

The Slovak Constitution as a path to national sovereignty and liberal democracy¹**Assist. Professor, PhD., Marek Káčer**

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Abstract: *This text presents a brief look into the history of the creation of the Constitution of the Slovak Republic, which recently celebrated its thirtieth anniversary. The author primarily focuses on the connection between the constitution-making and the disintegration of the Czechoslovak federation. From historical observations, he concludes that in the region of Central and Eastern Europe, the ethnic-cultural conception of the nation is still more preferred than the civic one. Then he considers whether the new Slovak Constitution was the work of political elites rather than the nation. In contrast to the contemporary Slovak constitutional theory, the author concludes the role of the nation in constitution-making was virtually non-existent, and yet, it is the nation which bears the ultimate responsibility for the constitution's protection.*

Key words: *Czechoslovakia, constitution, ethnic vs civic nation, nationalism, sovereignty, Slovakia, Velvet Revolution.*

Constituția din Slovacia privită ca o cale spre suveranitatea națională și democrația liberală

Rezumat: *Acest text prezintă o scurtă privire asupra istoriei creării Constituției Republicii Slovace, care a sărbătorit recent cea de-a treizecea aniversare. Autorul se concentrează în primul rând pe legătura dintre formarea constituției și dezintegrarea Federației Cehoslovace. Din observații istorice, el concluzionează că în regiunea Europei Centrale și de Est, concepția etno-culturală a națiunii este încă preferată celei civice. Apoi, el analizează dacă noua Constituție slovacă a fost opera elitelor politice, mai degrabă, decât a națiunii. Spre deosebire de teoria constituțională slovacă contemporană, autorul concluzionează că rolul națiunii în elaborarea constituției a fost practic inexistent și totuși națiunea este cea care poartă responsabilitatea finală pentru protecția constituției.*

Cuvinte cheie: *Cehoslovacia, constituție, națiune etnică vs. civică, naționalism, suveranitate, Slovacia, Revoluția de Catifea.*

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I. INTRODUCTION

On September 1, 2022, the Constitution of the Slovak Republic celebrated its 30th anniversary. A brief insight into the history of the creation of this document offers us valuable empirical material for reflection on the concept of sovereignty. Its summary looks as follows:

The Slovak Constitution is the result of the liberalisation process that occurred after the fall of communism in 1989 (1.). It is also the result of the emancipation of the Slovak nation, which led to the split of the Czechoslovak Federation into the unitary Slovak Republic and the Czech Republic (2.). The demise of Czechoslovakia confirms two conclusions: firstly, in the area of Central and Eastern Europe, the ethnic conception of nation prevails over civic one (3.), and secondly, despite the then-recent anti-communist revolution, in which broad sections of the population were involved, the creation of the fundamental law of the state was entirely in the hands of the political elite (4.). Although the Slovak political elite should have treated the Slovak Constitution better in the last two decades (5.), the people must ultimately guard its fundamental law (6.). The lesson to be taken from this development and the central thesis of the article is this: If people are to be sovereign, then not because they create a constitution of a law-governed democracy, but because this constitution lasts thanks to the people's civic engagement and conversely, it ceases to exist due to their indifference.

From a methodological point of view, this text presents a conceptual analysis based on historical enquiry, and it is a unique combination of democratic ideology with political realism.

II. THE FIRST WAVE OF LIBERALISATION

Although the Slovak Constitution was adopted on September 1, 1992, the constitutional foundations of the Slovak Republic began to emerge after the fall of communism in November 1989. The political leaders of the time abolished the exclusive position of the Communist Party of Czechoslovakia as the only ruling party; they also established democratic elections and gradually adopted the laws necessary for the implementation of civil rights, such as association law or assembly law (Gábriš 2016, 96). This first wave of liberalisation resulted in the adoption the Charter of Fundamental Rights and Freedoms at the beginning of 1991, which some authors call a "*constitutional revolution*" (Orosz et al. 2009, 13).

