Searching for a Government

Referenda and constitutional changes in Slovakia ahead of early elections

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On Saturday, 21 January 2023, Slovak voters had the opportunity to use their constitutional right to vote in a referendum for the ninth time in the Slovak post-1993 history. More than one million individuals, slightly more than a quarter of eligible voters, participated in the referendum on a constitutional amendment on early elections, with more than 97 percent of participating voters supporting the amendment. The referendum was, however, invalid, because a valid referendum in Slovakia requires a turnout of at least half of all eligible voters. Still, the turnout was the fourth highest among the nine, making it one of the more successful referendum initiatives.

The referendum took place less than six weeks after the no-confidence vote to the Slovak executive by the National Council (Slovak parliament). This development prompted steps towards amending the Constitution so that early elections become constitutionally permissible. This post shows how, in this political context, the referendum result itself is of little significance for the current government. Early elections will most likely be held in September 2023 in any case. Nevertheless, the January 2023 referendum does point to the vulnerability of this constitutional institution vis-à-vis abuse by illiberal actors.

The referendum subject and its initiators

On Saturday, voters addressed only one question but with an impressive length of 218 words. The question concerned a constitutional amendment that would enable early elections, that is, early termination of the electoral term of the Slovak legislature, either via a referendum or a parliamentary resolution. The reason for the question being a mouthful is that it contained the specific constitutional changes that, had it been successful, would have amounted to the first-ever direct amendment of the constitutional text via a referendum.

The particular regulation of early elections as specified by the 218-word question raised a whole series of issues of constitutional design. These encompass one of the evergreen controversies of Slovak constitutional law whether a referendum may directly amend the Constitution, in light of the convoluted provisions (Art. 98 and 99 of the Constitution) addressing this issue. In addition, the behaviour of partisan actors must not be left out of the equation. While formally launched on the basis of a petition of a minimum of 350,000 Slovak citizens (one of several avenues how to initiate referenda in Slovakia, as per Art 95(1) of the Constitution), the referendum is an idea of former three-times Slovak PM Robert Fico, who is presently in the opposition and is increasingly embracing illiberal rhetoric including in his support of Russia and denouncing of equal fundamental rights for all members of the political community. Setting aside his motivations (which may be very pragmatic, given that he is under investigation for crimes he may have committed while in the PM office), Fico embodies one of the main threats in relation to Slovakia's prospects for illiberalisation in 2023.

The profile of the referendum's initiator ensured that this referendum is best understood through the lens proposed by Erik Láštic over a decade ago, that is, as a means for unofficial, yet potentially effective partisan campaigns. Thus, those voters who did not want to unintentionally endorse the campaign even though they supported the introduction of a mechanism for early elections faced the difficult choice of whether to take part in the referendum at all. The same applied to those who, while supporting early elections in principle, did not agree with the design

choices the sponsors have opted for (particularly the proposed competence for a simple majority of MPs to trigger early elections with no further safeguards).

After the referendum: Yet another rushed constitutional amendment

Given the no-confidence vote to the Slovak executive in December 2022, the parliamentarians have, independently of the referendum, been deliberating on a constitutional amendment in order to enable early elections in a constitutionally conform manner. The amendment was enacted on 25 January, albeit not with the exact same wording as the one included in the referendum question.

Observers of Slovak constitutional developments can hardly be surprised that, once again, deliberation on important constitutional changes was minimal. The bill was initiated by MPs rather than the executive, which, given Slovak rules of legislative procedure, reduced the degree of public scrutiny of the legislative process. Moreover, an amendment to the bill was prepared by the former minister of justice (now an MP).

Moreover, this amendment encompassed an unrelated change which increases the threshold needed to implement changes to Slovakia's electoral system from a simple to a qualified (three-fifth) majority of deputies. The latter change cements the present electoral system in place with only small changes since 1998. It consists of two provisions. One articulates that the electoral system for parliamentary elections needs to follow 'the principles of proportional representation' (Art. 74 sec. 1). While this, in principle, rules out majoritarian or mixed systems to be implemented without a constitutional majority, the exact meaning of 'proportional representation' remains unclear.

The second, even more controversial, change requires a constitutional majority for increasing the number of electoral districts (Art. 74 sec. 2). Presently, the country as a whole uses a single electoral district. A single electoral district greatly increases the dominance of non-democratic internal party organizations centred around a single leader, which do not demonstrate continuity once the leader resigns or loses public support. Overall, such 'constitutionalisation' of the electoral system reduces the risk of a future parliamentary majority introducing outright unfair electoral rules. Yet, it has been done in a rushed fashion, with no expert and public discussion. For example, the official justification in the explanatory report for the constitutional majority requirement for increasing the number of electoral districts has exactly ten (10) lines.

