



Direct Democracy in Hungary (1989–2016): from Popular Sovereignty to Popular Illusion

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Abstract. Since 1989, there have been organized seven national referenda related to thirteen questions in Hungary. Based on the content of the questions raised, one can draw *a line of evolution* in the history of the institution: the symbolic political *issues of the transition and democracy-building* were followed by *the country's main strategic aims*. Later, national referenda functioned as *instruments of outsourced daily political debate* between government and opposition, while at present – based on practice – national referendum can be considered as a typical instrument of *plebiscitarian direct democracy*. Moreover, during this period, sixteen questions were set on the National Assembly's agenda based on successful *popular initiatives*. Since 2010, the legislative and the executive power's approach to direct democracy has radically transformed. The Government started to use frequently the so-called *national consultation* in important legislative issues – a misleading communication tool which has no legal background. Besides, based on the new Fundamental Law of Hungary (2011) and the new Act on Electoral Procedure (2013), the possibility of a successful national referendum has been greatly restricted: there is prescribed as a *necessary condition for a valid result* that the majority of the voters should cast a valid vote. This condition was barely reached twice in the preceding period. Furthermore, the institution of *popular initiative is not part of the legal system* anymore.

These trends are demonstrating that the classic tools of direct democracy are losing their relevance, while populist instruments are used more frequently in practice. The purpose of this paper is to contribute to the contemporary debate related to this challenge.

Keywords: national referendum, national consultation, minority direct democracy, plebiscitarian direct democracy

I. The Way We Should Think about Direct Democracy

Why are questions related to direct democracy relevant? One can assume that the usual tools of direct democracy do have weak influence on politics in parliamentary democracies. In modern societies – which are divided by different experiences, preferences, and opinions of their members –, there is no better option to reach a decision which represents the presumed interest of the community than a majoritarian decision-making of representative bodies. If parliaments are formed based on free and fair elections, then the majoritarian decisions of these – from the formal point of view – can be considered legitimate without any doubt. Moreover, the open debate in parliament can deliberate alternative opinions in complex social issues and therefore offers a useful framework to control the actions of the government.

However, the support of the majority of the elected representatives is not the only requirement related to decision-making in modern democratic societies. The famous phrase about the ‘tyranny of the majority’¹ demonstrates that the interests of the actual majority in some cases can counter the rights or interests of minorities in a way which is not acceptable. This is the case when fundamental rights are limited, other constitutional values are infringed, or certain minorities simply do not have the chance to raise their voice. Rules which function as safeguards and techniques related to the decision-making process can also effectively prevent such situations. In the case of parliaments, the veto power of the head of the state, the judicial review of the legislative decisions, and also the tools of direct democracy are traditional *external limits of majoritarian power*. The open debate in parliament which can deliberate alternative opinions, as well as supermajority requirements, can be considered as *internal limits of the majority*.

Direct democracy has special relevance in other aspects as well. It is not only an external limit of the majoritarian power but rather it is a tool which is in close connection with the principle of people’s sovereignty. When people have a right to participate directly in the most important decisions of the community, their position is similarly strong as in the case when they authorize the elected representatives to act in their names. One can state that referenda and other tools of direct democracy are not necessary preconditions of constitutional states. One can also add that in many countries with remarkable constitutional history and practice this institution is not available to the citizens.² However, in case a constitution opens these modalities of exercising power for the members of the political community, these should be taken seriously. The right to participate at a referendum is a political right which calls for sufficient procedural safeguards.

1 For the classic approaches, see Madison (1787) and Tocqueville (1835).

2 According to the database of the International Institute for Democracy and Electoral Assistance (IDEA), 57% of 188 countries use mandatory referenda, while 64% use optional referenda at the national level.

II. Trends Related to the Practice of Direct Democracy in Hungary (1989–2011)

The classic tools of direct democracy are relatively new institutions in Hungary, introduced right after the fall of the ‘state-socialist’ regime in 1989. The most relevant tools used at the national level were *referenda* and the institution of *people’s initiative*.

