

Referendum on early elections: The case of Slovakia in the European context

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Summary: The referendum initiative of 2021 is the fourth attempt in Slovakia to call a referendum on early parliamentary elections in less than 30 years. The aim of this article is to answer the question of whether the shortening of the parliamentary term by referendum is in accordance with the Slovak Constitution. Since the shortening of parliamentary term by referendum is a constitutional issue which is a question of identity common to all European democracies, the authors analyse the existence of such direct democracy instrument in the Council of Europe member states and compare the relevant constitutional framework with the Slovak Constitution. The authors' opinion is that the referendum on early elections contradicts not only several constitutional provisions, but also the overall philosophy of the Slovak Constitution and Western-type democracy.

Keywords: recall, dissolution of parliament, referendum, representative mandate, direct democracy

1. Introduction

After two unsuccessful and relatively older attempts in 2000 and 2004, the idea to demand early parliamentary elections through a referendum emerged in Slovakia once again. The initiative comes formally from a popular petition.¹ In reality, this petition is organized by several opposition political parties. Such initiative has naturally invoked not only political reactions, but also revived doctrinal discussions on compliance of such referendum with the Constitution of

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¹ According to article 95 (2) of the Slovak Constitution, a referendum can be declared by the president upon a petition submitted by at least 350,000 citizens (approximately 8 % of eligible voters) or upon a resolution of the National Council (approved by a simple majority of its members).

the Slovak Republic.² Although, first referendum on early parliamentary elections in Slovakia was held in 2000, historically first petition concerning such initiative was submitted to the president in 1994. After the signature review procedure, the head of state declined to declare referendum, since the submitted number of valid signatures was significantly lower than the number prescribed by the Constitution (350 000 citizens).³ The 2000 and 2004 referendums were declared and executed but failed due to insufficient turnout.⁴

It can be therefore determined that the 2021 referendum initiative is the fourth attempt in Slovakia to call a referendum on early parliamentary elections in less than 30 years. At the same time, it is the only topic that is repeatedly brought as the subject of the referendum so far. Resolving the issue of constitutionality of the referendum on early elections is of fundamental importance for the functioning of the Slovak constitutional system. In addition, it has also a European dimension, because all European democracies have at least a few important features in common: the principle of representative mandate and the existence of collective executive responsible to the elected legislature.⁵

The aim of this article is twofold. First, to answer the question of whether the shortening of the parliamentary term by referendum is in accordance with the Slovak Constitution. This is a specific, practical and essential question for Slovakia, which needs a clear answer. Second, it is insufficient to analyse this question only within the norms of the Slovak Constitution, case law and legal theory, but it needs to be answered in broader context: in the context of Western-style democracy. This category covers a set of countries, which can be understood more broadly or more narrowly, depending on the chosen criteria. For the purposes of this article, we focus on the Council of Europe member states. Some of them have long democratic tradition, the other are relatively new democracies, but the common denominator is that membership in the Council of Europe at least

² In the first phase and due to shortage of time, these discussions took place mainly in the Slovak daily press. See BUJŇÁK, V.: Prečo skrátenie volebného obdobia referendum nie je ústavné | Postoj (postoj.sk) [cit. 15.4.2021]; GIBA, M.: Referendum o predčasných voľbách alebo rozklad suverenity ľudu pod zámenkou jej výkonu – Denník N (dennikn.sk) [cit. 15.4.2021]; LALÍK, T.: Prečo je skrátenie volebného obdobia referendum ústavné | Postoj (postoj.sk) [cit. 15.4.2021]; BĀRĀNY, E.: Protipandemické opatrenia, ústavné limity a ľudské práva | Slovenské národné noviny (snn.sk) [cit. 15.4.2021].

³ See LĀŠTIC, E.: V rukách politických strán. Referendum na Slovensku 1993 – 2010. Bratislava: Centrum excelentnosti pre spoločenské inovácie Univerzity Komenského v Bratislave, 2011, pp. 31–32.

⁴ According to art. 98 (1) of the Constitution, the results of a referendum shall be valid provided an absolute majority of eligible voters have participated and the issue has been decided by an absolute majority of votes.

⁵ This common feature is not affected by differences that may exist between the various European democracies, for example in relation to the powers of president and his real strength.

formally signals a commitment to the basic principles of Western democracy. Shortening of parliamentary term by referendum is a constitutional issue which is, so to speak, a question of identity which is common to all European democracies, and a question of philosophy on which European democracy stands. It is therefore necessary to examine whether there are Council of Europe member states whose constitutional system recognizes and allows shortening of parliamentary term by a referendum. Subsequent conclusions will be an important starting point for examining the compliance of the referendum on early elections with the Constitution of Slovakia. In accordance with the aforementioned aims we first analyse the shortening of the parliamentary term by referendum in the Council of Europe member states (1). Afterwards we present an assessment of the referendum on early elections and its compliance with the Constitution of Slovakia (2).

2. Shortening the parliamentary term by referendum in the Council of Europe member states

Currently, there are only two states among the 47 Council of Europe members whose constitutional system presupposes the possibility of a popular referendum concerning a collective parliamentary recall. These states are Liechtenstein and Latvia. Identification of these two states is a combination of researching Council of Europe member states constitutions by authors themselves, information provided by the Venice Commission⁶ and conclusions of other authors.⁷ Before

⁶ „There are few European countries where recall at national level is possible. It is provided for in the Republic of Moldova and Romania for the President of the Republic, and for the Parliament as a whole in Latvia and Liechtenstein.“ Report of European Commission for Democracy through Law on the recall of mayors and local elected representatives (20 June 2019), no. CDL-AD(2019)011, p. 7. Available at

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)011_rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)011_rev-e) [cit. 20. 03. 2021].

⁷ RATO TRABUCCO, F. The Latvian direct democracy tools in a comparative European context. In: *Oñati Socio-Legal Series*, vol. 10, no. 4, 2020, pp. 770–774; WELP, Y. Recall referendum around the world. Origins, institutional designs and current debates. In: MOREL, L., QVORTRUP, M. (eds): *The Routledge Handbook to referendums and direct democracy*. New York: Routledge, 2018, p. 453; ŁUKASZEWSKI, M. Microstate and monarchy in the face of the challenges of the modern world. The political system of Liechtenstein and its specificity (an outline of the problem). In: *Przegląd Politologiczny*, no. 3, 2015, p. 97; MARXER, W., PÁLLINGER, Z. T. System contexts and system effects of direct democracy – direct democracy in Liechtenstein and Switzerland compared. In: PÁLLINGER, Z. T., KAUFMANN, B.,

proceeding with a closer analysis of the constitutional mechanisms of these two states, it is necessary to focus on the general framework in which the Council of Europe member states operate (1.1). Afterwards, we continue with an analysis of constitutional framework in Latvia (1.2) and Liechtenstein (1.3). Finally, we formulate findings acquired on the basis of examined framework in the form of interim conclusions (1.4).

2.1. General remarks on democracy in the Council of Europe member states

As noted by the Venice Commission in its Report on the Recall of Mayors and Local Elected Representatives (20 June 2019), the principle of free political mandate and its corollary, the prohibition of any imperative mandate, are at the foundations of representative democracy. Throughout history, the imperative mandate was eventually replaced by a system – the representative government – where “representatives do not exclusively represent their local electors but an abstract body, the nation, whose will is superior of and different from local constituencies”.⁸ The recall of representatives by popular vote touches on the very essence of representative democracy as a system by definition based on the principle of representation, where citizens delegate the exercise of their power (i.e. the right to govern) to elected representatives. They, in turn, adopt public policy decisions and measures on behalf of citizens that are supposed to be in the interests of all. In this system, regular elections which enable to make a decision on renewal or non-renewal of parliamentary mandates constitute main mechanism of political accountability.⁹

It is clear that in such framework there is a question of whether and under what conditions may voters retain the “right” to decide on the dismissal of elected representatives in the event of dissatisfaction with their activities and without waiting for another regular elections. The Venice Commission

MARXER, W., SCHILLER, T. (eds). *Direct Democracy in Europe. Developments and Prospects*. Wiesbaden: VS Verlag für Sozialwissenschaften, 2007, p. 26; KĀRKLIŅA, A. Dissolution of parliament in Latvia: Legal regulation and practice. In: *Jurisprudencija*, vol. 20, no. 3, pp. 1213–1229; HOLLANDER, S. *The Politics of Referendum Use in European Democracies*. Cham: Palgrave Macmillan, 2019, pp. 284–305.

