Z E S Z Y T Y N A U K O W E UNIWERSYTETU RZESZOWSKIEGO

SERIA PRAWNICZA

ZESZYT 71/2011 PRAWO 10

Branislav Fridrich, Lucia Mokrá[1]

LEGISLATIVE PROCESS IN THE SLOVAK REPUBLIC AND EXISTING LEGAL AND CONSTITUTIONAL DISPUTES REGARDING TO EU LAW

1. Current problems of legislative and decision-making process in the Slovak Republic

Problems in legislative process can be analysed in its separate parts. We can analyse particularly the problems connected with implementation of legislative responsibility of the Government of the Slovak Republic and central offices of public administration or the problems connected with the implementation of legislative initiation in the National Council of the Slovak Republic. Problems are mainly in the area of the legislative theory and legislative implementation as the part of legislative science, interconnected with the implementation of procedures governed by legislative procedural rules. Those problems are derived from the political order and relevant pressure and are mainly caused by missing experts and practitioners – professional legislators.

In the next part we will focus in detail to the current problems of legislative process, which arise in the process of legal acts adoption in the National Council of the Slovak Republic. These problems have roots in legislative work of MPs and the National Council committees and they can be restricted by using right and effective procedures by themselves. We are going to analyse those part of legislative process, which should be – from the point of legislative procedural law – named as the process of legal acts adoption. This process containing legislative initiation, adoption of the legal act and its promulgation is primary influenced by the work of the MP and work of the National Council committee and because of the evaluation of the legislative power it is in the centre of interest.

[1] Assoc. Prof. JUDr. Branislav Fridrich, PhD., Comenius University in Bratislava; JUDr. PhDr. Lucia Mokrá, PhD., Comenius University in Bratislava; This paper is output of the project „Influence of the European Union courts case-law on the Member States' national laws", supported by the Slovak Research and Development Agency (contract No. APVV-0754-07).

Current problem of legislative process is „inflation" of legislative, considered in laic as well expert public. Enormous increase of legislative acts is connected with the increase of the roles of democratic and mainly social state. In relation with the increase of number of the legal acts the continuous increase of the work of legislators in preparation of new and new legislation is required. The tempo of the preparing legislative work is accelerating. Political parties using the state power are trying to enforce its ideas in the area of the legal regulation to regulate as wide as possible spectrum of social relations in the shortest time. Executive power bodies are preparing proposals of legislative acts under big pressure of directly stated terms. The consequence is decreased quality of the legal act and technical level of its elaboration. If we are thinking on primary normative legal acts proposed by the Government of the Slovak Republic as one of the authorised body with legislative initiative power, elaborated on the level of relevant ministries, the „corrective" role of the MPs and the National Council committees in the legislative process is very important and cannot be replaced. Member of Parliament and responsible supervisor committee can work as effective filter of legislative gaps. The objective and individual work is necessary. This should be made without minimal political influence. In the other case, the negative aspects of the political order will be involved to the legislative process and this may lead to the non-functioning of the above-mentioned control-initiative mechanism. It is not possible to dismiss historical indicators of the legislative inflation development.

From the year 1918 to 1993 the level of legislative activity was constantly low, it was increasing only in the time of fundamental social-political changes, which significantly influenced legal order and increased the needs of the state for the adoption of legal rules. The period of the more active legislative work was years 1936, 1948, 1960 and 1968. In crucial year 1989 the legislative activity was low, instead of expectances. Enormous increase of the legislative activity was visible after 1993, reflecting the political situation. Dr. Cvrček, scientist of the Institute of the state and law of the Czech Academy of Science was analysing number of valid legal acts in the legal order of the Czech Republic with the method of legismatics. Conclusion of his research and analyse was, that the main reason of the increasing legislative activity is fact, that the state is missing Professional legislators with the qualitative education and practical knowledge.

Defect legislation – defect legal act evokes requirement of correction through of the amendment or modification, what means another legislative work, but in this time in bigger range. It is visible mainly in the situation, when the defect law is followed by the act of executive power or more of them. The following correction has to be complex, covering all vertical and horizontal relations. The question is, whether the „weak" legislator (subject of the legislative initiative power) is able to make efficient correction.