These observations confirm an obvious fact, namely that the transition of society from totalitarianism to democracy is unthinkable without interventions in the constitutional design of the state. That is why the Velvet Revolution of 1989 immediately began to manifest itself on the constitutional level.

This liberalisation trend was typical of all the states of the former Eastern Bloc, where communist regimes gradually fell like domino tiles. The commitment to human rights and their natural law origin was reminiscent of the period after the Second World War since "*natural law ideas and their postulates of justice always undergo a renaissance in periods of great upheavals, chaos and anarchy ... and immediately after them*" (Malenovský 2008, 88).

However, there were some differences between the post-war and post-revolutionary developments. While the Second World War was replaced by the Cold War between the Eastern and Western blocs, the collapse of the communist regime initially promised a much brighter future. Along with the demise of communist totality, the last relevant, powerful opposition to human rights and democracy also disappeared. The history of political

ideologies and institutions seems to have reached its finish line; liberal democracy ceased to have any viable alternative; it was the winner of political history. This is the famous thesis of Francis Fukuyama from the early nineties of the previous century (Fukuyama 1992, XIff).

III. LONGING FOR NATIONAL INDEPENDENCE

Today, more than ever before, it is apparent that such optimism was premature. However, specific reasons for doubt could be found even in the post-revolutionary development in Slovakia, which was characterised not only by leaning toward the principles of liberal democracy but also by leaning toward nationalism.

The fall of communism caught Slovakia as a part of the Czechoslovak federation and contributed to its disintegration in no small measure. Since the establishment of Czechoslovakia as a unitary state in 1918, a significant portion of the Slovak political elite longed for greater independence from the decision-making centre in Prague (Krajčovičová 2011, 144ff).

The desire for autonomy was not satisfied even in 1968 when the unitary Czechoslovak state was transformed into a federation. The main problem rested in the communist nature of the regime, which only got worse after the troops of the Warsaw Pact invaded Czechoslovakia in August 1968. It was a vain attempt to decentralise nominal power in the hands of the state when the real power was in the hands of the centralized communist party (Žatkuliak 2011, 315ff). Besides that, in the official state ideology based on Marxism-Leninism, there was not much room for the concept of the nation because the role of the primary mover of historical events was reserved for the social classes (cf. Saklani 2009, 719ff).

Thus, the collapse of communist totality in 1989 created an opportunity for a new arrangement of relations in the federation and eventually for the complete political emancipation of the Slovak nation. After the general election in June 1992, it became apparent that Slovakia's path to liberal democracy would ultimately lead to national sovereignty.

Initially, this ambiguity caused confusion, as is usual, when different people walk the same route but to various destinations. When the members of the Slovak National Council voted for the draft of the Constitution, they could not be entirely sure whether they were voting for the constitution of a member state of the existing federation or the constitution of an independent sovereign state that was yet to be established (cf. Orosz 2009, 31-32).

The draft explicitly mentioned the federation only at the very end in its transitional and final provisions as a matter of legislative technicality concerning the succession and reception of the law in force. A hint of the possible dissolution of the federation could be indirectly drawn from the last sentence of the draft, which made the entry into force of some articles of the Constitution conditional on "*relevant changes in the constitutional arrangements of the Czech and Slovak Federal Republic*".² This provision was not meant to do any harm; nevertheless, our common state with the Czechs certainly did not deserve to be treated in the draft only as some kind of technicality.

² Article 156 of the Slovak Constitution. Available on URL: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101>> [Last visited on September 11, 2022].

IV. NATION: CIVIC OR ETHNIC?

Yet, this episode of Slovak constitutional law development is more interesting from the general viewpoint of political philosophy than from a legislative-technical perspective. The history of the common state of the Czechs and Slovaks seems to confirm that in the region of Central and Eastern Europe, the promotion of the civic conception of the nation at the expense of the cultural-ethnic one is hardly politically sustainable.

