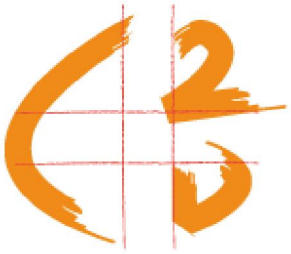

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Czech Republic:

Country Report

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ABSTRACT

The institute of referendum has not enjoyed a particularly active history in the Czech Republic (and prior to that state's birth on 1 January 1993, in the Czechoslovak Republic). It has existed both on the nation-wide level and locally, and it is on the latter level that it has laid more roots in the proper sense. The institute of referendum on a nation-wide level has been for all intents and purposes virtually non- existent. Although it has existed in the legal order at various times since the establishment of the Czechoslovak Republic in 1918, it has not existed at all times, and during periods when there was a positive legal basis for it, it was always regulated in the narrowest possible sense. The local referendum, which will be dealt with in turn, has had a more active career, but by its very nature has not had broad impact on political or legal affairs either.

CONTENT

Direct Democracy: country-report on the Czech Republic

Mark Gillis

1. Introduction

The institute of referendum has not enjoyed a particularly active history in the Czech Republic (and prior to that state's birth on 1 January 1993, in the Czechoslovak Republic). It has existed both on the nation-wide level and locally, and it is on the latter level that it has laid more roots in the proper sense. The institute of referendum on a nation-wide level has been for all intents and purposes virtually non-existent. Although it has existed in the legal order at various times since the establishment of the Czechoslovak Republic in 1918, it has not existed at all times, and during periods when there was a positive legal basis for it, it was always regulated in the narrowest possible sense. This latter aspect probably in large measure accounts for the fact that the institute has had no practical impact in the Czech Republic: since the establishment of the Czechoslovak Republic in 1918 not a single nation-wide referendum has been held.

The local referendum, which will be dealt with in turn, has had a more active career, but by its very nature has not had broad impact on political or legal affairs either.

In view of the fact that the institution of referendum does not have an extensive history and is not currently regulated, I propose to depart from the guideline for country reports and instead make a brief historical survey of the history of this institution since 1918. I consider that this approach will give a better illustration of the general attitude taken toward the referendum in the Czech Republic (the traditional negative attitude toward any form of direct democracy, as Prof. Filip characterized it in his brief initial report).

2. First Republic

The Constitutional Charter of the Czechoslovak Republic provided for a very limited form of referendum – a facultative referendum that could be called solely at the initiative of the government and solely in relation to a statute which the government had proposed and the Assembly had rejected. The general attitude toward referenda might be seen from the fact that the original draft of the 1920 Constitutional Charter did not contain a provision on referenda; it was not until debate on it that the Assembly itself introduced a provision (Art. 46) on referenda. That attitude is also well explained by the following quote from Headlam-Morley: “Distrust of a representative assembly . . . has always been strong in Germany; and it is in that country and in those influence by German thought that the widest use of the referendum and initiative has been made. . . . In Poland, Yugoslavia, and Czechoslovakia, on the contrary, where the influence of French constitutional thought is stronger, the referendum and initiative have been entirely or almost entirely, dispensed with. So strong, however, was opinion in

favour of the theory of direct legislation that the system was rejected in these countries, not so much because it was objected to in principle, but because it was considered unsuitable for a people not long used to the practice of self-government." [Headlam-Morley, A., **The New Democratic Constitutions of Europe**, (Oxford University Press, 1929). P. 133]

Article 46 of the Czechslovak Constitutional Charter provided that, in case the Parliament rejected a statute proposed by the government, the government could, by unanimous resolutions, put the statute to a referendum. As the government was the only possible initiator, the provision could certainly not be considered as a means of strengthening direct democracy, rather a type of instrument for affecting the balance between the legislative and executive branches. Also of note, changes to the Constitution could not be effected in this way, so that one of the most significant characteristics of referenda, leaving to "the people" decisions on basic issues of governance, was in Czechoslovakia the very thing denied to the people. This aspect was also pointed out by Headlam-Morley: "Its object is to strengthen the position of the Government as against the Chamber . . . [it] seems to be to enable the Government to pass a measure against the will of Parliament, without taking the extreme step of dissolving Parliament. So far the cause has remained a dead letter." [Headlam-Morley, A., **The New Democratic Constitutions of Europe**, (Oxford University Press, 1929). P. 139]

Issues of how referenda were to be held were meant to be regulated in a statute. As such a referendum could only diminish Parliament's role, it is not surprising that none was ever adopted, leaving Article 46 a "dead letter". [Id.]