⁸ Report of the European Commission for Democracy through Law on the Recall of Mayors and Local Elected Representatives (Venice, 20 June 2019, no. CDL-AD(2019)011rev, p. 5 and there mentioned authors. Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)011rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)011rev-e). [cit. 20. 03. 2021]

⁹ See also DOMIN, M. *Volebné právo a volebné systémy*. Bratislava: Wolters Kluwer, 2017, pp. 14–43.

highlights the ideas of Edmund Burke and Emmanuel – Joseph Sieyès about free mandate of representatives as a basic characteristic of the political representation and points out the model of deliberative democracy. The notion of deliberative democracy with its focus on the need for political decisions to be the product of fair and reasonable discussion and debate among citizens, suggests that members of deliberative assemblies will reach their decisions at the end of a process of consultation and debate, which is at odds with the notion of imperative mandate.¹⁰

The origins of the institution can be traced back to the Roman Republic, where tribunes were occasionally recalled. The first debates of the device in modern times are dated in the years following the American Revolution. Later on, after more than a century, there was a proposal to include recall in the Convention of 1787, but it was defeated. Federalist Alexander Hamilton led the opposition saying that recall „will render the senator a slave to all the capricious humours among the people“.¹¹ The recall became a powerful component of the argument of the Anti-Federalists, who were the opponents to the adoption of the Constitution. The Constitution required that either legislatures or special conventions vote in favour of the document before it would go into force. The lack of the recall as a reason to reject the document cited for example a well-known anti-federalist Luther Martin.¹²

The argument in favour of popular recall referendum is rather straightforward: if voters have the right to elect officials, then they should also have the right to recall them. Such referendum gives the voters an opportunity to continually make independent democratic decisions about who and how they are governed by. Representative democracy offers only one opportunity in three, four or five years, depending on the prescribed length of the election period. The representatives elected in this manner then take over the control and decision-making in the system, and citizens who do not have the right to recall them remain without a particular opportunity to decide against their elected representatives if they do not exercise the power in the manner in which they promised to perform it. According to supporters of the popular recall, this mechanism leaves room for voter control over the work of elected officials throughout the entire mandate.

¹⁰ Report of the European Commission for Democracy through Law on the Recall of Mayors and Local Elected Representatives (Venice, 20 June 2019, no. CDL-AD(2019)011rev, pp. 5–6.

¹¹ WELP, Y. Recall referendum around the world. Origins, institutional designs and current debates. In: MOREL, L., QVORTRUP, M. (eds). *The Routledge Handbook to referendums and direct democracy*. New York: Routledge, 2018, p. 451 and 452, and there mentioned authors.

¹² SPIVAK, J.: Recall Elections in the US: Its Long Past and Uncertain Future. In: WELP, Y., WHITEHEAD, L. (eds). *The Politics of Recall Elections*. Oxford: Palgrave Macmillan, 2020, p. 78 and there mentioned authors.

The ability to hold early elections when it is most needed due to the mistakes made by the ruling majority is cited as one of the key advantages.¹³

Arguments against the recall referendum are based mainly on the need for government stability and efficiency. As pointed out by Anne Twomey, there is a great risk that such instrument will cause governments to act in a populist manner and not take the often hard but unpopular decisions that are in the long-term interests of the state. One of the reasons behind fixed election terms is to allow governments some space to govern responsibly in the public interest without having to be constantly seeking popularity. The risk with citizens' initiated elections would be that governments would be perpetually on an election-footing, undermining their effectiveness and the long-term interests of the state. Another argument is the use of election petitions as political weapons. Petitions may be initiated even if there is no hope of success, in order to damage the reputation of a government, distract or deter it from pursuing difficult policy issues.¹⁴

It is interesting that despite the importance of Switzerland in the history of direct democracy,¹⁵ this state cannot be automatically added to Liechtenstein and Latvia, and the Venice Commission shares the same opinion. There is no popular recall referendum in relation to the Swiss Federal Assembly. However, there is the indirect option of launching an initiative for a total revision of the Constitution, which would, in the case of success, trigger new elections.¹⁶ Jozef Prusák highlights a failed attempt to revise the Swiss Constitution in 1934, organized by fascist party.¹⁷

While the Swiss example is, in theory, at least an indirect way of enforcing new elections, it is not possible to consider in the same manner a constitutional regulation according to which a certain fact results in the dissolution of parliament, but the formation of this fact is not in the power of citizens. According to § 105 of the Estonian Constitution, the Parliament has the right to submit a Bill or other issue of national importance to a referendum. If such Bill fails to receive a majority of the votes cast, the President calls an extraordinary parliamentary

¹³ KARAKAMISHEVA JOVANOVSKA, T. Why fear of recall for elected officials? In: *Iustinianus Primus Law Review*, vol. 10, no. 1, 2019, pp. 12 – 13.

¹⁴ TWOMEY, A. The Recall of Members of Parliament and Citizens' Initiated Elections. In: *The University of New South Wales Law Journal*, vol. 34, no. 1, 2011, pp. 67 – 68. See also GIBA, M.: Referendum o predčasných voľbách: niekoľko úvah. In: *The Milestones of Law in Central Europe 2008*. Bratislava: Právnická fakulta Univerzity Komenského, 2008, pp. 576 – 577.

¹⁵ ALTMAN, D. *Citizenship and Contemporary Direct Democracy*. New York: Cambridge University Press, 2019, p. 33.

¹⁶ SERDÜLT, U. Referendums in Switzerland. In: QVORTRUP, M. (ed). *Referendums Around the World. The Continued Growth of Direct Democracy*. London: Palgrave Macmillan, 2014, p. 88.

¹⁷ PRUSÁK, J. *Teória práva*. Druhé vydanie. Bratislava: VO PraFUK, 2001, p. 78.

election. The citizens cannot force the Parliament to submit a Bill to referendum and therefore they alone cannot enforce new elections. The so-called anti-blocking mechanisms leading to new parliamentary elections fall within the same category. The Greek Constitution for example enshrines in art. 32 (4) that should the third ballot of presidential election fail to produce prescribed majority, Parliament shall be dissolved within ten days of the ballot, and elections for a new Parliament shall be called. A similar consequence occurs according to art. 87 (5) of the Albanian Constitution after the fifth parliamentary vote. Again, however, such early elections are a result of a fact (non-election of the head of state by parliament) that citizens cannot enforce with legal instruments.