The Constitutional Court against direct democracy and rushed constitutional amendments?

The amendment enabling the legislature to decide on early elections is one avenue (see Art. 81a of the Constitution) for resolving the political stalemate exacerbated by the vote of no confidence to the executive in the legislature. The earlier practice of enacting ad hoc constitutional acts on shortening electoral terms was questioned by the Slovak Constitutional Court in its cases concerning referenda.

These cases (PL. ÚS 7/2021, PL. ÚS 11/2022), described elsewhere, run the risk of the Constitutional Court being vulnerable of accusations by political party actors of being 'against the will of the people', due to their invalidation of some of the referendum initiatives. These include banning the inclusion of a second question proposed by the petitioners for the January 2023 referendum, which could theoretically have brought about early elections directly, without a constitutional amendment and the parliament's decision. Such a question is arguably an example of what Richard Albert calls 'circumventing formal constitutional amendment rules' by the petitioners, who alone do not have the necessary majority to amend the Constitution.

Yet, if one reads the justifications of the Constitutional Court's decisions, they might find close connections between the referendum and the 'sovereignty of the people' that, in the majority of the judges' reading in these cases, seems to be the closest association to the constitutional principle of democracy (Art. 1 sec. 1 of the Slovak Constitution). If anything, subject to criticism may be the tendency (not only) in these two cases to separate democracy from the rule of law. Such separation may lead to misinterpretations whereby, for

'plain' democracy 'anything goes' in relation to referenda, and the rule of law alone is the source of some limits. However, limits such as the prohibition of referenda on matters of fundamental rights, taxes, duties or the state budget as stipulated in Art. 93(3) of the Constitution could well be read as required by democracy.

Beyond the referendum case law, the process of enacting the latest constitutional amendment (particularly the cementing of the electoral system rules which was not initially proposed by the bill and received virtually no scrutiny) might be among the challenges to be addressed by the Constitutional Court. In an important decision from December 2022, the Court invalidated selected (ordinary) legislative provisions because they were adopted in accelerated legislative procedure. The next level of this type of reasoning could consider the legitimacy of changes unrelated to the original intention of a bill introduced in the legislative process (accelerated or not), as it was the case with the changes concerning the electoral system type and number of electoral districts in the latest amendment.

No time like the present–to reform the referendum in Slovakia?

While a new legal framework on early elections is now in place, reforms of the regulation of referenda are not on the horizon. In its current form, the referendum seems to be particularly welcoming towards illiberal abuse, with little prospects to contribute to Slovakia's democratic life. The only successful referendum reaching the turnout threshold of more than 50 percent of the electorate was on Slovakia's EU accession, held at a peak time of the 'return to Europe' narrative when almost no one opposed EU membership (2003). With its exception, all referenda held so far were divisive, polarising moments in Slovakia's political life, underscoring the unfinished democratic transition in questions of fundamental rights, accountability and the relationship between the government and the electorate.

The design of the referendum is arguably in part responsible for its flaws. Although the high turnout requirement represents a safeguard against an illiberal takeover, the relatively simple way to initiate a referendum and the restrictive content it may entail (only a binary 'yes' or 'no' question) makes it an effective tool for illiberal campaigns. Furthermore, it may add to populist narratives that simplify complex affairs into dichotomous choices. (The complex wording of the January 2023 referendum question somewhat decreases the latter tendency, although it then also generates the dilemmas for the voters whose preference is not captured by either voting option.) As shown in neighbouring Hungary via the regular 'national consultations' initiated by the illiberal executive, as well as in the notorious case of the Brexit referendum, if not combined at least with political elite responsibility and with platforms for informed public deliberation, referenda may easily backfire and threaten the continuity of democratic regimes.

With intensifying discussions on the role of referenda and direct democracy in democratising the European Union, it is high time for Slovakia to consider the pros and cons of referenda, and their constitutional design, via public deliberation. Otherwise, they are likely to keep being utilised primarily by illiberal actors and alienate citizens from associating the moments when they are invited to ballot boxes with genuine, meaningful choices that may enrich Slovak political life.

In light of what is now the 21st or 22nd amendment to the Slovak Constitution (depending on whether one counts the 2019 decision of the Constitutional Court invalidating parts of the Constitution), the need for some introspection regarding the legitimacy of rapid and unsystematic constitutional amendments process can be added to the list.

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