The decreasing of the legislative activity requires adoption of qualitative, forceable and effective law. It is also the requirement of the legislative aspect of state power legality. The centre of quality is mainly in the pre-preparatory and preparatory phase of legislative process. As many authors stated in the scientific papers, the basic mistake is thinking, that the adoption of the legal act can help to solve the problem of the legal regulation, however the state does not have enough instruments and measures (not only financial) and possibilities for its implementation in practice. J. Grospič elaborated some criteria together with German experts from the legislative practice in last ten years. Regarding to universal using it is necessary to mention these criteria in the form of ten key questions, as follows:

– Is the thought legal regulation really necessary, or can the problem be solved by other measures instead of legislative?
– What are the alternatives of the legislative solution of the problem, mainly from the point of costs and expenses of private persons and the industry, from the point of the public costs, other influences and consequences?
– Are there necessary legislative regulations in the central level or can the legal rules adopted on the lower (regional, municipal) level cover the thought aim of the legal regulation?
– Is it necessary to adopt legal acts or is the delegation legislative sufficient?
– Is the thought legislative act from the point of the time immediately necessary?
– What should be the content and range of legal regulation and what details should be stated in the act, including the content and way of using general clauses or the blanket provisions?
– How the question of the time efficiency of the thought legal regulations should be solved; is it possible to foresee adequate time limit for the efficiency of the legal act?
– How can be the administrative intensity limited from the point of the required procedures and other formalities?
– Is it necessary to adopt new administrative proceedings or is it possible to use existing valid legal measures?
– Is it acceptable relation between the costs for the new legal regulation and expected profit from its implementation?[2]

These ten regulative questions can be used in pre-preparatory phase of legislative process, with some modification in adoption of different types of legal acts. This should help to improve legislative process, increase its professionalism and avoid of legislative gaps in the legal order of the country.

[2] J. Grospič, *Legislativní proces a kvalita právního řádu moderního státu*, „Právní rádce" 1995, č. 3, s. 50–52.

Correct preparation of legal act then should involve using of:

– analyses of application practice, e.g. evaluation of jurisprudence of the courts to the topic, legal doctrine and mainly de lege ferenda proposals in the scientific papers, research papers in the particular scientific institutions as well as the research work of the scientific council, universities etc.;
– comparison works with the legal regulation from abroad, especially countries with the long-lasting democratic tradition as well as the same (similar) legal culture and legal system, when not only the comparison of the texts of the legal regulation, but also the international conferences outputs, expert´s stays in these countries and knowledge and experiences of the experts from those countries should be used;
– analyses of international treaties, binding for the Slovak Republic and especially communitarian law of the European union and conventions of the Council of Europe;
– sociologic methods focused not only to the experiences from the implementation of the current legal regulation, but also knowledge of the experts from this area;
– knowledge of economic-financial experts, transforming the influence of the proposed legal regulation to the state expenses etc.

Many legal acts were prepared without using of the mentioned methods and used only the casuistic regulation of the current problem ad hoc. We will mention two most serious from the last period. The first one is dealing with the state budget amendment within the year of its implementation.

Separate problem of the legislative process in the Slovak republic was the question of the amendment of the valid and efficient act on the state budget. Political parties as well as individual MPs of the National Council of the Slovak Republic were not sure which proceeding should be used in the amendment process of the content of the state budget, already adopted for the concrete fiscal year. Following rules of legislative procedural law and accepting the purpose and substance of the legislative process it is necessary to create a statement based on the premise: the National Council of the Slovak Republic has to discuss the proposal for amendment act on state budget within the proceeding governed by the provision § 87 of the Act No. 350/1996 Coll. of Laws (Act on Parliamentary Rules of Procedure).

Reasons for this statement is more, concretely those are:

1) The purpose of the regulation containing in the provision § 87 para 2 the first sentence of the Act No. 350/1996 Coll. of laws is the exclude proceedings on the substance of the act proposal in the public debate, because regarding to the detail legal regulation stated in the Act No. 523/2004 Coll. of Laws (Act on budget rules of the public administration and on amendment and adding of some acts) the Government is obliged to submit proposal of the act on state

budget to the National Council of the Slovak Republic in the strictly defined structure. The purpose of the mentioned provision is possible to be viewed from the opposite position. Referring to the constitutional status of the National Council of the Slovak Republic it has to be stated, that the National Council of the SR is annually obliged to adopt state budget, i.e. it is necessary to exclude provision § 73 para 3 of the Act No. 350/1996 Coll. of laws. Proceeding on the proposal of the act on state budget is made only in the second and third reading, and the situation when the National Council of the Slovak Republic postpone the proceeding or send the proposal back to the proposer upon the valid resolution cannot develop.

