

SVK-2014-3-003

a) Slovakia / b) [Constitutional Court](#) / c) Plenum / d) 28-10-2014 / e) PL. ÚS 24/14 / f) / g) / h) CODICES ([Slovak](#)).

Keywords of the Systematic Thesaurus:

- [01.03.04.06.01](#) Constitutional Justice - Jurisdiction - Types of litigation - Litigation in respect of referendums and other instruments of direct democracy - **Admissibility** .
- [04.09.02.01](#) Institutions - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy - **Admissibility**.
- [04.09.02.02](#) Institutions - Elections and instruments of direct democracy - Referenda and other instruments of direct democracy - **Effects**.
- [05.03.32](#) Fundamental Rights - Civil and political rights - **Right to private life**.
- [05.03.34](#) Fundamental Rights - Civil and political rights - **Right to marriage**.
- [05.04.02](#) Fundamental Rights - Economic, social and cultural rights - **Right to education**.

Keywords of the alphabetical index:

[Marriage](#), same-sex couple / [Couple, same-sex](#), marriage, right / [Couple, same-sex](#), adoption, right / [Couple, same-sex](#), rights / [Couple, same-sex](#), protection / [Referendum, question](#), limit.

Headnotes:

The irrevocability of human rights means that the standard (level) of human rights as set in the constitutional text cannot be reduced. If the subject of a referendum would lead to the broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights to such a degree that it would jeopardise the nature of the rule of law, such a referendum would not be constitutionally acceptable.

Summary:

I. In Slovakia, a referendum may be initiated by a petition signed by at least 350,000 voters. The questions must relate to the public interest, but the subject of the referendum must not be basic rights and freedoms.

A referendum may be used to decide on crucial issues in the public interest (Article 93.2 of the Constitution). No issues of fundamental rights, freedoms, taxes, duties or national budgetary matters may be decided by a referendum (Article 93.3 of the Constitution).

The Constitutional Court may review whether the subject (question) of the referendum conforms to the Constitution on the request of the President, who announces the referendum. In 2014, 408,000 voters asked the President to announce a referendum on the following questions:

1. Do you agree that the term marriage' may not be used to designate any other form of cohabitation of persons other than the union between one man and one woman?

2. Do you agree that pairs or groups of persons of the same sex may not be allowed to adopt children and subsequently to bring them up?

3. Do you agree that no other form of cohabitation of persons other than marriage should be accorded the special protection, rights and obligations which are accorded solely to marriage and spouses by the legal system as at 1 March 2014 (especially recognition, registration and documentation as a union for living by public authority, or the possibility of a child's adoption by the other spouse of the child's parent)?

4. Do you agree that schools may not require children to attend lessons in the field of sexual behaviour or euthanasia, if their parents and the children themselves do not agree with the teaching content?

The President doubted whether the first question was in the public interest, because the Constitution had recently been amended in the same sense. Moreover the question relates to the right to privacy, which the President viewed from the perspective of the European Court of Human Rights case-law.

The President questioned whether the second and third questions were admissible because they related to the right to privacy (Article 19 of the Constitution) and the rights set out in Article 41.4 of the Constitution (childcare and upbringing shall be the right of parents; children shall have the right to parental care and upbringing). The President supported his arguments with the European Court of Human Rights and European Court of Justice case-law. In his view, the third question was also imprecisely formulated.

Regarding the fourth question, the President opined that it involved a narrowing of the school curriculum, which might interfere with the essence of the right to education.

So the President asked the Court to review whether the questions were in conformity with Article 93.3 in connection with Articles 1.2, 7.5, 12.2, 19.2, 41.1, 41.4, 42.1 and Article 93.2 of the Constitution.

II. The Court stressed that this was the (very) first time it had reviewed the subject of the referendum within this particular competence. It referred to its case II. ÚS 31/97 (*Bulletin* 1997/2 [[SVK-1997-2-005](#)]; binding interpretation of the Constitution) in which the Court ruled that a request to amend the Constitution may be the subject of a referendum.

Another, possibly more problematic area is that of the legal effects of a referendum, as Parliament is the sole constitution-framing and law-making body pursuant to Article 72 of the Constitution. However, the constitutional concept of a referendum supports the existence of its legal effects. The Constitution prescribes strict conditions which have to be fulfilled in order that a specific referendum firstly may be announced (Article 95.1 of the Constitution), and secondly may be valid and effective (Article 98.1 of the Constitution).

It follows that the result of a valid referendum has a high level of legitimacy, which is also confirmed by Article 99.1 and 99.2 of the Constitution (the National Council may amend or annul the result of a referendum by passing a constitutional law, but only after a period of three years has elapsed from the date of promulgation of the result, and a referendum may be

repeated on the same issues at the earliest after a period of three years elapses from the date it was held).

The substantive background of the results of a referendum therefore clearly favours the existence of legal effects of a referendum, since all proposals confirmed by a successful referendum are promulgated in the Collection of Laws by the National Council in the same manner as its laws (Article 98.2 of the Constitution). With respect to possible collisions between the legal effects of a referendum and the exclusive legislative power of Parliament, the Court concluded that Article 72 of the Constitution does not preclude passing generally-binding legal regulations with the same legal force as laws or constitutional laws through referendum.