The Czechoslovak Republic was established after the First World War in 1918 as a state of one Czechoslovak nation. The idea of Czechoslovakism – according to which Czechs and Slovaks formed one inseparable political community speaking one “Czechoslovak” language – was pure fiction from a historical and ethnographic point of view. However, at that time, it was accepted for pragmatic reasons: The state, founded on the ruins of the multi-national Austro-Hungarian monarchy, needed its state-forming nation to be numerically more significant than its national minorities, mainly German and Hungarian, which were more loyal to the defunct monarchy and their successors (cf. Krajčovičová 2011, 142-143).

Nevertheless, the fact that a particular nation is a fiction from a historical and ethnographic point of view is not an *a priori* obstacle to its political viability. For example, Anglo-American countries, mostly made up of immigrants, managed to mould their nations from different cultural and ethnic groups. Thus, if inhabitants of the first Czechoslovak Republic began to derive their essential political identity from belonging to the same state, from a belief in the fairness of its constitutive values and aptness of its form of government, the fiction of the Czechoslovak nation would become a reality.

But it did not happen; not even seven decades, 3-4 generations of new citizens born in the common state, were enough for the Czechoslovak nation to prevail over the Slovak one. The idea of Czechoslovakism failed *inter alia* because it was not founded on the political unity of Czechoslovak citizens but rather on the fiction of cultural unity between Czechs and Slovaks. Consequently, some Slovaks felt they were involuntary culturally assimilated, not to mention the problematic minorities of Germans and Hungarians who were not included in the state-forming nation at all (see Bakke 2011, 257ff).

While ago, I indicated that the liberalisation trend in the early post-communist countries was in opposition to their newly emerging nationalism. However, the tension between these two trends is not a conceptual necessity. When the *Ancien Régime* started to crumble in the 18th century, many French Enlightenment philosophers thought it would be replaced by a nation-state protecting modern liberal values. In the upcoming century, liberalism and nationalism would conflate. As Andrew Heywood observes, “for many European revolutionaries in the mid-nineteenth century, liberalism and nationalism were virtually indistinguishable” (Heywood 2021, 138).

Even some contemporary liberal philosophers subscribe to a moderate version of nationalism (Cibik 2017, 100ff), not to mention conservative thinkers (Scruton 2014; Kysela-Ondřejek et al. 2016, 278-282). The rationale for this position is simple: For the constitution to fulfil its functions, it should rule over people who are in solidarity with each other, feel a sense of belonging and share a particular set of fundamental social values. They do not need to have the same ancestors, but they need to see themselves as having a shared future. From this point of view, it is not necessarily a tragedy for liberal democracy if it is built and operated not within the *cosmopolis*, the universal world order, but only within the *polis*, the national

order. And therefore, Czechoslovakia's disintegration cannot be evaluated *a priori* as something contrary to the principles of liberal democracy.

V. WHOSE SOVEREIGNTY?

The Slovak constitution-making in the context of the dissolution of the federation is interesting yet for another reason. Until now, we have worked with the implicit assumption that the subjects of sovereignty are nations, whether civil or ethnic. However, the manner in which the Czechoslovak federation disintegrated suggests that perhaps the bearer of sovereignty is not the nation but the parliament, similar to the case in Great Britain (cf. Turpin-Tomkins 2007, 40ff).

The Federal Assembly of the shared state formally decided on the dissolution of the federation in November 1992, roughly two months after the adoption of the Slovak Constitution³. This act would not be so strange if the same body did not adopt a constitutional law over a year ago, which explicitly stated that the federation could be split only in the referendum⁴. Therefore, the political elite decided on the union's dissolution by itself, consciously ignoring the nation's will, whether Czechoslovak, Czech or Slovak. This elite not only very tactlessly bypassed the constitutional obligation to hold a referendum, but they also decided to dismember the federation without a direct and explicit mandate from the voters.

At first glance, it might seem that in the system of representative democracy, it does not matter whether the bearer of sovereignty is the nation or the parliament that represents it. The very idea of representation is based on the fact that these two entities are identical. The nation acts through the parliament; therefore, everything the parliament does is as if the nation itself has actually done it (Kysela 2014, 105). On a practical level, however, the difference is substantial.