2) Sources of legislative procedural law do not define range of the amendment of the act. Regarding to this we can suppose, that if the amendment modify 99% of the previous primary legal regulation, its output will be *totally new* act. Once we support argument that the proceeding for state budget adoption should follow general provision § 67 to § 86 of the Act No. 350/1996 Coll. of Laws for legislative process instead of the provision of the specific act for adoption state budget, this can led to the situation, which means practical obviation of the provision § 87 para 2 of the Act No. 350/1996 Coll. of Laws when deciding on state budget in regular legislative process.
3) The threat of the involvement of general debate and proceeding on the substance of the act proposal in the first reading is not so significant. However, proceeding on the amendment of the act on state budget (which can be *totally new* act on state budget and has to be if the substantial parts of the state budget will be changed or modified, i.e. incomes of state budget in classification to chapters, expenses of the state budget to the application of activities necessary for fulfilment of governmental aims and objectives or the excess or deficit of state budget) when subsumed under the proceeding governed by the provision § 74 para 1 of the Act No. 350/1996 Coll. of Laws can led to the situation, that only some of parliamentary committees can deal with the budget proposal, not all of them as it is stated in provision § 87 para 2 second sentence of the Act No. 350/1996 Coll. of Laws (excluding the mandate and immunity committee and committee for the incompatibility of functions, as stated in the same provision). This risk is relevant to the fact, that each parliamentary committee should follow relevant chapter of state budget and control its fulfilment. Obviation of the provision § 87 para 2 second sentence of the Act No. 350/1996 Coll. of Laws and exclusion of any of the parliamentary committee (excluding the mandate and immunity committee and committee for the incompatibility of functions) from the proceeding of the amendment of the act on state budget, degrade the whole legislative process and contradict the whole logic on state budget proceeding.
4) In relation to the range of the act on state budget amendment, it is necessary to give attention to the provision § 5 para 1 first sentence of the Act No. 39/1993

Coll. of Laws (Act on Supreme audit office of the Slovak Republic as amended), regarding to which the office has to elaborate statement to the proposal of the Slovak Republic state budget, evaluating also the proposal of the budget of public administration (including in the state budget proposal) and proposal of the state closing account. If the National Council of the Slovak Republic when deciding on amendments of substantial parts of state budget, i.e. incomes of state budget in classification to chapters, expenses of the state budget to the application of activities necessary for fulfilment of governmental aims and objectives or the excess or deficit of state budget will proceed without the statement of Supreme Audit Office, this will cause significantly restriction of its independent position and will breach its control power.

5) In relation to the time defined in the provision § 87 para 2 third sentence of the Act No. 350/1996 Coll. of Laws in connection with the provision § 74 para 2 of the Act No. 350/1996 Coll. of laws, after the logical interpretation the following statement has to be derived: provision § 87 para 2 third sentence of the Act No. 350/1996 Coll. of Laws in relation to the provision § 74 para 2 of the Act No. 350/1996 Coll. of laws is special only in the definition of the subject stating the time for the proceeding the act proposal in the committees. Minimal time of 30 days has to be reached. Such conclusion is correspond also to teleological interpretation, because the purpose of stated time is reach of the legislative process, whose outputs will be perfect legal acts without vertical and horizontal conflicts.

Possibility of the mistakes existence in the legislative process due to the lack of time is visible and it is not necessary to prove it especially. The next practical example follows. The concrete case is dealing with the wrongful interpretation of the MPs competence in the legislative process – adoption of the amendment to the concrete legal act through the enabling clause in the other legal act different of the purpose and substance to the amending one. This case is right now object of proceeding before the European Court for Human Rights in Strasbourg.

