

Andrzej Bisztyga¹

Critic of Attendance Threshold in a Nationwide Referendum

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Abstarct

On the basis of the Constitution of the Republic of Poland, the binding effect of the result of the vote in a nationwide referendum depends on attainment the attendance threshold. This threshold was determined as participation in a referendum of more than half of persons entitled to vote. The systemic argumentation in favor of establishing this threshold proves to be weak and unconvincing. The constitutional regulation is characterised in this scope by inconsistency in the form of not covering the constitutional referendum by the requirement of the attendance threshold. Furthermore, the desire to ensure the legal effectiveness of the outcome of the vote in the referendum results in extending time of the vote in the referendum. The conclusion includes the proposal to introduce an amendment to the Constitution consisting in resigning from the threshold in question.

¹ ORCID ID: 0000-0002-6579-9656, Assoc. Prof., Department of Constitutional, European and International Public Law, Institute of Legal Sciences, University of Zielona Góra. E-mail: a.bisztyga@wpa.uz.zgora.pl.

Streszczenie**Krytyka progu frekwencyjnego w referendum ogólnokrajowym**

Na gruncie Konstytucji Rzeczypospolitej Polskiej moc wiążąca wyniku głosowania w referendum ogólnokrajowym jest uzależniona od osiągnięcia progu frekwencyjnego. Próg ten został określony jako udział w referendum więcej niż połowy uprawnionych do głosowania. Ustrojowa argumentacja na rzecz ustanowienia tego progu przedstawia się jako słaba i nieprzekonująca. Konstytucyjną regulację cechuje w tym zakresie niekonsekwencja w postaci nieobjęcia referendum konstytucyjnego wymogiem progu frekwencyjnego. Ponadto, chęć zapewnienia skuteczności prawnej wyniku głosowania w referendum skutkuje wydłużaniem czasu głosowania w referendum. W konkluzji sformułowany został postulat zmiany Konstytucji polegający na rezygnacji z przedmiotowego progu.



From the point of view of the constitutional principle of sovereignty of the people, a nationwide referendum is a notion of particular importance, as it allows the direct expression of the will by the superior power, and makes use of a dominant indirect form of exercising the authority in Poland². It is a statement providing an important background to further reasoning.

A very controversial issue concerning the constitutional institution of a nationwide referendum is the notion of attendance threshold. The constitutional norm makes the legal effectiveness of the result of a nationwide referendum dependant on attaining the threshold. It is an issue to which Polish constitutional law pays amazingly little attention as if this threshold was unquestionable and irrefutable, and its existence was determined once and for all. Article 125(3) of the Constitution of the Republic of Poland states that if more than half of persons entitled to vote takes part in a nationwide referendum, its result is binding³. To the contrary, if less than a half of persons

² The institution of a referendum may be incorporated in the law-making process in various ways. E. Zieliński, *Referendum w państwie demokratycznym*, [in:] *Referendum w Polsce współczesnej*, eds. D. Waniek, M. Staszewski, Warsaw 1995, p. 32.

³ The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item 483).

entitled to vote takes part in a nationwide referendum, the result of the referendum is not binding⁴. In my opinion, making the legal effectiveness of the referendum result dependant on attaining the attendance threshold is an inappropriate approach and should be abandoned.

Supporters of maintaining the attendance threshold constantly quote one relatively illusory argument. They want to prevent making decisions concerning the whole nation by a minority of persons entitled to vote or – sticking to the letter of the Constitution of the Republic of Poland – to prevent making decisions on issues of particular importance for the state. Therefore, the importance of the issue being the object of a referendum – issues of particular importance for the state – is to be the key argument in favor of the existence of the attendance threshold⁵. In the background of this reasoning, there is a “hint” of care for respecting the principle of sovereignty of the people. However, this care presents itself as fake, which will be discussed below, and consequently the argument itself as superficial.