In the 1990s, there was a discussion about a constitutional fixation of the referendum on the dismissal of the national Parliament in Ukraine. According to proposed art. 110, the mandate of the Supreme Council of Ukraine could be terminated early upon decision on non-confidence taken by a national referendum, with subsequent mandatory self-dissolution.¹⁸ This proposal was heavily criticized by the Venice Commission and was not approved. Afterwards, the Venice Commission commented on another similar consideration that the possibility of a vote of no confidence by the people in Parliament is alien to the Western concept of representative democracy and can in no way be presumed in the absence of an express constitutional authorisation.¹⁹

One of the oldest democracies which also has extensive experience with the institute of a referendum, is France. The issue of shortening the parliamentary term by referendum has never been addressed there, but the issue of a popular referendum initiative is still worth mentioning. Although the constitution of the current 5th Republic of 1958 reintroduced referendum in the French constitutional system, it does not presuppose the existence of citizen-initiated referendum.²⁰ Its introduction was considered in 2008, before the most extensive amendment to the constitution so far. The adoption of amendment was preceded by several months of work by an expert group led by the former Prime Minister É. Balladur. The Balladur commission did not recommend to adopt a citizen-initiated referendum, only a referendum initiated by one-fifth members of Parliament, supported by one-tenth of voters. The Commission argued for the need to „reconcile the

¹⁸ Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(1995\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(1995)028-e). [cit. 20. 03. 2021]

¹⁹ Parts 30 – 32 from the Opinion of European Commission for Democracy through Law on Constitutional referendum in Ukraine (31 March 2000). The authors thank Šimon Drugda for information about this material. Available at [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2000\)014rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2000)014rev-e). [cit. 28. 03. 2021]

²⁰ On the constitutional definition of the national referendum in France, see GIBA, M. *Súdna kontrola ústavnosti vo Francúzsku*. Bratislava: Wolters Kluwer, 2017, pp. 112–123.

*right of citizens' initiative with the necessary safeguards of this right in order to mitigate the risks that may arise from the choice of certain societal issues*²¹

Another European state with a long democratic tradition is the United Kingdom, which introduced the Recall of MPs Act in 2015. The act allows for the removal of an MP by the public in the particular constituency, if the MP has received a prison sentence (custodial or suspended), or if the MP is convicted of providing false or misleading information for allowance claims under the Parliamentary Standards Act 2009, or if the MP is barred from the House of Commons for ten sitting days, or fourteen calendar days. A certain legal fact therefore activates the possibility of recall. In order to trigger a by-election, the petition needs to be signed by a minimum of 10 % of the MP's constituents.²² The possibility of recalling a particular member instead of shortening the term of the entire lower house and the existence of certain legal fact instead of discretion of eligible voters means that the United Kingdom cannot be added to Liechtenstein and Latvia.

Therefore, apart from these two states, no other Council of Europe member states allow the dismissal of the national Parliament by popular vote and at the initiative of the people themselves, without the existence of a specific legal fact. In addition, we have identified a state whose constitutional court has ruled in the past on the unconstitutionality of such a referendum on early elections. In January 1993, the Constitutional Court of Hungary issued a judgement 2/1993 (I. 22.). The court ruled on unconstitutionality because of several reasons, and one of them was the prohibition of the imperative mandate: *„On the contrary, the essence of a free mandate lies in the fact that the legal dependence between the representative and the voters ends with an electoral act. Therefore, the representative cannot receive instructions, nor is he obliged to request voter opinions on the issues under discussion. (...) As a voting representative, he or she cannot be held responsible for his or her activities and voting during the term of office, so the duration of their term of office is for the entire term of office, which cannot be shortened by voters. The relationship between representatives and voters is of a political nature, and therefore responsibility can only emerge during elections. (...) The possibility of recall would be followed by a series of almost constant efforts with recall initiatives, as non-parliamentary or rival political parties could constantly scrutinize the support of an elected member or party majority, or voters themselves could seek recall because of the vote for an unpopular*

²¹ Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la Ve République. Final report published in Journal officiel de la République française, 30 octobre 2007, p. 17699.

²² See TONGE, J. The Recall of MPs Act 2015: Petitions, Polls and Problems. In: *The Political Quarterly*, vol. 90, no. 4, 2019, pp. 713–718.

measure. (...) No responsibility can be deduced on the part of the voter towards a specific member of Parliament during the exercise of the mandate, a group of deputies or Parliament as a whole, based on the constitutionally enshrined principle of a free mandate. The referendum on the dissolution of the National Assembly, the outcome of which is binding on the National Assembly, leads to the termination of parliamentary seats, and its purpose is to hold members of parliament and the Parliament itself accountable to the electorate. The referendum would, in fact, mean a dismissal of parliament by voters. The referendum on the dissolution of the National Assembly also contains the risk of becoming a sanction for parliamentary approval of such proposals in parliament which themselves cannot be the subject of a referendum.²³ Although new Constitution of Hungary (2011) states in „Closing and miscellaneous provisions“ that „the decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law are repealed“, it also contains art. 8 (3, f) according to which no national referendum may be held on the dissolution of the National Assembly. Therefore, the legal situation in Hungary remains the same even after adopting new constitution.

There are also two decisions of the Constitutional Court of Lithuania in relation to the possibility of dismissing an individual member of Parliament by popular vote. The court declared in 1993 that *“the essence of an unrestricted mandate of a Seimas²⁴ member lies in the freedom of a representative of the nation to implement the rights and duties vested in him without restricting his freedom by any mandates of the voters, political requirements of parties and organisations that nominated them, and without recognising the right to recall a Seimas member”*.²⁵ The court followed this opinion in 2003: *„A pre-term recall of a member of the Seimas would constitute one of the elements of an imperative mandate. The Constitution prohibits an imperative mandate. Democratic states do not recognise the imperative mandate of a Parliament member; thus, the possibility of a pre-term recall of a Parliament member from his office does not exist, either.”*²⁶

²³ Decision of the Constitutional Court of Hungary no. 2/1993 on representation as the primary form of the exercise of sovereignty, 22 January 1993. Available at <http://public.mkab.hu/dev/dontesek.nsf/0/75E5E98AB4A78405C1257ADA0052B3B9?OpenDocument>. [cit. 15. 04. 2021]

²⁴ Unicameral Parliament of Lithuania.

²⁵ Decision of the Constitutional Court of the Republic of Lithuania of 26 November 1993. Available at <https://www.lrkt.lt/en/court-acts/search/170/ta945/summary>. [cit. 15. 04. 2021]

²⁶ Decision of the Constitutional Court of the Republic of Lithuania of 30 May 2003, No. 21/2003. Available at <https://www.lrkt.lt/en/court-acts/search/170/ta1244/content>. [cit. 15. 04. 2021]

2.2. Shortening the parliamentary term by referendum in Latvia

The Constitution of the Republic of Latvia is the oldest Eastern or Central European constitution still in force and the sixth oldest still-functioning republican basic law in the world, having been adopted by the Constitutional Assembly of Latvia on 15 February 1922.²⁷ Later, its actual application was prevented by the activities of external forces from 1940 to 1990. On 4 May 1990, the Supreme Soviet of the Latvian Soviet Socialist Republic restored de facto the existence of the Republic of Latvia, and on 6 July 1993, the Constitution entered into force in full scope.²⁸ Although it is not expressis verbis stated in the constitution, Latvia is a parliamentary republic.²⁹ There were several tools that allowed to take a specific decision directly by the people already in the original version of the Constitution.³⁰

In the modern era, the Latvian people have been given the opportunity to initiate a vote on the dismissal of the parliament in 2009 after an explicit constitutional amendment. However, this amendment was preceded by the process connected with art. 48 and a special power of the President. A. Kārklīņa states that in the end of 2007, close to the Houses of Parliament a peaceful gathering took place, in which a large section of the public expressed its disappointment with the parliamentary and government work and requested the President to dissolve the Parliament. The President at that time considered that it would not be the best option and the proposal for the dissolution did not follow. Public discontent with the parliamentary work continued in 2008, when this discontent materialised into an initiative delivered to the Parliament, requesting a constitutional amendment

²⁷ JARINOVSKA, K.: Popular Initiatives as Means of Altering the Core of the Republic of Latvia. In: *Juridica International*, no. 20, 2013, p. 152.

²⁸ LAZDIŅŠ, J.: Continuity of the Judicial Power in the Republic of Latvia. Preconditions and Necessity. In: *Juridiskā zinātne / Law*, no. 9, 2016, pp. 70–71.

²⁹ BADOVSKIS, M. a kol. Public Law. In: KERIKMĀE, T., JOAMETS, K., PLEPS, J., RODIŅA, A., BERKMANAS, T., GRUODYTE, E. (eds.). *The Law of the Baltic States*. Cham: Springer International Publishing AG, 2017, p. 192.