Applicant affirms, that in this case there exists violation of Act 350/1996 Coll. of laws on Parliamentary rules of procedure, as well as evasion of right of the government to express the opinion to each act proposal regarding to article 119 letter r) of the Constitution of the Slovak Republic in connection with provision § 70 para 2 of the Act 350/1996 Coll. of laws on Parliamentary rules of procedure, which can be considered as the right of other participants in legislative process to know the Government´s opinion.

It is necessary to notice to above-mentioned, that there is missed explanatory report to the proposals for amendment as stated in § 68 para 1 of the Act 350/1996 Coll. of laws on Parliamentary rules of procedure, however it still holds that the absence of the Government´s decision still means enhanced risk of arbitrariness.

Constitutionally conform interpretation of provisions regulating right to submit proposals for amendments to discussed proposal of the act (mainly provision § 29 of the Act 350/1996 Coll. of laws on Parliamentary rules of procedure) requires, that the proposal for amendment has to really amend proposed legal regulation, i.e. in conformity with the so-called *germaneness rule*, requiring the proposal for amendment has to be of the same object as proposal discussed in legislative process. Proposal for amendment cannot deviate from the limited area stipulated to proposals for amendments in the form of extensive exceeding of the subject of discussed proposal of the act. This responds to applicant´s opinion on constitutionally conform interpretation of provision § 29 of the Act 350/1996 Coll. of laws on Parliamentary rules of procedure. Applicant affirms that such requirement in this case was not fulfilled. Instead of other, this led to breach of separation of powers with consequences violating principles of creating conform, transparent and foreseeable law connected to attributes of democratic legal state. Follow there the institute of legislative initiative was eluded and the right of the Government to give an opinion to act proposal regarding to article 119 letter r) of the Constitution of the Slovak republic in connection with provision § 68 para 1 of the Act 350/1996 Coll. of laws was violated.

Regarding to this, the applicant has to state, that suffered article V. of the Act 309/2007 Coll. of laws introducing provision § 10c ZoKP was not adopted by National Council of the Slovak Republic by constitutionally conform way. National Council of the Slovak Republic during adoption of Act 309/2007 Coll. of laws did not follow principle of understandableness, transparency and clarity of legal order, which are integral components of legal state and also did not respect democratic principles in legislative process.

Respect of procedural rules incorporated in the Constitution of the Slovak Republic and in the Act 350/1996 Coll. of laws on Parliamentary rules of procedure, is necessary to be required, because however the recipients of these rules are not private persons, non-performance of those can significantly touch fundamental rights of those persons. Recipients of legal rules have, without doubt, right to legitimate expect that prospective restriction of their rights made upon the act, are results of discussion made through the whole political spectra; the discussion in which all participants had possibility to be informed on the substance in detail and had possibility to present their opinion on it. In the legal state only such process can be acceptable, which provide open discussion between representatives of competitive opinion, including minority opinions. According to this such procedure which secure on one side hearing of the parties and on the other side formal quality of legislative process are gaining ground. Legislative process becomes the real source of Act legitimacy.

Applicant affirms that the act or any legal rule cannot be adopted by illegal way. Principle of separation of powers which has character of value can be de-

rived from the material legal state. Separation of powers is also the structural element of constitution. Considering separation of powers is also reason the constitutional limitation of cooperation of individual powers in the case, and in this case cooperation of executive and legislative power in legislative process.

The following to the principle of „germaneness rule" has to be added:

a) Principle „germaneness rule" is used in American Congress since 1789 and today is involved in procedural rules of Congress and is recognised as fundamental rule of legislative process.
b) This rule represents requirements regarding which the proposal to amendment has to be of the same subject as proposal of the act which is actually discussed. It is based on idea that the parliament can in the concrete time discuss only the one limited substance.
c) Its purpose is to secure regular procedure in the sense of regular informed and substantially prepared discussion and to secure flexibility and effectiveness of the parliament discussion.
d) Requirement that the proposal for amendment has to be closely connected to the concrete provision of discussed act proposal or its part is resulting from this rule.

In suffered case there were violated simultaneously several requirements. Proposal for amendment was dealt with different subject as that what was discussed in legislative process. Parliament in the same time discussed several things (it can be clearly derived from the notice of discussion of ninth day of eleventh meeting of National Council of the Slovak Republic, which was submitted together with application). The Government of the Slovak republic had been denied the right to gain opinion to proposal, dealing with concessionary fees and because of this the discussion was not informed and substantially regular prepared. Proposal for amendment was not anyhow connected to concrete provision of discussed act on safety and protection of health in work.