Based on the theory of the French revolutionary thinker Emmanuel Sieyès, most Slovak constitutional lawyers are confident that only the people is the *constituent* power that can adopt a new constitution. At the same time, the parliament is the *constituted* power, i.e., the state body that must operate only within the limits of the Constitution and therefore cannot change it. Thus, from this perspective, sovereignty belongs solely to the nation, not the parliament (cf. Drgonec 2015: 654ff; Balog 2014: 57; L'álík 2015: 96).

This theory was also adopted by the Slovak Constitutional Court, which expressed that some provisions of the Constitution are immutable. Consequently, if the Slovak parliament adopts a constitutional amendment that contradicts the stated principles, the Constitutional Court will annul it. This situation happened in 2019 when the Constitutional Court dared to repeal a constitutional amendment embedding the judicial vetting process straight into the Constitution⁵. Even though the controversial amendment fulfilled a legitimate goal – it aimed to cleanse the judiciary of corrupt elements, which, by the way, is a problem in most post-communist states, the Constitutional Court came to the conclusion that the vetting process is

³ The Constitutional Law no. 542/1992 Coll. on the demise of the Czech and Slovak Federative Republic from November 25, 1992. Available on URL: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/542/19921208>> [Last visited on September 11, 2022].

⁴ The Constitutional Law no. 327/1991 Coll. on referendum from July 18, 1991. Available on URL: <<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1991/327/>> [Last visited on September 11, 2022].

⁵ The ruling of the Constitutional Court of the Slovak Republic file no. PL. ÚS 21/2014 from January 30, 2019.

disproportionate for it infringes the right to privacy of vetted judges and the independence of the judiciary.

VI. A DIRTY GAME OF POLITICS

The conventional image of politics as a dirty game with concealed intentions and dishonest methods reinforces the anti-parliamentary sentiment among Slovak constitutional lawyers (e.g., Lalík 2019: 284). This depiction of politics leads to an interesting paradox: the Slovak parliament is perceived as the source of the gravest threat to the existing constitutional order, not the basis of its democratic legitimacy. This perception is all the more bizarre if we bear in mind that it was the Slovak parliament that decided to adopt the Constitution without an explicit mandate from the people, without directly asking them in the referendum, and without a valid agreement with the Czech party on how to deal with the surviving federation.

This example illustrates how constitutional theory can be detached from reality, or at least from history. To be fair, it must be said that the Slovak parliament has not always treated its Constitution with due respect, especially in the last two decades. The fundamental problem is that the Slovak Constitution can be changed too quickly; a 3/5 majority of the parliament is enough to do it. As a result, the Constitution has been amended more than twenty times, while many of these amendments were not objectively justified (cf. Procházka 2018). The MPs' part was more about political marketing; a cheap gesture meant to show the care about the nation's interests without involving much work or invention.

An example is an amendment that introduced a ban on the export of drinking water through pipelines or an amendment that explicitly defined marriage as a unique union between a man and a woman. And we are not even talking about the fact that some amendments were adopted in a short legislative procedure avoiding proper discussion. The record is held by a constitutional amendment strengthening presidential powers adopted in 2011 in less than 45 minutes (Procházka 2018: 103). Despite this legislative malpractice, it remains an unquestionable reality that the only constitution-giving power in the Slovak Republic is vested in the directly elected parliament.

THE ROLE OF THE PEOPLE (CONCLUSION)

Naturally, this does not mean that the parliament can do whatever it wants with the Constitution and that the political elite can ignore it. The Constitution of the Slovak Republic issued under number 460 from 1992 Coll. is just a piece of paper. What makes it the country's fundamental law is people's conviction that it is a valid law with which other regulations and state practices must conform. This belief should be held by a critical mass of civil society that can stand up to defend the Constitution if the state authorities fail. I am not referring to the right to revolt guaranteed to citizens by Article 32 of the Constitution, which can only be used as an *ultima ratio*. Slovak citizens are armed with various political rights, exercising which they can compel political leaders to govern within the spirit of the Constitution.