³⁰ Art. 78 of the constitution stated: „*Not less than one tenth of the voters have the right to submit to the President a fully developed draft amendment to the Constitution or a draft law, which the President submits to the parliament. If the parliament does not accept it without amendments in terms of content, then it shall be submitted to a referendum.*“ Another instrument of direct democracy was enshrined in art. 48. The President had the right to propose the dismissal of the parliament. If in such referendum more than half of the voters voted for its dismissal, then the parliament was considered to be dismissed. Failure to dismiss parliament constituted a dismissal of the President, with a new presidential election in parliament for the remaining term of office of the dismissed president. Available at <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme>. [cit. 15. 04. 2021].

on the basis of art. 78 of the Constitution. The draft constitutional amendment contained the possibility of initiating a vote on the dismissal of Parliament directly by the people. The submission of the draft was initiated and coordinated by the non-governmental organization – the Latvian Free Trade Union. After the rejection in Parliament, the draft was submitted to national referendum pursuant to art. 78 of the Constitution. The turnout in the referendum was insufficient and therefore, the draft was not adopted. The referendum was attended by 42% of voters, from which an overwhelming 96% of the voters had voted in favour of the amendment. Afterwards, then President Zatlers took into account that a significant portion of the society had expressed the wish that the people have the right to initiate the dissolution of the Parliament, and addressed the Parliament in this matter. President Zatlers stated that otherwise he would initiate the dissolution of the Parliament, in accordance with art. 48 of the Constitution. The Parliament complied and approved the necessary constitutional amendment in April 2009.³¹

The amended art. 14 of the Constitution grants to not less than one-tenth of electors the right to initiate a national referendum regarding recalling of the Parliament, which is the same quantity as in art. 78. If the majority of voters and at least 2/3 of the number of the voters who participated in the last elections of the Parliament vote, then the Parliament shall be deemed recalled.³² The right to initiate a national referendum cannot be exercised momentarily, since art. 14 contains some sort of a stabilization or protection clauses. It is excluded one year after the convening of the Parliament and one year before the end of the term of his office, during the last six months of the term of office of the President, as well as earlier than six months after the previous recall referendum. It is worth noting that the original wording of art. 14 of the Constitution contained a ban on recall referendum towards individual members, which is a part of art. 14 even after the constitutional amendment. There was no *argumentum e contrario* in relation to the original wording (i.e. if there is only a prohibition on recall referendum of an individual member, then the recall of the Parliament as a whole is permissible) and an explicit constitutional amendment was necessary.

The stabilization or protection clauses in art. 14 of the Constitution attract attention due to absence of comparable clauses in art. 48. In other words, the head of state in Latvia can initiate vote on parliamentary dissolution even during the last six months of the term of his office, and similarly also immediately after the convening of the Parliament and in the last months of parliamentary term. There

³¹ KĀRKLĪŅA, A. Dissolution of parliament in Latvia: legal regulation and practice In: *Jurisprudence*. 2013, roč. 20, no. 3, p. 1223.

³² Ratto Trabucco considers such threshold to be disproportionately high. See RATTO TRABUCCO, F. The Latvian direct democracy tools in a comparative European context. In: *Oñati Socio-Legal Series*, vol. 10, no. 4, 2020, p. 769.

is a notable case from Latvian constitutional history when the President actually used art. 48 in the last months of his term. On 28th May, 2011 president V. Zatlers issued the decree No. 2 “*On the proposal on dissolution of the parliament*”. On the grounds of this decree the Central Election Committee declared a referendum on dissolution of the Parliament which was held on 23 July, whereas President Zatlers’ term of office ended on 7 July 2011. Therefore, had the people in the referendum refused to dissolve the Parliament, there could be no removal of President according to art. 50 of the Constitution and the election of a new President for the remaining term. On 23 July 2011 the referendum took place in which the participation rate of electors was 44.73%, while 94.3% of all the votes were cast for dissolution of the Parliament. The referendum was valid because in this case, a particular quorum is not constitutionally prescribed.³³

Since the constitutional amendment of art. 14 in 2009, there were three attempts to initiate a referendum on the dissolution of Parliament (May 2013, November 2015, November 2016). None of these attempts gained the number of supporters required by the Constitution.³⁴ Thus, the people of Latvia haven’t fully used this new direct democracy instrument so far.

2.3. Shortening the parliamentary term by referendum in Liechtenstein

The Principality of Liechtenstein is a constitutional monarchy in terms of the form of government, but its monarch has much wider powers than the heads of state in other European constitutional monarchies. Some authors categorize Liechtenstein as a semi-constitutional monarchy which is comparable to Jordan, Morocco and Thailand.³⁵

Liechtenstein established a unicameral Parliament (Landtag) which can be recalled by citizen-initiated referendum on the basis of 1921 Constitution. Initially, the Constitution stated in art. 48 (3) that the referendum could be triggered in two ways: either at the initiative of 600 citizens eligible to vote or at the initiative of four municipalities. Amendment no. 55 of 1947 increased the required number of eligible citizens to 900,³⁶ and an increase to 1 500 eligible citizens occurred

³³ BALODIS, R., KĀRKLĪŅA, A., DANOVSĶIS, E. The Development of Constitutional and Administrative Law in Latvia after the Restoration of Independence. In: *Juridiskā zinātne / Law*, no. 5, 2013, pp. 74–75.

³⁴ RATTO TRABUCCO, F. The Latvian direct democracy tools in a comparative European context. In: *Oñati Socio-Legal Series*, vol. 10, no. 4, 2020, p. 768.

³⁵ CORBETT, J., VEENENDAAL, W., UGYEL, L. Why monarchy persists in small states: the cases of Tonga, Bhutan and Liechtenstein. In: *Democratization*, 2017, vol. 24, no. 4, pp. 699–700.

³⁶ Available at <https://www.gesetze.li/chrono/1947055000>. [cit. 15. 04. 2021]

after the entry into force of amendment no. 27 in 1984.³⁷ The latter amendment must be seen not only in the context of the generally growing population of Liechtenstein, but also in view of the introduction of women's suffrage in national elections following the successful 1984 referendum which increased the number of eligible citizens.³⁸ Nowadays, 1,500 eligible citizens represent approximately 7.36 % of the total number of eligible citizens.³⁹

In the parliamentary elections, Liechtenstein has enacted a system of proportional representation on the basis of art. 46 (1). Overall 25 members of parliament are elected in two constituencies, Oberland and Unterland. According to art. 47 (1) of the constitution, there is a four-year term of office. Act no. 50 of 1973 (Volksrechtgesetz) and its art. 86 in particular contains details on the exercise of the right enshrined in art. 48 (3) of the Constitution.⁴⁰ The right of recall can only be asserted against the Landtag as such, but not against the individual members. The act also contains a precise formulation of the question asked in the recall: “Do you want to have the state parliament dissolved?” If the absolute majority decides to dissolve the state Parliament, the government declares the Landtag to be dissolved and immediately orders new elections. Successful recall does not result in an election of new Parliament for the remainder of the previous parliamentary term, but for a new four-year term.⁴¹ W. Marxer highlights that the possibility of citizen-initiated recall of Parliament was not put into practice so far.⁴²

2.4. Interim conclusions

Based on a comparative analysis of the issue of shortening the parliamentary term in Europe, we can draw several general conclusions on this important constitutional issue.

First, there is no constitutional regulation or constitutional practice in relation to shortening the term of the national Parliament through a referendum in

³⁷ Available at <https://www.gesetze.li/chrono/1984027000>. [cit. 15. 04. 2021]

³⁸ The successful 1984 referendum on women's suffrage was preceded by three unsuccessful referendums in 1968, 1971 and 1973. The 1968 referendum was consultative. The 1971 referendum was decided by a margin of 81 votes, and two years later, by a margin of 451 votes. KOZBIAŁ, K., STANKOWSKI, W.: *Konstytucja Księstwa Liechtensteinu. Naród – państwo – polityka*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2009, p. 38.