Note that the decision on withdrawing from the participation in a nationwide referendum is also the decision of a person entitled to vote in the referendum⁶. The application of the attendance threshold causes that in practice votes of persons entitled to vote who do not take part in the referendum are classified as negative votes, i.e. as “no” votes. They could be classified as positive votes, i.e. as “yes” votes, as well. How may it be established that all persons entitled to vote who do not take part in the referendum would like to vote against the issue being the object of the referendum? Why not to assume that they make up the majority accepting the proposal of the referendum? In the face of impossibility to resolve this dispute, it would be definitely better to adopt a neutral solution assuming that resigning from the participation in the referendum means the lack of interest in the object of

⁴ J. Marszałek-Kawa, D. Plecka (eds.), *Dictionary of Political Knowledge*, Toruń 2019.

⁵ *Nota bene*, I am of the opinion that a better wording of the Art. 125(1) of the Constitution if the Republic of Poland would be a wording according to which a referendum would be called in case of issues of particular importance for the people, not for the state. The proposed amendment would correspond definitely better to the principle of sovereignty of the people, which elaboration and realization is the institution of a nationwide referendum.

⁶ A. Bisztyga, *Czy potrzebne są zmiany w Konstytucji Rzeczypospolitej Polskiej?*, “Zeszyt Naukowy Katedry Prawa i Administracji Górnośląskiej Wyższej Szkoły Handlowej” 1997, No. 32, p. 29.

the referendum and, consequently, non-voters count for the decision taken by those who decided to take part in the referendum. The implementation of this assumption implies the necessity to abandon the institution of the attendance threshold.

If some people want to actively participate in democracy and in taking decisions in a democratic referendum procedure, they should accept the fact that it requires them to think about the referendum question and to go to the referendum station in order to vote. It is an *absolute minimum* of effort required by democracy. It is and should be a free choice of the person entitled to vote in the referendum, whereas establishing the attendance threshold contains an element of a hidden indirect form of forcing a citizen to attend the referendum. If citizens do not take part in the referendum in a sufficient number, the result of the vote in the referendum will not become legally effective. The role of the constitutional legislator is to force – even indirectly – the citizens to take part in a nationwide referendum⁷.

The systemic beneficiaries of the existence of the attendance threshold in the constitutional regulation of a nationwide referendum are legislative authorities, i.e. Sejm and Senate, as in case of non-attainment of the attendance threshold, the decision on this issues will be taken by these legislative authorities. The Roman maxim: *is fecit, cui prodest* constitutes an appropriate comment to this situation. Therefore, the application of the attendance threshold – a high attendance threshold, we may add – constitutes an instrument by which the impact of citizens on the direction of legislative actions is reduced.

In this way, the attendance threshold does not constitute an instrument supporting the implementation of the principle of sovereignty of the people. On the contrary, it weakens it. Legislative authorities are aware of it, whereas citizens have this knowledge only to a limited extent. Here the difference between the supreme authority exercised by citizens and the power exercised by state authorities, in this case Sejm and Senate, reveals. The “supreme authority” notion within the meaning of the Art. 4 of the Constitution of the Republic of Poland and the “power of state authorities” notion are separate

⁷ J. Wawrzyniak, *Aksjologia referendum konstytucyjnego*, [in:] *Referendum konstytucyjne w Polsce*, ed. M. Staszewski, Warsaw 1997, pp. 119, 196.

notions. I think that the existence of the attendance threshold in the referendum unnecessarily complicates and, in principle, falsifies relations between citizens and legislative authorities representing them⁸, promoting the last ones in an unjustified way.