In the preceding period, citizens participated six times at *referenda* to express their opinion in altogether twelve questions. At the end of 1989, in the so-called ‘four yeses’ referendum, the questions raised were related to the following topics: (a) the timing of the election of the president of the republic (the head of the state), (b) the dissolution of the party militia, (c) the prohibition of party organizations at workplaces, and (d) the report on the state-socialist party’s property. Right after the ‘four yeses’ referendum, in 1990, there was organized a referendum on the modality of electing the president (directly or by the parliament). The 1997 referendum concerned the North Atlantic Treaty Organization (NATO) membership, while the 2003 referendum the accession to the European Union. In 2004, citizens could vote for two issues: (a) the citizenship of native Hungarians living outside the country and (b) the privatization of hospitals. The 2008 referendum concerned three questions closely related to social policies (the so-called ‘social referenda’): (a) daily inpatient fee in hospitals, (b) outpatient medical consultation fee, and (c) university tuition fee.

It seems appropriate to assess these referenda from a broader perspective – that of the position of the political community.

In 1989 and in 1990, the questions were closely related to the important political *issues of the transition and democracy-building*. In 1989 – in the absence of a freely elected parliament –, some of the then opposition parties intended to put symbolic questions on the political agenda in order to build up political support for their organizations.

The referenda on the NATO (1997) and EU membership (2003) form the second stage in this line of evolution. These questions concerned the *country’s main strategic aims* – therefore, the referenda were to some extent solemn declarations of the will of the political community.

The referendum has become an *outsourced instrument of the daily political debate* between government and opposition since 2004. All the questions raised in 2004 and 2008 were initiated with the support of the then opposition parties. One can also note that the 2008 ‘social referenda’ were obviously successful from the point of view of the initiators as they resulted in the symbolic political defeat of the prime minister and the governing parties. This period could be considered as the third stage in the history of national referenda.

The issues set on the agenda of the National Assembly by the *people's initiative* show a variety of the topics based on the actual interests of the initiators. The National Assembly dealt with altogether 16 questions based on people's initiatives in the preceding period, in four cases deciding in accordance with the original proposal of the initiators.

At this point, it is worth mentioning the way the Constitutional Court assessed the function of direct democracy in the constitutional system of Hungary based on the previous Constitution (1989) and the legal background. In the early years, the Constitutional Court stated that 'in the constitutional order of Hungary the primary form of exercising popular sovereignty is representation'.³ The statement had special relevance, as the relation between direct and representative democracy was not stipulated in the text of the Constitution at that time. Four years later, the Court declared that 'the direct exercise of power is an exceptional form of exercising popular sovereignty, but in exceptional cases when it is actually realized it stands above the exercise of power through representatives'.⁴ The assessment is to some extent controversial as it can be interpreted as a clarification of the principle explained in the previous decision, while at the same time as well as a new principle which contradicts the former. It is also important to note that the Constitutional Court interpreted the relationship between direct democracy and the constitution-amending power as well, declaring that 'the Constitution cannot be amended – on the basis of a voter initiative – through a referendum'.⁵ One can add that the Constitution did not contain a restriction in this respect.

III. Regulation after 2011

The Fundamental Law of Hungary (2011) in many aspects sustained the institutions of direct democracy used since 1989. The text of the Fundamental Law repeats the former ascertainments (including the possible implicit contradictions) of the Constitutional Court on the relationship between representative and direct democracy.⁶ On the other hand, the Fundamental Law modified the way direct democracy can be exercised in important aspects.

Based on the former regulation, a national referendum has to be ordered *mandatory* by the National Assembly based on the imitation of at least 200,000 citizens eligible to vote, while a national referendum could be ordered by the *discretionary resolution* of the Parliament based on the imitation of (a) at least 100,000 citizens eligible to vote, (b) the President of the Republic, (c) the

3 Decision 2/1993. (I. 22.) CC.

4 Decision 52/1997. (X. 14.) CC.

5 Decision 25/1999. (VII. 7.) CC.

6 See Article B Section (4) of the Fundamental Law.

Government, and (d) at least one third of the elected MPs. The Fundamental Law sustained the regulation in this respect, except the imitation of the MPs – therefore, *the sphere of action of parliamentary minorities is weakened* in this regard.

A national referendum can be initiated exclusively in a question which falls within the competence of the National Assembly, as the parliament is the addressee of the question raised. The Fundamental Law contains a detailed list on the topics in which no referendum may be organized.⁷ The most of these topics are ‘classic’, well-known in other country regulations and the former Hungarian Constitution as well (e.g. central budget, international treaties, declaration of state of war, etc.). However, the new list of the ‘excluded topics’ of the Fundamental Law contains two new elements: (a) matters aimed at the amendment to the Fundamental Law (a ban earlier declared by the Constitutional Court) and (b) the content of the Acts on the elections. One can note that based on the new regulation the *members of the political community have less sphere of action to influence the way they elect their representatives*.