³⁹ 20,384 eligible citizens were registered for the 2021 general election. Available at <https://www.landtagswahlen.li/resultat/12>. [cit. 15. 04. 2021]

⁴⁰ Available at <https://www.gesetze.li/chrono/1973050000>. [cit. 15. 04. 2021]

⁴¹ BUSSJÄGER, P.: *Kommentar zur liechtensteinischen Verfassung*. Online-Kommentar, Bänden: Liechtenstein-Institut (Hrsg.), 2016, part 57. Available at https://verfassung.li/Art_48. [cit. 15. 04. 2021]

⁴² MARXER, W.: Direct Democracy in Liechtenstein. In: *International Conference Direct Democracy in Latin America 14–15 March 2007*, Buenos Aires, Argentina, p. 12.

the states that are part of Western Europe (in the sense of the former “Western bloc”), whose democratic traditions are generally longer and richer. There are no attempts to introduce citizen-initiated recall referendum in their constitutional development. Such instrument is established only in Liechtenstein. Without attempting to underestimate its importance, however, the fact is that Liechtenstein is a state whose size and population roughly corresponds to the size of one smaller town. Moreover, it is a monarchy, which is an exception in nowadays Europe, and it cannot be considered purely constitutional. For these reasons, Liechtenstein is destined to be a curiosity rather than a reference to the democratic world in the field of constitutionalism.

In some contrast to the above stand the states of Central and Eastern Europe, which were part of the Eastern bloc during the Cold War. Even here, it cannot be argued that shortening the parliamentary term by referendum is an accepted constitutional mechanism. The only state in this category whose constitution explicitly includes such an institute is Latvia. The context and reasons for the introduction of this mechanism into the Latvian Constitution (together with the fact that it has not been used yet) show that it was a momentary political coincidence rather than a real need, objectively raised by constitutional practice. There is also a notable example of Hungary, whose Constitutional Court dealt with the issue of shortening the parliamentary term by referendum with a very categorical rejection quite shortly after the advent of democracy after 1989. The new Constitution, which has since been adopted in Hungary, has upheld this decision by reflecting its main conclusion directly in its text. At the turn of the millennium, constitutional developments in Central and Eastern Europe prompted the Venice Commission to issue an opinion in which it stated that the shortening of the parliamentary term by referendum was alien to Western democracy and that, if it were to be permissible in a particular state, this mechanism needed to be explicitly enshrined in the Constitution.

The third interim conclusion is directed at the occurrence of such referendum not at the national level, but at the level of the member units of the federation.⁴³ Such a mechanism exists in some cantons of Switzerland and in some Länder of Germany, but these cantons and Länder represent only a minority of the federation units. In Switzerland, last successful referendum of this kind occurred in the mid-19th century. A number of cantons that initially introduced this mechanism have since abolished it.⁴⁴ It was used widely in the period of Weimar Germany,

⁴³ For capacity reasons, we have not included the detailed research we have done in this area in this article, but we present at least the essential conclusions that emerged from it.

⁴⁴ For details, see WELP, Y.: Recall referendum around the world. Origins, institutional designs and current debates. In: MOREL, L., QVORTRUP, M. (eds). *The Routledge Handbook to referendums and direct democracy*. New York: Routledge, 2018, pp. 451–463; SERDÜLT, U. The

and among its initiators were quite frequently those political parties (fascists, communists) that tried to undermine the democratic parliamentary system.⁴⁵

The most important general conclusion which can be drawn from the above is that a referendum on shortening the parliamentary term, whether at the national level or at the level of a member state of the federation, is something that is highly atypical in the European context. Those rare cases where it exists appear to be the exceptions that prove the rule, and at the same time two facts apply as well: 1. in terms of constitutional definition, this mechanism is always based on an explicit provision in the relevant constitutional text; 2. In terms of constitutional practice, this mechanism is practically unused.

On the basis of this analysis, it can be concluded that a referendum on early parliamentary elections is something alien in the European context. At best it can be considered an exception to a clear rule, at worst an exotic unworthy of an advanced democracy...

3. Referendum on early elections and the Constitution of Slovakia

A referendum on shortening the term of the Parliament in Slovakia first took place on 11 November 2000. Only 20.03% of eligible voters took part in the vote, therefore it was invalid. The constitutionality of such a referendum at that time could not have been assessed by the Constitutional Court, as the Constitution had not included this type of review yet. The President of the Republic, Rudolf Schuster, called this referendum, but his doubts led him to put pressure on the introduction of a preventive constitutional review of the subject of referendum. The Parliament answered this request of the President. The amendment to the Constitution, adopted in 2001 as Constitutional Act 90/2001 Coll., created a procedure enabling the Constitutional Court to examine the conformity of a referendum with the Constitution before it is called.⁴⁶

history of a dormant institution: Legal norms and the practice of recall in Switzerland. In: *Representation*, vol. 51, no. 2, 2015, pp. 65–121.

⁴⁵ For details, see GREENE, L. S. Direct Legislation in the German Länder, 1919-32. In: *The American Political Science Review*, vol. 27, no. 3, 1933, pp. 445–454; KOLB, E. *The Weimar Republic*. Second Edition. New York: Routledge, 2005, p. 120; FEUCHTWANGER, E. J. *From Weimar to Hitler: Germany, 1918-33*. New York: Palgrave Macmillan, 1993, p. 84.

⁴⁶ This mechanism is fixed by Art. 95 par. 2 and Art. 125b of the Constitution. Only the President can ask for this review before calling the referendum. The Constitutional Court shall decide within 60 days and if it declares the subject of referendum unconstitutional, the referendum cannot be called.

Slovakia experienced the second referendum on early elections on 3 April 2004. It is not without interest that although the preventive constitutional review of the subject of referendum was already available, the President Schuster not only did not use it, but called the referendum on the same day as the first round of the presidential election in which he ran for re-election. Even the concurrence with the presidential election did not help this referendum to become valid, as it was attended by 35.86% of eligible voters only. Leaving the Constitutional Court out of the whole process has meant that Slovakia still does not have a binding answer to the question of whether the referendum on shortening the parliamentary term is constitutional. The Constitution does not explicitly mention the possibility of holding a referendum on early elections, nor does it explicitly exclude.⁴⁷

Therefore, in the second part of the paper, we will look for an answer to the fundamental question of whether or not the referendum on shortening the parliamentary term conforms to the Slovak Constitution. In the background of this Slovak constitutional problem, there is the European context, which, as follows from the first part of the paper, *a priori* does not favour the idea of shortening the parliamentary term by referendum. If it is tolerated, then only when such a mechanism is explicitly set in the constitutional text. In an effort to examine the conformity of the referendum on early elections with the Slovak Constitution, we will first look at the question of the purpose of early elections and government accountability (2.1), as well as the interpretation of the principle of people's sovereignty (2.2). We will also focus on the argument based on the right to access elected offices under the same conditions (2.3). Based on the analysis of these partial questions, we come to the conclusion that the referendum on early elections contradicts the Slovak Constitution.

3.1. The purpose of early elections and government accountability

Every constitutional law mechanism has a reason for its existence and a goal for which it is to serve. It is no different with early elections. Both from the legal theory⁴⁸ and the valid wording of Art. 102 par. 1 letter e) of the Slovak Constitution,

⁴⁷ The initiators of the referendum rely on Art. 93 par. 2 which admits a referendum on “*crucial issues of public interest*”. Article 93 par. 3 excludes explicitly from the referendum only the issues of “*fundamental rights, freedoms, taxes, duties or state budget*”. However, regarding Art. 95 par. 2 and Art. 125b, it is clear that the enumeration of the issues excluded from referendum is only demonstrative and the Constitutional Court can, by its interpretation, identify other issues that cannot be decided by referendum.