Nationwide referenda, including the accession referendum, are subject to the institution of the attendance threshold. On their background, another nationwide referendum presents itself differently. It is the constitutional referendum of approving character (Art. 235(6) of the Constitution of the Republic of Poland). The result of the constitutional referendum has a consequence in the form of an amendment to the Constitution, if the majority of voters was in favor of the amendment. We do not encounter in this referendum the requirement of attaining the attendance threshold of the voters. In this case, there is double inconsistency between constitutional regulations concerning the nationwide referendum and the constitutional referendum⁹. First of all, there is a formal inconsistency. It turns out that the attendance threshold concerns all nationwide referenda (Art. 125(3)), except for the constitutional referendum (Art. 235(6)). Secondly, there is a substantive inconsistency. Nationwide referenda are held on issues of particular importance for the state (Art. 125(1)) and, therefore, the establishment of the attendance threshold is used to justify their character, whereas it is difficult to consider that an amendment to the Constitution is not an issue of particular importance for the state. Moreover, an amendment to the Constitution must certainly be qualified as an issue of particular importance for the state, as it is the legal foundation of the political, social and economic system of the state.

A nationwide referendum constitutes an institution similar by its character to the institution of elections, including parliamentary elections or presidential elections. In each of these cases, citizens express their wills and make it directly, i.e. in the form of voting in person, whereas in the Polish tradition of the electoral law, there are no solutions making the legal ef-

⁸ A. Bisztyga, *O referendum jako elemencie procesu tworzenia prawa*, [in:] *Konstytucjonalizm a doktryny prawne. Najnowsze kierunki badań*, ed. R. Małajny, Katowice 2008, p. 243.

⁹ This problem was indicated during works on the wording of the present Constitution of the Republic of Poland. R. Kmiecik, *Uwagi krytyczne o trybie przygotowania i uchwalenia ustawy zasadniczej (w związku z uchwaleniem projektu Konstytucji RP z 16 I 1997)*, "Annales Universitatis Mariae Curie-Skłodowska, Sectio G" 1997, vol. XLIV, pp. 50–51.

fectiveness of elections dependant on attaining the attendance threshold. From this point of view, the establishment of this threshold presents itself as an artificial measure. Lack of attainment of the attendance threshold promotes *de facto* the nation representation at the expense of citizens. The logic inappropriateness of the regulation in force is underlined by the fact that this nation representation is elected by citizens in free elections from the attendance threshold. If an appropriately high threshold was introduced in parliamentary elections, in many cases these elections would be unsuccessful and, consequently, Sejm and Senate would not be elected. To sum up, we will elect the nation representation even if a small part of voters takes part in elections. *Nota bene*, it happens in the case of Senate by-elections.

From the point of view of the implementation of the principle of sovereignty of the people, the question about consequences of lack of attainment of the attendance threshold seems essential. In case of its attainment, the decision taken by citizens in the referendum is legally effective, whereas lack of attainment of the attendance threshold makes this decision legally ineffective. In such a case, the legislator may – but does not have to – consider in its actions the result of the vote in the referendum.

If so, the result of this referendum is, for the legislator – or more generally, for authorities – only of survey or consultative nature¹⁰. Yet, this is obviously contrary to the principle of sovereignty of the People. In the state ruled by law in which this principle is determined as the supreme principle, the institution of a consultative referendum, i.e. non-constitutive referendum, should not exist at all. But it turns out that – although not named and well-concealed – it exists. If such a referendum was not considered even as consultative, the situation would be even worse from the point of view of the principle of sovereignty of the People. In such a situation this referendum would involve citizens only uselessly and senselessly in the appearance of the decision-making process¹¹.

¹⁰ A similar position is taken by B. Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*, Kraków 2004, p. 315.

¹¹ Among politicians, Ryszard Kalisz takes consequently a critical position on the attendance threshold. *Debata w redakcji Gazety Prawnej z udziałem B. Banaszaka, A. Bisztygi, R. Kalisza i J. Stępnia*, “Gazeta Prawna”, Warsaw, 11 April 2006.

What is particularly interesting, the issue of the attendance threshold in the referendum, which also applies to the accession referendum, remains connected with the issue of the time of the vote in the referendum¹².