Based on the former constitution, there was no validity requirement related to the turnout: a referendum was conclusive if at least one quarter of the total number of citizens had given identical answer to the question concerned. However, the Fundamental Law prescribes a rigid validity requirement: a national referendum shall be valid if more than half of all voters participate at the referendum and cast valid votes. One can note that *the new validity requirement is not easy to comply with*: citizens participated at referenda in such proportion only twice in the previous period.⁸

According to the Fundamental Law, the outcome of the valid referendum is always binding on the Parliament for a three-year period, while based on the former regulation *consultative referenda* (referenda with no binding effect) also existed. This modification demonstrates that *the effects of national referenda are stronger*.

It is also an important new element of the Fundamental Law in this regard that *the people’s initiative is no longer part of direct democracy* in Hungary. It is remarkable that this institution was a balanced tool to influence politics⁹ in a way which was suitable to overcome the classic conflict between representative and direct democracy.

7 See Article 8 Section (3) of the Fundamental Law.

8 The voter turnouts were the following: 1989: 58.03%, 1990: 14.01%, 1997: 49.25%, 2003: 45.62%, 2004: 37.49%, 2008: 50.51%, 2016: 41.32%.

9 See Article 28/D of the 1989 Constitution: *At least 50,000 voting citizens are required for a national popular initiative. A national popular initiative may be for the purpose of forcing the Parliament to place a subject under its jurisdiction on the agenda. The Parliament shall debate the subject defined by the national popular initiative.*

IV. Trends Related to the Practice of Direct Democracy in Hungary after 2011

During the heated debates related to the drafting process of the Fundamental Law (2010–2011), it has been suggested that the new constitution of the country needs stronger legitimacy than that of the MPs of the governing coalition (Fidesz¹⁰ and KDNP¹¹), which maintained two-thirds of the parliamentary seats in the parliamentary term of 2010–2014. However, the governing parties maintaining the exclusive supermajority power expressed that they have no intention to confirm the Fundamental Law by a national referendum – a possibility opened based on the 1989 Constitution,¹² which was in force at that time. It is well-known that the unilateral constitution-making process was intensively criticized by opposition parties, scholars,¹³ NGO-s, and international organizations.¹⁴

On the contrary, the Government started to use *national consultations* in order to ask for the opinion of the voters in daily policy issues – for the second time on questions related to the Fundamental Law. Before passing the Fundamental Law, every citizen received a simplified questionnaire, which contained 12 questions. Questions about complex constitutional issues and fundamental rights were formulated in a very simple way and even suggested the expected answers. The unilateral consultation, which lacked any professional or ethical standards, was not suitable for any ‘in-merit consultation’ even if approximately 10 percent of the citizens returned their answers to the Government. It is also doubtful whether these answers had any effect on the drafting process of the Fundamental Law. One can add that since 2010 altogether five national consultations have been organized in Hungary, and the sixth one takes place in 2017.

It is important to note that *Hungarian national consultations are clearly different from the complex methods with similar name* and known from comparative constitutional law. The recommendation of the UN High Commissioner for Human Rights for post-conflict states in matters of transitional justice¹⁵ or the constitutional practice of some Latin American states¹⁶ can be mentioned in this respect. The Hungarian national consultation *has neither constitutional foundations nor any special function in the decision-making processes of*

10 Alliance of Young Democrats.

11 Christian Democratic People's Party.

12 See Article 26. Section (6) of the 1989 Constitution.

13 For detailed analysis on the question of legitimacy, see Sonnevend–Jakab–Csink 2015. 33–109.

14 In its Opinion on the new constitution of Hungary (Venice, 17–18 June 2011), the Venice Commission stated the following: ‘it is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by a lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe’.

15 See: http://www.ohchr.org/documents/Publications/NationalConsultationsTJ_EN.pdf.

16 See Barczak 2001. 37–60.

the political community. Even though it seems like a similar technique to the national referendum, in practice, it is quite different. The questions raised, and even the possible answers, are formulated exclusively by the Government, there are no constitutional safeguards related to the procedure (including judicial review), and the legal consequences are uncertain. As a result, the use of national consultations – as communication tools – can be considered as the *illusion of direct democracy*.