3. 1991 Constitutional Act

Federal Assembly of the CSFR Constitutional Act of 18 July 1991 No. 327/1991 Sb., on Referenda, provided the first legal basis for a nation-wide referendum since the 1920 Constitution was repealed in 1948. While this Act has some very significant and powerful elements of direct democracy, it concerned basically one issue - the resolution of constitutional relations within the federation of the Czech and Slovak Republics. Had this tough issue been resolved by political means, Act No. 327/1991 Sb. would apparently have lost its purpose and significance. As it was, its significance (or lack thereof) was amply demonstrated by the fact that, when the terminal crisis of the CSFR came about, this Act was entirely ignored.

Act 327/1991 provided for the calling of referenda on two issues: the first - rather generally phrased (albeit still limited in breadth) - concerned the decision of basic issues of the CSFR constitutional organization; the second - a very specific issue - the decision whether a republic should secede from the federation. Of course, in a certain sense, these two issues shade into each other - the referendum on secession is a specific instance of the more general type, differing perhaps only in its apparent finality and the fact that it is held at the republican level. Also, the more general one encompassed the issue of joint (federation-wide) decisions on dissolution by agreement not by

secession. While the referendum on the former issue was facultative (to be called only at the initiative of the Federal Assembly), on the latter issue a referendum was mandatory, to be called by the national council of the republic contemplating succession. Although no direct (people's) initiative was contemplated, the people's voice was binding in the sense that, in the general case, the results had "the binding force of a constitutional act". Though nothing in the Act prevented the Federal Assembly from subsequently adopting a contrary act and overruling the people (although this would seem to be contrary to the point of a referendum), a negative result was binding in the sense that no further referendum on the same issue could be held for five years (a rule for stability). Although again, it seems there would have been nothing to prevent the Federal Assembly from overruling the negative result - immediately if it wished.

Article 6 para. 3 makes amply clear that a positive result on the second issue - the succession vote - was binding, as it directly lays down the consequences, namely that the federation should come to an end one year following the announcement of the results and that each republic would become bearers of full state sovereignty. While no explicit provision barred the Federal Assembly from overruling such a result by the adoption of a subsequent constitutional act (of course, politically such a move would have been highly unrealistic), the documents makes clear that this is meant to be a final and binding decision.

Since the referendum was binding and had such far-reaching and permanent consequences, a rather stricter voting majority was required; an absolute majority (50% plus one) of all eligible voters had to vote in favor (the more typical requirement calls for 50% vote with participation of at least 50% of the eligible voters, theoretically allowing just over 1/4 of eligible voters to decide an issue).

Article 1 para. 1 provided that a proposal for secession of the CR or SR could be decided only by referendum. It is possible that dissolution by agreement (the route actually taken, at least in the estimation of most people) was not covered. If this restriction was truly intended, one could say that, in any case, Federal Assembly of the CSFR Constitutional Act of 25 November 1992, No. 542/1992 Sb, on the dissolution of the CSFR, repealed it. Whether it was legitimate for it to do so requires different answers in the political and legal sense. Politically one could say no, but they got away with it. Legally, it is hard to argue for the entrenchment of this provision, so that the constitutional act later in time should prevail over the former.

4. The Czech Republic since 1993

As far as concerns the already existing legal regulation of the institution of referendum, since Act No. 327/1991 Sb. was never formally repealed, questions are raised about its present validity. Prof. Filip lays down the strong case (for purposes of argument, not necessarily to indicate his agreement therewith) for this Act having some current effect, in order to show that it would still not provide a sufficient basis as to authorize the holding of a referendum at the present time. [Filip, Ustavni pravo v CR, pp. 371-72]

First, the 1993 Constitution brought several crucial changes to the legal order in the Czech Republic. Constitutional Act No. 4/1993 Sb., contains a general reception clause providing that all constitutional acts of the CSFR were received as constitutional acts of the CR as of 31 December 1992. However, as of 1 January 1993, those acts either were repealed (by virtue of Article 112 para. 2 of the Czech Constitution repealing all constitutional acts amending or supplementing the 1960 CSSR Constitution), or the surviving acts were derogated to the status of ordinary statutes, hence under Article 2(2) of the Czech Constitution (which requires a constitutional act as the basis for a referendum) were of an insufficient legal strength to provide the legal basis for a referendum. Further, the 1991 implementing statute (No. 490/1991), as called for in Article 7 of Act No. 327/1991 Sb., while still existing in the legal order, is merely a body without a head - a statute with no purpose because its application presupposes a constitutional act on referenda.