Regarding to above-mentioned facts the applicant has to state, that the proposal for amendment of MP Podmanický, amending text of article V. of the Act 309/2007 Coll. of laws and introduced provision § 10c ZoKP was not proposal for amendment in the material sense, but it represented legislative initiative made in second reading of legislative process what means fundamental breach of legislative process (legislative process begins in first reading by applying legislative initiative). Proceeding of MP Podmanický was in contradiction to provision § 67 and following of the Act 350/1996 Coll. of laws on Parliamentary rules of procedure.

To support above-mentioned applicant add, that the same arguments were used by the Constitutional Court of the Czech Republic in its decision of 15 February 2007, file ref. No. Pl. ÚS 77/06 when deciding on unconstitutionality of the act adopted by the same way as in this case. We notice that the legislative process in Czech Republic is comparable with the legislative process in the Slovak Republic.

Legislative process and using the power of the legislative initiative is mainly in the hands of the executive bodies. It is correct if the majority of acts proposals are made by the Government of the Slovak Republic, which is able to implement those in practice. The Government is responsible also for the regular proceeding of the reminding. As J. Barák stated, the proceeding of the reminding is „key phase of the legislative process in the executive power sphere"[3]. It is due to the fact that directly here implementation problems of adopted legislation can become visible before. However, we have to conclude, that the most visible problem in this area is the tendency for the adoption of legal regulation which should led to the personal profit or visibility of MPs.

2. Electoral years in the Slovak Republic

In the area of administrative law the most important issues were connected with elections and referendum. The last period in the Slovak Republic there were several elections and the most famous referendum.

The Chairman of the National Council of the Slovak Republic announced by his Decree No. 1/2009 of 8 January 2009 the elections of the President of the Slovak Republic. The election was held on Sunday 21 March 2009. If none of the candidate obtains absolute majority of votes of entitled voters, Sunday 4 April 2009 is predetermined to the second round of election of the President of the Slovak Republic. The election will be held according to the Act No. 46/1999 Coll. on the way of election of the President of the Slovak Republic, on referendum on his appeal and on supplementation of other amended acts.

The Chairman of the National Council of the Slovak Republic announced by his Decree No. 2/2009 of 8 January 2009 the elections to the European Parliament. The election was held on Saturday 6 June 2009. The election was held according to the Act No. 331/2003 Coll. on the elections to the European Parliament as amended.

The President of the Slovak Republic by his decree No. 311/2010 (Coll.) of 6 July 2010 announced the referendum with these questions:

1. „Do you agree that National Council of the Slovak Republic repeals by law the duty of natural and legal persons to pay a fee for services provided to public by Slovak television broadcasting and Slovak radio broadcasting?"

2. „Do you agree that the National Council of the Slovak Republic extends by law the possibility to hear a performance of a National Council's member as a misdemeanour in all cases as stated by the Act on misdemeanours?"

[3] J. Barák, *Legislativní pravidlá a legislativní proces*, 4. část, „Právní rádce" 10/1996, s. 49.

3. „Do you agree that the National Council of the Slovak Republic by constitutional law decrease the number of its member to 100 as of the next term?"

4. „Do you agree that the National Council of the Slovak Republic enacts that the public administration bodies can procure personal motor vehicles up to maximum price of 40 Thousand EUR?"

5. „Do you agree that the National Council of the Slovak Republic provides the possibility to vote the members of the National Council and the European Parliament by internet?"

6. „Do you agree that the National Council of the Slovak Republic exempts by law the public officers from right of reply as stated by the Act on press law?"

He stipulated the day of referendum Saturday on 18 September 2010. The referendum was held in line with the Act No. 564/1992 (Coll.) about way of executing of referendum as amended.

The referendum was dealing with questions, regarding to which one political party became a parliamentary party. These questions were almost political and electoral program of Freedom and Solidarity, newly established liberal party in the Slovak Republic. The referendum was called by the president upon the petition of more than 400 thousand people. The question relevant to the topic was, whether the results of the facultative referendum are obliged to the parliament.