In the short 30-year history of the Slovak Constitution, there are two notable cases where citizens managed to avert the danger of the autocratization of the republic by using their political rights. The first was the removal of Slovak prime minister Vladimír Mečiar from power in 1998. It is, in a way, a historical irony: Mečiar was more responsible for the foundation of the Slovak Republic than anyone else. He set the disintegration of the

Czechoslovak federation in motion by insisting that the Slovak Republic must be the direct subject of international law, which was unacceptable to the Czech party. At the same time, he was the main initiator of the Declaration on the Sovereignty of the Slovak Republic and the Constitution itself. These achievements earned him the title “*father of the Slovak Republic*” among some citizens (cf. Goldman 1999, 38 – 50). However, Mečiar was also known for his autocratic style of government. During his rule, the secret service kidnapped the son of then President Michal Kováč, a political rival of Mečiar’s. After the murder of a key witness in that case, Madeleine Albright, the US Secretary of State at the time, called Slovakia the “*black hole of Europe*” (Dzurinda 2018). Mečiar was finally defeated in the general election in 1998. Although his party came first on official election results, he could not form a coalition government, which is typical for a proportional electoral system. The role of civil society was manifested especially before the election in a strong mobilisation campaign, which resulted in up to 84 % turnout (Fisher 2006, 146, 166).

The second case is the civil protest initiated by the murder of the investigative journalist Ján Kuciak and his fiancée in February 2018. Ján died a violent death because he had proactively exposed and warned of criminal activities by a number of individuals who enjoyed impunity. That is why his death has become a tangible symbol of a gross dereliction of duty on the part of the state. Kuciak’s murder triggered the most widespread protests since the fall of the communist regime (Aktuality 2018), lasting four weeks and resulting in a major cabinet reshuffle, including the replacement of the prime minister (Prušová-Dugovič 2018). Following the prime minister’s resignation, several leading figures in the police force were replaced, and criminal charges were brought in several cases that the police failed to tackle before Kuciak’s murder. This political event once again confirmed that Slovak citizens are not indifferent to whether state bodies properly fulfil their constitutional functions or serve the private interests of a few chosen ones.

Aristotle once said that a constitution could only survive if the part of a citizenry which wishes it to continue is stronger than the part which does not (Aristotle 1995: 161). The two examples of the involvement of Slovak civil society give a reason for moderate optimism, for the belief that it is the stronger part of the society for which the Constitution is not just a written piece of paper but also a generally recognised way of managing public affairs. The Slovak Constitution is 30 years old today. Compared to the American fundamental law, it is still very young; however, compared to our country’s constitutions during the 20th century, it is already mature⁶.

Moreover, the Slovaks have not had such a long experience with democracy because the one experienced with the Czechs in the first common state lasted only 20 years before the outbreak of fascism and communism. Today, it seems that the 21st century is beginning to resemble the 20th in its turbulence. It can therefore be expected that the Slovak Constitution

⁶ Just a brief overview of the constitutional development of the Slovak territory in the 20th century: The First Czechoslovak Republic with a democratic form of government lasted from 1918 to 1938. The Second Czechoslovak Republic, with the reduced territory and greater autonomy for Slovakia, took place after the Munich Agreement in September 1938 and lasted only until March 1939. After that, Czechoslovakia was split; the Czech part of the state transformed into the war Protectorate of Czechia and Moravia, while the Slovak part became a totalitarian puppet state of Adolf Hitler. This embarrassing episode lasted until the end of the war, after which Czechoslovakia was restored. However, in 1948 there was a communist revolution leading to the establishment of the communist regime with a new totalitarian constitution. In 1960, a more advanced communist constitution was adopted. In 1968, Czechoslovakia became a federation, and in 1989, it started to transition to democracy.

still has the most challenging test ahead of it. I firmly believe that Slovak citizens will not lose their determination to defend it when the time comes. Because even when the Slovak nation is not the original maker of its Constitution, it is its ultimate guardian.