The 1993 Constitution itself contains no explicit reference to the institute of referendum, rather Article 2 of the Constitution, which concerns the sovereignty of the people (para. 1 contains the standard proclamation that "All state authority emanates from the people; they exercise it through the legislative, executive, and judicial bodies") makes an explicit reference to direct democracy in para. 2, which provides: "A constitutional act may designate the conditions under which the people may exercise state authority directly." Several important consequences follow from this Article. There is currently no positive law basis in the Czech Republic for the institute of referendum. Unless and until a constitutional act concerning the matter is adopted, "the people" as holders of state authority have delegated that authority to state bodies, which exercise it in their name. The Czech Republic is, in a full sense, a representative democracy. Further, the wording of Art. 2 para. 2 makes perfectly clear that the state has absolutely no obligation to adopt such a constitutional act; the Constitution gives it facultative authority - "a constitutional act may designate". Hence, the situation bears strong similarities to that which existed under the First Republic. The institute of direct democracy was introduced in principle in the Constitution, but the perfected legal authority for holding one depends on further actions, when the state authorities generally lack any political will to adopt such further enactments as would perfect the legal basis for the institute of referendum. As referenda can be introduced only by constitutional act, the current situation would seem to be even more intractable than that which existed during the First Republic, where a mere ordinary statute sufficed. The nearly dozen attempts to adopt such an act have so far been unsuccessful (however, see below, concerning the most recent and most successful attempt to date).

However, it would not be accurate to come to the conclusion that the Czech Republic will not adopt the institution of referendum, as further factors make the introduction of a referendum quite likely. In particular, all parliamentary parties agree at a minimum on the need to hold a referendum concerning the accession of the Czech Republic into the European Union. For this reason alone, there is a strong likelihood that a constitutional act on a referendum will be adopted during the current electoral term (which ends in June, 2002). The heart of the debate, then, centers on what type of act will be adopted,

and to what extent it will permit referenda. One of the main issues involves the form the constitutional act on referendum should take, whether it should a general act giving an open-ended authority for the calling of referenda on undesignated issues or whether it should be necessary for the Parliament to adopt a constitutional act specifically for each particular issue to be voted on in a referendum (as a discrete empowering act authorizing each particular referendum). Some deputies argue strongly for the bare minimum solution - which would mean authorizing a referendum solely on this single issue, essentially a solution whereby it would be necessary, in order for a referendum to be held, for the Parliament to adoption a discrete constitutional act authorizing it. Clearly, barring unique situations like the entry into the EU, with such an approach, it is highly unlikely that another such act would actually be approved. Prof. Filip deals with this issue by a grammatical interpretation of Art. 2(2) [Filip, p. 369] which favors the interpretation that the Act should authorize multiple or general use (in Czech, the use of the imperfect aspect of the verb "to exercise" indicates that a repeated or repeatable activity is contemplated, not a one-off decision). Another approach argues for the adoption of a constitutional act that would introduce a general institution of referendum, one not tied to any particular issue.

In December, 1999 the lower chamber of the Czech Parliament, the Assembly of Deputies, adopted a constitutional act on referenda. While the act was initially introduced by the government, that version (which opted merely for the one-off, EU accession issue solution) was significantly amended during debate to more nearly conform to a proposal earlier submitted by the Christian Democrat party which allowed for the open-ended authorization. Before it can enter into effect, the Act still must be adopted by a $3/5^{th}$ majority of the Senate, by no means a certain outcome.

In its adopted form, the Act provides for two types of referenda: first, a more general one concerning drafting principles of a constitutional act; and second a one-off referendum, concerned exclusively with accession into the EU. The first, as the name suggests, would call for public votes on the principles upon which a constitutional act should be drafted (the referendum could contain, as an appendix, the text of the constitutional act proposed to be submitted). Of course, since the question put to the people is of a strictly preliminary nature, the vote is not binding; it imposes an obligation only in the sense that an approved referendum places a duty upon the government to submit a proposal arising from (and in conformity with) the principles voted upon in the referendum. The Parliament is in no way obliged to approve that proposal, and apparently it would be entirely proper for the Parliament, after it has voted down the proposal, to adopt one entirely in conflict with the principles voted upon in the referendum (although one expects political parties normally would not have the temerity to act so blatantly in the teeth of the popularly-expressed will).