As stated in the Constitution of the Slovak Republic in article 93 para 1 „A referendum is used to confirm a constitutional law on entering into a union with other states, or on withdrawing from that union" in connection with article 7 para 1 „The Slovak Republic may enter into a state union with other states upon its free decision. The decision on entering into a state union with other states, or on withdrawal from this union, shall be made by a constitutional law which must be confirmed by a referendum". Only in this case the referendum is obligatory and is legally binding for the National Council of the Slovak Republic. The second paragraph of the article 93 of the Constitution states, the referendum can be used to decide also on other important issues of public interest. But what is the result of such referendum? Is the referendum output legally binding for the National Council for adoption and individual act of general character?

Follow in article 98 of the Constitution is stated, that „The results of the referendum are valid if more than one-half of eligible voters participated in it and if the decision was endorsed by more than one half of the participants in the referendum. The proposals adopted in the referendum will be promulgated by the National Council of the Slovak Republic in the same way as it promulgates laws". Consequentially, using this wording, the output of obligatory or facultative referendum should be dealt in regular legislative process, except of the first reading – similarly to the state budget adoption proceeding, because of

missing necessity to discuss on the purpose and substance of the act. The missing interpretation of the Constitutional Court of the Slovak Republic to this question, provide space for two possible logic interpretation:

1) the wording of article 98 has to be interpreted in strict way – the results of the referendum have to be promulgated by the National Council of the Slovak Republic as the law in case of obligatory referendum called upon the article article 93 para 1 in connection with article 7 para 1.

2) the wording of article 98 has to be interpreted in wide way – the results of the referendum have to be promulgated by the National Council of the Slovak Republic as the law in case of any referendum, because as stated in article 2 para 1 of the Constitution „State power originates from citizens, who exercise it through their elected representatives, or directly". The direct exercise of citizens´ powers should not be restricted regarding to this article. However, the following article 72 is stated, that „the National Council of the Slovak Republic is the sole constitutional and legislative body of the Slovak Republic". This contradiction led to the next legislative gap, which should be eliminated as soon as possible by authorized bodies.

The referendum was not valid, but the questions which arose from its implementation practice and unclear procedural rules are the objective of the wide public and scientific discussion. Just the following time will show us the correct interpretation from two mentioned possibilities.

Conclusion

The Slovak republic as EU member is obliged to follow democratic principles. Legislative and constitutional practice in the Slovak republic can be discussed and considered at least as partially non-effective, due to practical adoption of defect legislation. The process of writing and passing laws in the EU is complicated. It involves balancing the interests of the member states in the Council of the European Union and the European Parliament, with the interests of the European Commission. How all of these institutions work together in forming legislation depends upon the type of legislation being passed. Because of its complexity, European lawmaking is often criticised for being too bureaucratic, secretive and difficult to understand. However, we have to mention, that this process at EU level reflects principle of transparency, democratic legitimacy and effectiveness of decision-making. The legislative process in the Slovak republic should follow the principles, not only regarding to EU membership, but mainly due to fulfillment of one principle of democratic state – effectiveness of decision-making and adoption of legislation in favor of citizens.

LEGISLATIVE PROCESS IN THE SLOVAK REPUBLIC AND EXISTING LEGAL AND CONSTITUTIONAL DISPUTES REGARDING TO EU LAW

Summary

The article was analysing the contemporary problems and disputes of legislative and decision-making process in the Slovak Parliament and the concrete problem of implementation legislative rules and existence of legislative gaps in the legal system. Main legislative gaps as considered are two: the first one, possibility to adopt the act in extraordinary „shorten" procedure due to some very vaguely stated reasons for such proceeding application, and the second one, adoption of an amendment to a legislative act in the form of in-direct modification, via the substantially different law. This means a possible violation of the legislative rules and also a threat to the principle of legal certainty. As stated in the article, there is a case against Slovakia in proceedings before the European Court of Human Rights based on this legislative mistake.

A certain part of the article is focused on missing procedural rules when promulgating the results of a facultative referendum as an instrument of the public voice hearing in the system. The rules are stated in the constitution in a very silent way, what lead in practice, especially in the case of the last referendum, to many questions on binding and enforcement of such results in practice. There is missing a constitutional court´s interpretation and regarding to this, there is no case law. We can refer only to the constitutional practice and general democratic principles and values, what is usually vague and inefficient practice.