The vote in the referendum may be held during one or two days, while if it is held during two days, the referendum is organized on a public holiday and on the day preceding it¹³. Therefore, the regulation included in the Act on nationwide referendum allows the possibility to vote in the referendum for two days. It should be underlined that two-day vote in the referendum is based on concern that the attendance threshold will not be attained or, looking at the issue from another angle, it is based on care for attaining the attendance threshold. It has not always been the case. The previous legal state provided for one-day vote in the referendum. According to that legislation, the referendum important for the state and the people on the accession of the Republic of Poland to the European Union was to be held during one day. The concern about the lack of attainment of 50% attendance threshold in this important matter was so huge that Sejm decided shortly before the referendum to adopt a resolution extending the time of the vote in the referendum to two days¹⁴. The lack of attainment of the attendance threshold in the accession referendum must result in the question about the political responsibility for failure of the referendum held on an issue of such a great importance for the People and the state. It was hoped that extending the time for the vote in the referendum to two days would result in the increased attendance of voters¹⁵. Note that if there was no attendance threshold, there would not be concern about the attendance, or a nervous debate in Sejm on this issue or attempts of a kind of circumvention of or at least weakening the barrier of the threshold by adoption of two-day vote.

¹² M. Dębicki, *Referendum: iluzja czy realność bezpośredniej demokracji*, "Rzeczpospolita" 1995, No. 282, p. 7.

¹³ Art. 4 sec. 1 the Act of March 14, 2003 for a nationwide referendum (Dz.U. 2015, item 318).

¹⁴ Art. 3 of the Resolution of the Sejm of the Republic of Poland of 17 April 2003 on holding a nationwide referendum on granting consent for the ratification of the Treaty concerning the accession of the Republic of Poland to the European Union (M.P.No. 66, item 613).

¹⁵ This effect was achieved. 58.5% of Polish citizens entitled to vote took part in the vote in the accession referendum on 7–8 June 2004, while on the first day 17.61% voted and 40.89% voted on the second day. M. Jabłoński, *Polskie referendum akcesyjne*, Wrocław 2007, p. 272.

In the legal system in force, the decision on holding the referendum during two days is taken not in the form of the Sejm resolution, but in the form of the act. If the attendance threshold was abandoned, two-day referendum would not be necessary. This raises the question of whether the creation of the possibility of two-day vote in the referendum guarantees the attainment of the attendance threshold. Two-day vote in the referendum increases chances to attain the attendance threshold, but of course it does not guarantee it. The attempt at securing the attainment of this threshold may result in the attempt at extending the time of the vote in the referendum by the Sejm resolution or an amendment to the Act on nationwide referendum. We cannot exclude the tendency to extend the time of the vote in the referendum, similarly as we cannot exclude the occurrence of such projects in relation to elections. The reason for previous and maybe future legislative measures is the desire to secure the attainment of the attendance threshold required by the Constitution in the nationwide referendum. These measures may be assessed as attempts at circumventing this constitutional threshold. In the face of the weakness of the systemic justification of the attendance threshold existence, we should rather consider its cancellation. There are two positive results of the cancellation of the attendance threshold in the referendum. First of all, we achieve such a n effect that each nationwide referendum results in a legally effective decision. Secondly, the occurrence of the effect motivating society, which will always take real part in the decision-making process, is highly probable. Thirdly, it would constitute the simplification of the institution of the nationwide referendum, which will result in its better understanding by society¹⁶.

In conclusion, I tried to justify the need to introduce an amendment to the Constitution consisting in resigning from the attendance threshold in the nationwide referendum. I claim that we should avoid calls for a complete revision of the Constitution. The proposal to carry out a complete revision involves the idea of the reform of the value system promoted and protected by the current Constitution. I think that there is no need to propose and, moreover, to introduce amendments of fundamental nature to the Constitution. However, it is advisable and even desirable to formulate proposals of

¹⁶ Wider background of complexities of the nationwide referendum regulation is presented by L. Garlicki, *Komentarz do artykułu 125 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, ed. L. Garlicki, Warsaw 2001, p. 12.

amendments to the Constitution of reasonable nature. As we strive to ensure that our Constitution is of juridical nature, juridical arguments rooted in rules of logical thinking should dominate in discussions on potential amendments thereto.

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