As regards the general type of referendum (on drafting principles of constitutional acts), the eligibility to initiate one would be so broad as to include, in addition to the government and two-fifths of the Deputies, a minimum of 250,000 eligible voters. Notably, the President would not himself be permitted to initiate a referendum, but would be obliged to call one whenever one of the qualified

initiators had properly invoked their power (see below for cases where he would be able to refuse for improper invocations). The referendum would succeed by a simple majority vote, that is, it would be adopted if at least one half of the eligible voters take part and at least one half vote in favor.

The President would not, however, be obliged to call a referendum if either he or a qualified number of MPs (either 41 Deputies or 17 Senators) submit a request for the Constitutional Court to decide that the proposed referendum question does not conform to this Constitutional Act or to the statute to be adopted pursuant to Article 4, para. 4 of the Assembly Draft, concerning detailed regulation of the issue. The Constitutional Court would have to decide within 15 days. Apparently the issue of conformity to this Act would include a determination as to whether substantive limits laid down in Article 1 para. 2 of the Assembly Draft have been respected. That Article excludes from the questions that may be posed any that are directed toward changes in the basic requirements of a democratic, law-based state, such as annulment or limitation of constitutionally guaranteed rights or freedoms (which would seem to rule out the reintroduction of the death penalty as Article 6 of the Charter of Fundamental Rights and Basic Freedoms clearly provides that the death penalty is prohibited), violation of the Czech Republics international obligations (which would rule out a vote on pulling out of NATO) fiscal matters, any recall issues, and any intervention into the exercise of judicial power. These limitations are odd considering that the vote is not binding and that on most, if not all of these issues, the Parliament could itself adopt such a change by the adoption of a constitutional act. Hence, it is a restriction on the people expressing their views in an officially recognized manner, which not incidentally avoids placing pressure on the politicians in these sensitive issues.

What is most striking about the way the Assembly's Constitutional Act regulates the EU entry referendum is that it would be facultative rather than obligatory. Either the government or two-fifths of the Deputies would be permitted to propose that such a referendum be held, but would not be required to do so as a condition to entry into the EU. In addition, eligible voters would be denied the right to initiate a referendum. This fact again evidences distrust in the vox populi, as in this most sensitive of issues the people are denied the right to demand a vote on the issue. Fortunately in this respect, at present there seems to be an overwhelming political will in favor of the necessity of holding such a referendum. Of even more significance, however, is the fact that such referendum would be merely consultative and not be binding on the state actors. Hence a negative vote would not prevent the Czech Republic from joining (as a legal matter, that is; the political consequences are quite another matter).

5. Local Referenda

The only type of referendum for which there currently exists legal basis in the Czech Republic is the local referendum, that is referenda concerning issues at the municipal level. Although this type of referendum is not specifically provided for in the Constitution, it is, nevertheless, considered an exercise of the constitutional right to local self-government (Articles 99-105 of the Czech

Constitution). Moreover, indirect support for it might be drawn from Article 21 para. 1 of the Charter of Fundamental Rights and Basic Freedoms (See Filip, p. 372), which provides: "Citizens have the right to participate in the administration of public affairs either directly or through the free election of their representatives." Otherwise, the local referenda is provided for by statute only (Czech National Council Act No. 298/1992 Sb., on Local Referenda), as well as implementing regulations.

Detailed rules for local referenda are laid down in the Act on Local Referenda, particularly concerning who may participate, what issues may be raised, and the procedures. Voting is limited to Czech citizens permanently residing in the municipality, who have unlimited legal capacity, and whose freedom has not been restricted due to medical reasons or incarceration in relation to a criminal matter. The only issue that must be put to a referendum is the division of a municipality into two or more segments. Optional referenda may only be held concerning matters within the jurisdiction of municipalities. Further, several very important matters may not be dealt with in a referendum: financial matters, the form of municipal government or recall of officers, matters that are dealt with in administrative proceedings, etc. A petition to hold a referendum may be submitted by any person who would be qualified to vote in it. The submitter must have gathered the number of signatures corresponding to a specific percentage of the local population (which varies depending on the size of the population, 30% of eligible residents in municipalities in which reside up to 3000 citizens, but only 6% for municipalities with over 200,000 residents). As there is no statutory rule restricting local government organs from subsequently adopting inconsistent legal acts, it is not entirely clear whether they are bound by referenda results.