The subject of a referendum must not be basic rights and freedoms. A wider interpretation of this norm might work against the functionality (purpose) of referenda. The Court considers as basic rights and freedoms also human rights treaties, not just the Constitution. The power to review the subject of a referendum must be differentiated from the usual, abstract, judicial review of legal norms. The idea of prohibiting referenda about human rights is rooted in the protection of individuals and prevention of the risk of totalitarianism. Some countries protect freedoms even with the «*Ewigkeitsklausel*» (prohibition to amend certain articles of the Constitution).

In the Slovak Republic, by comparison, the inalterability of constitutional provisions guaranteeing fundamental rights and freedoms is protected primarily by Article 12.1 of the Constitution (Basic rights and freedoms are irrevocable, inalienable, imprescriptible, and infeasible.), but provisions with the same purpose are undoubtedly included also in Article 93.3 of the Constitution.

For this reason, regarding its decision-making on the proposal of the President under Article 125.b of the Constitution, the Constitutional Court inclined to the interpretation according to which Article 93.3 of the Constitution prevents referenda which if successful would entail breaching of the concept of fundamental rights and freedoms through lowering the standard deriving from international as well as national law to an extent threatening the character of the state governed by the rule of law.

On the other hand, it is not possible to reject every question which might even minimally affect one or other fundamental right or freedom. Otherwise this could lead to denial of the sense and purpose of referenda themselves, which Parliament as framer of the Constitution certainly did not mean by including Article 93.3 in the Constitution.

The Constitutional Court needs to balance these two conflicting notions in its decision-making on any specific challenged referendum question, in the sense that it should examine the consequences of potential outcomes of a successful referendum for persons and entities affected by the rules resulting from such a referendum.

As Article 12 of the Constitution guarantees the irrevocability of human rights and Article 93.3 of the Constitution has a similar purpose, the Court argued that this irrevocability means that the level of human rights as set in the constitutional text cannot be reduced. This implies that if the subject of a referendum would lead to broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights, such a referendum would not be constitutionally acceptable.

Question 1: The Court stated that the fact that marriage had been recently defined in the Constitution was clear evidence that the question was in the public interest. Specifically, Article 41.1 of the Constitution reads:

«Marriage is a unique union between a man and a woman. The Slovak Republic comprehensively protects and fosters marriage for its own good.»

The Court added that there is no right to same-sex marriage according to the European Court of Human Rights. A positive answer to the first question in a valid referendum would strengthen the current constitutional definition of marriage. So there would not be a reduction of the human rights standard as stipulated in the Constitution or in the European Court of Human Rights standards. So Question 1 was declared acceptable.

Question 2: The European Court of Human Rights case-law states that it is a matter for the member states to determine whether they allow one member of non-married couples (whether homosexual or heterosexual) or a person in registered partnership to adopt a child of the other partner. However if they allow this for non-married heterosexual couples, then it is discrimination to completely exclude same-sex couples from adopting. The Family Code allows adoption by spouses or by a married stepparent, so adoption is in any case based on marriage, as in the European Court of Human Rights' *Gas and Dubois* case. From this point of view, the second question would not reduce the standard of the right to privacy (Article 19) in the sense intended by Article 93.3 of the Constitution. So Question 2 was declared acceptable.

Question 3: The Court opined that (nominally) this question has no gender connotation. It excludes all non-marriage cohabitations from particular «marriage» rights. These rights relate to the right to privacy. The Court realised that the legal order accords these particular rights also to other forms of cohabitation of persons (such as unmarried couples). From this point of view, the question was ambiguous. Also it might lead to reducing the standard of the right to privacy for other already-recognised forms of cohabitation of persons. So Question 3 was declared non-acceptable, i.e. not in conformity with Article 93.3 of the Constitution in connection with Article 19.2 of the Constitution.

Question 4: The Court argued that this question might produce a result leading to an acceptable balance between the interests of children on the one hand (Article 42.1 of the Constitution, whereby every person shall have the right to education) and interests of parents on the other (Article 41.4 of the Constitution, whereby childcare and upbringing shall be the right of parents; Article 24.2 of the Constitution on religious freedom). The particular implementation of the result might raise constitutional dispute, but this would be a matter of review of ordinary laws. So Question 4 was declared acceptable.

III. There were dissenting opinions. One judge argued that the whole methodology should have been different. Instead of the prohibition of reducing the standard of rights, just the criterion of «relating to basic rights» should have been used. From this point of view, he could accept only the fourth question. The reference criterion should have been not particular constitutional articles or Strasbourg case-law, but the constitution itself, i.e. constitutionality. He also cited the decision of Italian Constitutional Court in *Corte Costituzionale*, 45/2005, *Bulletin* 2005/1 [[ITA-2005-1-001](#)].

In his dissenting opinion another judge said that he would put more stress on normative consequences of referendum. He accepted the methodology based on prohibition of non-reduction of the standard of human rights, but he suggested that this standard should contain not just human rights but also principles of anti-discrimination, state governed by the rule of law, democracy and even the natural law approach. From this point of view, he could not allow the second question either.

Supplementary information:

The President announced the referendum in line with the decision of the Constitutional Court. It was held on 7 February 2015. Participation in the referendum amounted to 21.41 % of all voters, so it was not valid. The reason is that Article 98.1 of the Constitution stipulates that the results of the 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.

Cross-references:

European Court of Human Rights:

- *Gas and Dubois v. France*, no. 25951/07, 15.06.2012.

Constitutional Court of Italy:

- no. 45/2005, 13.01.2005, *Bulletin* 2005/1 [[ITA-2005-1-001](#)].