⁴⁸ See for example GOHIN, O. *Droit constitutionnel*. 2e édition. Paris: LexisNexis, 2013, p. 542 and following pages.

it follows that early elections are a tool for resolving a political crisis that escalates into a constitutional crisis. A typical example: in the middle of an election period, the governing coalition disintegrates, causing a vote of non-confidence against the government. Or, the coalition loses a majority and thus the ability to push its proposals through the Parliament. The government cannot really fulfil its functions or programme, at utmost it only makes ends meet. There are two possibilities: either to form a new coalition within the same Parliament by joining a part of the old one with a part of the opposition, or to hold early elections. The first option is practically unrealistic – it is hard to imagine that a coalition party would unite with the opposition and govern dispassionately for the rest of the term. In such a case, early elections are the most correct way out of a political and constitutional crisis in which there is no possibility to govern fluently. But such a crisis cannot be invoked in a situation when the government enjoys the confidence of the Parliament and also the formal numbers of MPs in the ranks of the coalition give a majority in the house.

In accordance with the logic of the parliamentary form of government, early elections are always a way out of objective need, but never a tool for revising the results of previous elections.⁴⁹ If there is no other option, they must be held, but ideally they should not be. In relation to this, there is the question of the political accountability of government parties to voters. A simplified view of governance in Slovakia fully corresponds to the European scheme of the parliamentary form of government: the people in the elections elect a Parliament where a majority is put together, which subsequently forms a government. The government presents its programme to the Parliament and, since it has a majority in it, it gains its confidence. The parliamentary term is four years, so the new government, logically, sets its programme to work on it for four years, and then presents its results to the voters. In the parliamentary elections, the voters make an account to the government: they will either let it in power or replace it. This is how it works in any parliamentary democracy.

A year or two after the election, more than one government finds itself in a situation where, if the elections were held at that moment, it would lose them badly, but in the regular elections at the end of the term, the government finally defends its position without any problem. It is also common that a government maintains the support it loses at the crucial moment at the end of the parliamentary term. The fate of the elections and government can sometimes be decided by external factors, the occurrence of which is uncontrollable i.e. accidental from the government's point of view (war, economic crisis or pandemic). Such

⁴⁹ GIBA, M. Referendum o predčasných voľbách: niekoľko úvah. In: *The Milestones of Law in Central Europe 2008*. Bratislava: Právnická fakulta Univerzity Komenského, 2008, p. 574.

a coincidence can bring one politician to the pinnacle of power, and can “break the neck” to another one. One is lucky, another one unlucky, which he can perceive as an “injustice.” *C’est la vie* – not everything is predictable.

However, what can be predicted is the length of the election periods. This is the basic point for any government to know how to plan its programme and set the stages for its implementation. If the government itself does not spoil its position by losing the confidence of the Parliament or by breaking up the majority and provoking early elections, then it knows that it will present its results to the voters after four years. At the same time, the voters will be able to make the account most accurately. If the programme is planned for four years and the deduction is made after only two years, it is necessarily distorted. But beware, we are not saying that every government or every prime minister is to govern for four years, or that they have “a right to enjoy their posts uninterrupted”. The government can and should be permanently “disrupted”, controlled and confronted in the performance of its duties, primarily by the Parliament to which it is accountable. Some activity from its own parliamentary majority can be rightly expected if the situation is serious, critical or unsustainable, and the government does not know or does not want to act. The President can also act by the force of his authority, and then there are other more or less effective forms of pressure that can be exerted on the government or its member and can result in his resignation.

However, the instruments of this pressure should not include a referendum on early elections. There is a reason that sometimes disappears in the debate, although it has a very important systemic aspect. The narrative of collecting signatures in a petition for a referendum on shortening the term of the Parliament in Slovakia in 2021 is more or less in the context that it is necessary to end the government of the current coalition as soon as possible. It is possible that the petition was also supported by many of those who voted for this coalition in the 2020 elections. If the voter gradually turns away from the one he has trusted in the election, it is his right, and in a democracy this is not an unusual phenomenon.

But, if the referendum on early elections is to be considered as a sanctioning tool against the current government, be careful not to overlook the forest for a tree. If we accept today that the referendum on early elections is in conformity with the Constitution of Slovakia, it will mean that it can be used at any time in the future. No future government can be sure that, while retaining a parliamentary majority, it will have four years to implement its programme. What will it lead to? As we have generally pointed out in the first part, it is highly probable that any government, with a pragmatic attitude, will behave as if it were in an election campaign from the very beginning and throughout the whole term. For a long

time now, the level of daily populism present in politics has been unbearable. At the same time, experience shows that this rate is rising in direct proportion to how the elections are approaching. What will then happen if the four-year term of the Slovak Parliament is abolished? That is to say, more precisely, when a four-year period becomes *de facto* only a subsidiary rule, which will only apply if a referendum does not decide on early elections?

3.2. How does the people's sovereignty work?

The principle of people's sovereignty in Slovakia follows from Art. 2 par. 1 of the Constitution: "*The state power comes from citizens who exercise it through their elected representatives or directly*". For supporters of the referendum on early elections, this is a major trump card: the people can also act directly, not only through the Parliament, the people are more than the Parliament, thus the people can also decide to end the term of the current Parliament and elect a new one. At first glance simple and tempting, in fact very complicated. The Constitution is not just one article without context. It is a system of values and principles expressed in one form or another in all its provisions. Each provision should be seen as one of the components of a complex system that can only work well as a whole. In other words, it is a systematic approach to the Constitution, which implies that all its provisions must be interpreted and applied in relation to each other as a whole, governed by certain common principles and based on certain values.⁵⁰

Even the principle of people's sovereignty cannot be isolated from the rest of the Constitution, absolutized and perceived in such a way that the people can decide on anything at any time in a referendum. It is worth recalling that French constitutional theory and practice have long addressed a similar issue, i.e. whether the referendum is subject to constitutional constraints or whether it cannot be too "bound" by constitutional limits, as it is an exercise of people's sovereignty. Today, hardly anyone in France doubts that the first option applies. One of the most important French constitutionalists of the 20th century, Georges Vedel, aptly remarked that the sovereignty of the people "*cannot enjoy any supremacy over the Constitution*" and is "*only one norm of constitutional power among others.*"⁵¹ In other words, the inclusion of the people's sovereignty among the basic provisions of the Constitution "*expresses a principle which applies only within the framework determined by the other articles of the Constitution*"⁵². And third, "*sovereign power is not one that is not subject to any rules, but one that cannot*

⁵⁰ Compare CIBULKA, L. et al. *Štátoveda*. Bratislava: Wolters Kluwer, 2017, p. 124. See also decision of Slovak Constitutional Court PL. ÚS 12/01 of 7 December, 2007.

⁵¹ VEDEL, G. Souveraineté et supraconstitutionnalité. In *Pouvoirs*, no. 67, 1993, pp. 79–97.

⁵² CHANTEBOUT, B. *Droit constitutionnel*. 26e édition, Paris: Dalloz, 2009, p. 462.

*have the rules imposed upon it without its consent.”*⁵³ There is nothing shocking about these opinions – on the contrary, they are a manifestation of judiciousness and respect for the logic on which modern constitutions stand. The Slovak theory reasons in the same way: “*The referendum represents the exercise of the power of the sovereign, but at the same time the sovereign is limited by the Constitution which he has adopted (cf. the preamble to the Constitution). The exercise of the power of citizens in a referendum is thus not equivalent to the original constituent power; which is a priori unlimited.*”⁵⁴

Article 93 par. 3 of the Constitution explicitly prohibits a referendum on certain matters.⁵⁵ Article 95 par. 2 and Art. 125b par. 1 also allow the Constitutional Court to check the compliance of the subject of referendum with the Constitution. With regard to the systematic interpretation of the Constitution, but especially to the wording of Art. 125b par. 1 *in fine*⁵⁶, it should be emphasized that the conformity of the subject of referendum can be examined not only in relation to Art. 93 par. 3, but in relation to any provision of the Constitution or any provision of any constitutional act.

