world scale the institute of referendum start be used widely from 60s – however the renaissance of the institute is considered last 20 years [17].

Switzerland has with application of this institute one of the longest traditions (from approximately thirteen centuries on local scale), or first state level referendum in 1802 related to the new constitution, which was brought by occupation from French side and creation of protectorate. Switzerland is sometimes also called half – direct democracy. As in other states is referendum usually considered to be just consultative institute [14, p. 103]. Interestingly states like Great Britain, where this model is considered only as a secondary, without any influence, as it is expected that the institute would be limiting sovereign status of both chambers of the parliament. This however is now somehow forgot and the will to leave the EU is taken as granted. According Reich there were more than half of referenda (52%) organized at state level in years 1903 to 1993 (from 60s almost 300) organized in Switzerland. The question is though, how many of them
were really successful. In reality actually, many of them did not get through the voting process at the end. Referendum can be initiated by practically anyone, who has the right to vote in Switzerland (even Swiss citizens living outside of Switzerland). On the top, to initiate a referendum in Switzerland, it is enough to raise 50,000 signatures, what is just something about 2% of population. To ensure the objectivity during federal compulsory referenda, taking into consideration language and cultural diversity of Switzerland, there is needed double majority – so not only the majority of all participants, but also majority of cantons, where the decision was able to raise the vote of majority (there are 26 cantons, but 8 of them according Constitution have only “half canton vote”). Though the referendum is quite secured against misuse, there were accepted many acts of the minor political parties, what can be questionable (on the side of negative influence of the influence of majority on the minority many times in negative connotations), and not only for the ability to initiate the change of the matters, which are not related to majority, but will have to follow it, but also in the meaning, that to this process the political parties shall not interfering.

Conclusions
Referendum is questionable institute, which may be contributing positively to the democratic governments and help them nourish the rule of power transfer, especially when the question decided is too complicated or was not dealt properly on governmental level, despite the interest of the citizens [18]. Though, the problem is, that the citizens, are not always the most rational and the mass of people can be more dangerous sometimes, than government representative acting on behalf of the person, who remunerated him or her to do so [19]. James Madison in relation with direct democracy said “measures are sometimes too often decided, not based on the regulations of the fairness or minority, but on the base of superior power of the interested and prevailing majority”. To this Madison said, that “it is very important for republic ensure society not only against of rulers, but also ensure also society against injustice coming from the other side” [20].

* Decision of the Constitutional Court of Slovak Republic No. II. ÚS 31/97.
** Decision of the Constitutional Court of Slovak Republic No. I. ÚS 76/97.
*** Decision of the Constitutional Court of Slovak Republic No. II. ÚS 31/98.
**** Decision of the Constitutional Court of Slovak Republic No. I. ÚS 60/97.

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TAG: proceedings, Referendum, Diritto dei Paesi dell’UE

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