The *fifth national consultation on immigration and terrorism* was held in the summer of 2015 aiming at building up public support for the restricting immigration policy of the Government. In the following period, extremely restrictive legal measures took place in Hungary as a reaction to the European refugee crisis. The measures taken were intensively criticized by the international community.¹⁷

As a symbolic element of this immigration policy, on 16 February 2016, the Government initiated a national referendum on the following question: ‘Do you want to allow the European Union to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?’ The National Election Committee authenticated the question,¹⁸ and later its decision was approved by the Curia¹⁹ (the Supreme Court of Hungary). Both decisions generated *intensive critiques*,²⁰ as they did not take into account that (a) the addressee of the question was not the National Assembly but the European Union, (b) the issue of the referendum (the possible constraints of the European Union) was an ‘excluded topic’ as it is regulated in an international (European) treaty, and (c) the question was not worded in a manner that allows a straightforward response. At the referendum organized on the 2nd of October 2016, only 41.32% of the voters cast valid votes; therefore, the validity requirement prescribed in the Fundamental Law was not met. However, later, the Government initiated an amendment to the Fundamental Law related to this topic, which was eventually not supported by the National Assembly.²¹

As a consequence, the national referendum functioned as an *instrument of populist majoritarian politics* in 2016 as the newest stage in the line of evolution of the institution in Hungary.

17 See also the detailed analysis of the United Nations Refugee Agency (UNHCR).

18 See Decision 14/2016 of the National Election Committee.

19 See the Decision Knk. IV.37.222/2016/9 of the Curia.

20 Halmai 2016, Pozsár-Szentmiklósy 2016. 77–84.

21 On the analysis of the proposed Seventh Amendment to the Fundamental Law, see Uitz 2016.

V. The Way We Should Use Direct Democracy

From a broader perspective, there are many arguments supporting direct democracy as well as convincing counter-arguments.

Direct democracy can effectively influence legislation in many cases. Moreover, it can function as *counterbalance of the parliamentary majority*: as a result of a national referendum, political actors are under greater pressure to meet minority demands. This phenomenon can lead to a consensus-orientated decision-making process.²² A national referendum can also function as a very spectacular way to express the political opinion of the active members of the political community.

On the other hand, strong arguments are demonstrating that direct democracy has more disadvantages. In many cases, *initiatives directly target minority interests* by supporting the preferences of the actual majority.²³ Due to the fact that the tools of direct democracy do not offer a deliberate process, ‘people often vote about initiatives without really understanding what they’re about’.²⁴ It is also a strong argument that ‘while the principle of separation of powers offers a structural protection for the most important constitutional values by effecting a diffusion of powers among the different branches of the government, in the case of direct democracy, checks and balances do not function’.²⁵

Both approaches face a ‘collective dilemma’ on relying on median voters on matters of collective deliberation and restraining at the same time the median voter on issues related to individual rights.²⁶ For the possible solution of the dilemma, it seems useful to distinguish between the main types of direct democracy on a *functional basis*. Silvano Moeckli differentiates between *minority direct democracy*, where ‘a minority of qualified voters or members of parliament can bring an issue before the electorate against the will of the political majority’, and *plebiscitary direct democracy*, where ‘a political majority holds a referendum on an issue that it could decide on its own’.²⁷ In this sense, minority direct democracy can bear the possible advantages of direct democracy, while plebiscitary direct democracy has probably more disadvantages.²⁸

22 Moeckli 2006. 107–124 (especially 118.).

23 See Chemerinsky 2007. 293–306 (especially 297.).

24 See Chemerinsky 2007. 299.

25 See Chemerinsky 2007. 296.

26 See Epstein 2011. 819–826 (especially 823.). The author also emphasizes that ‘no constitutional democracy can afford to neglect either part of the two-step game’. See Epstein 2011. 823.

27 See Moeckli 2006. 107.

28 The influence on the legislation, counterbalancing parliamentary absolutism, and the protection of minority interests can be mentioned as the possible benefits of direct democracy, while populist campaigns, avoiding compromise solutions, and the exclusiveness of the majority opinion as typical weaknesses. See Morel 2012. 501–528, 502–507.

In the Hungarian legal order, both functional types of direct democracy are present. Many of the elements of the new regulation (excluding the initiation of a national referendum by the parliamentary minority, extension of the ‘excluded topics’, prescribing a higher turnout requirement, excluding the consultative referenda and the people’s initiative) are *weakening the sphere of action for minority direct democracy*, while worrying tendencies (the frequent use of national consultations, initiating a national referendum by the Government in a question which is already decided, questionable decisions of the National Election Committee and the Curia) are *strengthening the effects of plebiscitary direct democracy*.

It is high time to shift to focusing to the *genuine exercise of political rights* related to direct democracy.

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