If we admitted that the people’s sovereignty in the referendum is superior to the rest of the Constitution, because it is the action of the sovereign himself, the Constitution would become useless: practically, everything could be decided in the referendum with the argument that the people are sovereign. Not only shortening the parliamentary term, but for example, also extending it. Why not? After all, if the people are so satisfied with their servants that they wish to keep the Parliament in this very composition, why not extend its term immediately? The term of office of the President of the Republic could also be terminated prematurely, on the basis of a referendum on the citizens’ initiative, where the participation of an absolute majority of eligible voters would be sufficient for validity. That is, by completely circumventing the mechanisms of popular voting on the recall of the President, with all the conditions and consequences that are imposed by Art. 106 of the Constitution⁵⁷. The term of office of all judges of the Constitutional Court could also be shortened, arguing that the Parliament and

⁵³ RIALS, S.: Les incertitudes de la notion de Constitution sous la Ve République. In: *Revue du droit public et de la science politique en France et à l'étranger*, 1984, pp. 587–606.

⁵⁴ ĽALÍK, M., ĽALÍK, T. *Zákon o Ústavnom súde Slovenskej republiky. Komentár*. Bratislava: Wolters Kluwer, 2019, p. 340.

⁵⁵ „No issues of fundamental rights, freedoms, taxes, duties or state budget may be decided by referendum.“

⁵⁶ „The Constitutional Court shall decide on whether the subject of a referendum to be called upon a petition of citizens or a resolution of the National Council of the Slovak Republic according to Art. 95 par. 1 is in conformity with the Constitution or a constitutional act.“

⁵⁷ The Constitution of Slovakia, in its Art. 106, admits explicitly a popular vote on the recall of the President from his office. However, this “referendum” differs from the facultative referendum

the President should choose better ones. And if they do not, the question in the next referendum could be the abolition of the Constitutional Court. Absurd? Yes, but this is exactly what the absolutization of one constitutional principle – the people’s sovereignty – would lead to at the expense of the rest of the Constitution. And, on the top of that, it would be cynically claimed that it is “democratic”.

Article 2 par. 1 of the Constitution states that the people exercise their power either through their representatives or directly. It is an either-or situation. These are two factually equivalent but technically different ways of exercising power, each with its own rules. The paradox of the referendum on early elections is that it essentially mixes these two different ways of exercising power into one bizarre whole. This referendum does not take any specific substantive decision with long-term effect. Such would be, for example, a referendum on the questions: Do you want to leave the European Union? Are you in favor of a direct election of the head of state? Are you in favor of establishing a bicameral Parliament? Are you in favor of the Constitutional Court being able to assess the constitutionality of constitutional laws? One can think anything about these issues, but they make sense in that they have some real substantive content on which the citizens may have opposite opinions and the referendum reflects what the majority stands for. And these are all issues on which the state can function with the possibility of yes and the possibility of no, and it must be recognized that asking the citizens, as the source of power, to decide is legitimate and democratic.

However, the referendum on early elections does not resolve any substantial issue permanently. It does not introduce or repeal any rule, change any of the decisions of the current Parliament or prevent it from exercising all its powers until any early elections. It only depicts that instead of one group of representatives who makes decisions on behalf of the people, the people want another group of representatives to take them on their behalf. In any case, the people will not have a direct impact on the decisions made, they will only exchange representatives. An act of direct democracy calls for an act of representative democracy. It is being decided that people want to decide again in the election afterwards. Direct and representative democracy in one.

However, the essence of the referendum is that the people make a particular decision *instead* of their representatives. Either in a matter that is too serious to be decided “only” at the level of representatives (mandatory referendum – in the case of Slovakia, it is entering into a state union with another state), or in a matter that could be decided by the representatives, but in a specific situation and for some reason, the matter is submitted to the people directly in order to

of Art. 93 as for its initiation, required majority and also its consequences that arise both in the event of the President’s recall and his non recall.

decide (optional referendum). As the theory states: “*A systematic interpretation of the constitution implies that citizens exercise legislative power through a referendum. By referendum, citizens are entitled to make decisions independently from public authorities.*”⁵⁸

The referendum on early elections does not fit into these schemes. In its essence – even if it is not called that way – it is actually a recall of all deputies from office. A recall is, in general, a matter that is possible in a democracy. Although it is practiced against members of Parliament almost nowhere where there is a representative mandate. The removal of a representative is possible if the mandate is conceived as imperative – the representative does not represent all people but only his constituents (his constituency), whose orders he should follow and who can dismiss him if they are not satisfied with his work⁵⁹. Such a thing was made possible (albeit rather only theoretically), for example, by the Constitution of the Czechoslovak Socialist Republic of 1960⁶⁰. The referendum on early elections actually means a mass recall of all deputies, which is contrary to the representative mandate and the whole philosophy of our democracy.

In defense of this referendum in the daily *Postoj*, Tomáš Ľalík compared the relationship between voters and deputies to the relationship between a client and an attorney who represents him in a legal dispute. We agree that it would be absurd if the client could not revoke the mandate of his attorney and select another one, and it would be inconceivable to claim that the attorney has the right to represent the client throughout the whole court proceedings. That is all true. The problem is that the client’s relationship with the attorney, by its nature and functioning, is not similar to the relationship between the people and the deputies in a modern democracy at all. An attorney represents the individual interests of a particular client in a dispute, where on the other side, another individual stands with his lawyer, who, in turn, represents his interests. The same attorney could not represent both because he would be in a conflict of interest. However, it is not the role of a member of Parliament to represent the interests of one citizen against the interests of another. He represents the whole people whose welfare is to be sought as best as he can. The people are made up of all citizens, specific individuals of flesh and bone. But constitutionally, the people are one abstract entity that cannot be met, talked to or touched. The people express themselves either in elections, when they elect their representatives to serve them best as they know for a certain known and limited time

⁵⁸ ĽALÍK, M., ĽALÍK, T. *Zákon o Ústavnom súde Slovenskej republiky. Komentár*. Bratislava: Wolters Kluwer, 2019, p. 340.

⁵⁹ See also DOMIN, M. *Volebné právo a volebné systémy*. Bratislava: Wolters Kluwer, 2017, pp. 17–18.

⁶⁰ See also OROSZ, L. et al. *Volebné právo*. Košice: Právnická fakulta UPJŠ, 2015, pp. 191–195.

or in a referendum when they decide about a particular matter instead of their representatives.

The most important argument for which we consider the referendum on early elections to be unconstitutional is that this referendum devalues the importance of active suffrage, i.e. the right to vote. The rights through which the sovereignty of the people is realized. Every voter, part of the abstract sovereign people, has his own electoral vote, an imaginary “piece” of power to decide what the assembly will look like. However, the power to decide on elections lies not only in the possibility of determining the composition of the assembly, but also in the possibility of doing so with effect for a certain period of time. The weight of the decision is not the same when it is made for four years and when it is made for a year. Alternatively, when it is not known how long it would be valid, because early elections can be called by referendum at any moment. If the voters during the election do not know how long their decision will be valid they may lose interest in the election over time. There can be no doubt that an act that potentially happens at any moment is less significant than an act that only happens once every four to five years.

Jan Filip has previously formulated the opinion that a citizen is not a holder of a subjective right to the length of the parliamentary term set by the Constitution.⁶¹ This opinion was adopted by a chamber of the Slovak Constitutional Court⁶² in a slightly different context. The argument as such can be accepted – after all, it is only confirmed by the very existence of a parliamentary dissolution mechanism. However, it is still possible to ask whether the absence of a subjective right of a citizen for a specified length of the parliamentary term *ipso facto* means that its shortening cannot, in certain cases, unacceptably interfere with the citizens’ active right to vote. Those arguments concerning the devaluation of that fundamental right are serious. It would be difficult to defend the argument that a decision taken for four years and a decision taken for one year have the same weight. The matter must be seen systematically and active right to vote must be also seen in conjunction with the basic provisions of the Constitution, in particular the principle of democracy and the sovereignty of people. It is through active suffrage that these principles are implemented and, so to speak, “come to life”.

Accepting the referendum on early elections as a part of the rules of the game would arise permanent uncertainty to the election process and reduce their real significance in the long term perspective. It would devalue representative democracy without, at least, replacing it with a direct one – as has already been

⁶¹ FILIP, J. Zkrácení volebního období. In *Parlamentní zpravodaj*, 1997–1998, no. 12, pp. 132–134.

⁶² Decision of the Constitutional Court II. ÚS 153/2013 of 28 February 2013.

said, no substantive decision is taken in the early elections referendum, it is just a decision to re-elect the representatives.

3.3. The right to access the elected office under the same conditions?

The former President of the Constitutional Court of the Czechoslovak Federal Republic Ernest Valko and Katarína Babiaková in 2004 rejected the referendum on early elections as unconstitutional. Their main argument, in short, was that a representative has the right to exercise his term of office for the same length as representatives in other, unabridged terms. The basis for this argument was the wording of Art. 30 par. 4 of the Constitution, according to which the citizens have access to elected and other public offices under the same conditions. According to the authors, it was possible to shorten the election period either only for reasons explicitly regulated by the Constitution (dissolution by the President) or by the Parliament itself, if it decides on early elections.⁶³

At the first glance, the argument about the right to access the elected office under the same conditions is being offered. It cannot be overlooked that in today's world there is a strong tendency to seek everything through the courts. This increasingly powerful judicialization, which permeates all spheres of life, in which suing for public office is no longer unusual, naturally brings a stream of thought which tends to view the exercise of a public office more through the prism of the fundamental right of its holder than as a service for the society. Nevertheless, in view of the current reality, it is to be acknowledged that the debate can also be moved to the position of protection of the “fundamental right to access the elected office under the same conditions”. Such an optic is possible today and it is conceivable that it can be adopted by the courts to some extent.

In reality, however, the question is not whether the person holding the public office has the right to exercise the rights associated with it while the function lasts – there is no reason to doubt the positive answer to this question. The question is, whether the public function is associated with the “fundamental right” to exercise it in the full length of the term of office envisaged by the Constitution. There are a large number of public functions. Their nature, content and importance for a democratic rule of law vary. In our opinion, it is not possible to “sew” one flat rule for such a varied scale. Even if we accept that for some public officials a very narrow interpretation of the possibilities of their early dismissal could be considered, the problem in the position of a representative may be that

⁶³ VALKO, E., BABIAKOVÁ, K. Fenomén predčasných parlamentných volieb a referendum. In: *Justičná revue*, 2004, vol. 56, no. 3, pp. 291–298.

no professional or personal requirements are prescribed for this position, only an inclusion on the list of candidates of a political party and then only the confidence measured by the number of votes in the election – nothing more.

If the right of citizens to access elected and other public offices under the same conditions also implies the right of a representative to a full (non-shortened) term of office within the meaning of the article by E. Valko and K. Babiaková, it could not be an absolute right. The fact is that early parliamentary elections are generally a natural (and necessary) part of the system of parliamentary form of government, the one where the government depends on the confidence of the Parliament. The Slovak Constitution explicitly regulates four cases in which the President may dissolve the Parliament and one case where he even must do so [Art. 102 par. 1 letter e)]. The result is always the termination of the mandate of all representatives and early elections. Every elected representative must therefore be aware that, regardless of his will and behavior, the constitutionally presumed circumstances may arise which will lead to early elections.

It is worth recalling that even the Constitutional Court of the Czech Republic, in the famous *Melčák* case of 2009, did not issue its decision on the violation of the representative's right to perform the function in the full length. The Constitutional Act and with it also the early elections were repealed on the grounds that the Constitution of the Czech Republic did not recognize the shortening of the term of office of the Chamber of Deputies by a constitutional act. At the same time, it is clear from the Court's opinion that the early termination of the term of office is not a problem itself – it just must take place in a way that respects the constitutionally established material and procedural conditions. According to the Court, this is a matter of “*protection of the legitimate confidence of citizens in the law and of the right to vote freely, i.e. – inter alia, the right to vote with the knowledge of conditions in which the democratic public authorities are elected, including the knowledge of their term of office*”. It is this argument, although from the neighbours, that fundamentally calls into question not only the shortening of the election period by a constitutional act, on which the Slovak Parliament would voluntarily pass, but also the shortening of the election period by referendum. Unless we accept that the right of citizens to vote with knowledge of all conditions and the protection of their confidence in the law can be “erased” by referendum...

4. Conclusion

While formulating conclusions which specific provisions of the Slovak Constitution are contradicted by the referendum on early elections, it is necessary to

highlight the most important arguments formulated by the Constitutional Court in relation to the referendum over the decades. Although it has not had the opportunity to comment on the merits of this particular issue, and neither did it *obiter dictum*, it has been dealing with the referendum repeatedly and extensively.⁶⁴ We recall the essential conclusion formulated in 2014, according to which “*Art. 93 par. 3 of the Constitution precludes referendums with such issues, the success of which would violate the concept of fundamental rights and freedoms, in the form of lowering their standard resulting from international law as well as from the national legal system, to the extent threatening the rule of law. (...) When lowering the standard of a certain fundamental right or freedom through a referendum, the Constitutional Court is required to be vigilant due to the already stated potential danger of violating the essence and purpose of the fundamental right or freedom, in relation to all its addressees or in relation to a group of addressees defined generically. In such cases, it would be the duty of the Constitutional Court to provide consistent protection of fundamental rights and freedoms, also in terms of the constitutional principles that shape their quality.*”⁶⁵ For the exposed at the end of part 2.2 of this article, we state that the referendum on early elections fulfils the signs of lowering the standard of active suffrage (Article 30 para. 1, first sentence of the Constitution) in a way, that corresponds exactly to the way the Court excluded in 2014.

The referendum on early elections significantly contradicts the Constitution of Slovakia. It contradicts, in the first place, the principle of a democratic state and the principle of the rule of law, which is enshrined in Art. 1 par. 1. Secondly, it contradicts Art. 2 par. 1, according to which state power belongs to the citizens and they exercise it in one of the two available options, but not both at the same time. It also contradicts the first sentence of Article 30, par. 1, according to which “*citizens have the right to participate in the administration of public affairs directly or through the free choice of their representatives*”, in conjunction with Art. 1 par. 1 and Art. 2 par. 1. That right, if it is to have real substance and weight, must include not only the possibility for a citizen to cast a vote in an election, but also the possibility of doing so with the effect for a certain period of time. In conjunction with Article 73, par. 1, this period is four years for the Slovak Parliament. As such, a referendum would lower the existing standard of the right to vote, thus it is also contrary to Art. 93, par. 3. Last but not least, it is also contrary to Art. 73, par. 2, because such a referendum is incompatible with the concept of a representative mandate. Finally, it contradicts the overall philosophy of the Slovak Constitution

⁶⁴ For a more detailed overview of the most relevant case law of the Constitutional Court on referendum, see for example GIBA, M. et al. *Ústavné právo*. Bratislava: Wolters Kluwer, 2019, pp. 207–226.

⁶⁵ Decision of the Constitutional Court PL. ÚS 24/2014 of 28 October 2014.

and Western-type democracy, as follows from the analysis of member states of the Council of Europe. The referendum on early parliamentary elections is contrary to the Slovak Constitution and is therefore inadmissible.

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