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“Political Offenses” against the Nationwide Referendum in Poland*

1. Introduction

After the introduction of the principle of nation’s sovereignty in the Constitution of the Republic of Poland¹ it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. In fact, as a form of participation in determining public matters it serves as the immediate expression of the political will allocated to the citizen.² However, it needs to be remembered that according to the intentions of the founders of the Constitution the direct democracy institutions should not restrict the dominant position of the parliament, hence in the Constitution a national referendum was attributed a “supplementary character” in relation to the activities of representative organs – the Sejm and the Senate.³ The above view was also

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1 The Constitution of the Republic of Poland of 2nd April 1997, *Dziennik Ustaw* (Official Journal of Laws of the Republic of Poland, hereinafter referred to as: “Dz.U.”) 1997, No. 78, item 483, as amended, hereinafter referred to as: “Constitution.”

2 See more: Z. Witkowski, M. Serowaniec, *The Views of the Polish Political Class on the Institution of a Nationwide Referendum*, “Kultura i Edukacja” 2016, No. 4 (114), p. 165–168.

3 Cf. M. Pietrzak, *Demokracja reprezentacyjna i bezpośrednia w Konstytucji RP* [Representative and direct democracy in the Polish Constitution], in: *Referendum konstytucyjne w Polsce* [Constitutional referendum in Poland], ed. M.T. Staszewski, Warszawa 1997, p. 31–32.

shared by the Polish Constitutional Court in point 11.5 of judgment K 11/03 as of 27th May 2003.⁴ The Court recognised there that:

[...] the thesis on the supplementary character of direct democracy finds its justification... in the legal character of a referendum from the point of view of the entity entitled to refer to (initiate) the referendum procedure. In the Polish legal system we do not speak of a civil right to a referendum, as the citizen (group of citizens) does not have a legally effective possibility to initiate actions whose immediate result consists in calling a referendum.⁵

The Polish Constitution of 2nd April 1997 provides for holding a referendum in three following cases:

- 1) in matters of particular importance for the state (Art. 125);
- 2) in a matter of expressing a consent to the ratification of an international agreement on whose basis Poland will delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters (Art. 90);
- 3) in a matter of an approval of a law on amending the Constitution, as far as its provisions interfere with the content of Chapter I – ‘Commonwealth’, II – ‘Liberties, rights and obligations of the man and citizen’ and XII – ‘Amendments to the Constitution’ (Art. 235).

In none of the above cases, however, there is an obligation to conduct a referendum, it is always optional and held if an authorised entity files a motion and a proper decision is taken by authorised organs.

The objective of this paper is to discuss the “Political Offenses” against the Nationwide Referendum in matters of particular importance for the state (Art. 125). Such a referendum can be called by the Sejm by an absolute majority of the votes in the presence of at least half of the statutory number of members of the Sejm or by the President of the Republic of Poland with the consent of the Senate expressed by an absolute majority of votes in the presence of at least half of the statutory number of senators. In the first, the Sejm can make a resolution on holding a referendum by an absolute majority of votes. A draft resolution

4 Dz.U. 2003, No. 98, item 904. An identical opinion on this issue is expressed by Prof. M. Jabłoński, *Polskie referendum akcesyjne* [Polish accession referendum], Wrocław 2007, p. 106, fn. 333.

5 M. Jabłoński, *Polskie...*, p. 106.

on the order of a nationwide referendum may be submitted by the Presidium of the Sejm, a Sejm committee or a group of at least 69 deputies. Moreover, a request to order a referendum can be submitted to the Sejm by the Senate, the Council of Ministers, or a group of 500.000 citizens. The popular initiative, however, may not concern such issues as expenditures, incomes, defence capability of the State and amnesty. It is the Sejm duty to examine the submitted request, however, ordering a referendum is left to the recognition of the chamber. For the second, the decision to hold a referendum can be made by the President. Such a decision must be approved by the Senate by an absolute majority of votes. The Senate should take the appropriate resolution within 14-days of the date of submission of the draft provisions of head of state.⁶ At the same time it should be noted that it is the President who determines the entire content of an ordinance to conduct a referendum, thus he decides which matters are of particular significance for the state, formulates the questions and indicates the date thereof, whereas the role of the Senate is limited to issuing a consent, *i.e.* passing a resolution that allows or rejects a referendum in the date and form defined by the President. In this way, the Polish Constitution precludes the Head of State from holding a referendum without the consent of the Parliament. Such solution remains in accordance with the rationalised parliamentary system, which operates on the basis of the Constitution 1997.

2. The role of nationwide referendum in Polish democracy

The conclusions that can be drawn from the current practice of use of the institution of referendum in Poland are also not optimistic. From the very beginning of the implementation of this institution in the Polish legal system it was accompanied by political horse-trading. The members of the of the Constitutional Committee of the National Assembly challenged the importance of the institution of referendum by raising the argument that it created the premises for the establishment of “a permanent referendal republic” thus providing “a very dangerous window for numerous initiatives that would create divisions in the society and burden

6 Cf. K. Prokop, *Polish Constitutional Law*, Białystok 2011, p. 80–81.

the state’s budget,” which was seconded by some of the representatives of science of law.⁷ It was prophesied that instead of strengthening the democratic legitimacy of a new state a referendum would act as a convenient form of exerting constitutional pressure on the Sejm and create cycles of tensions that would destabilise the state should the motions for a referendum be rejected by the Sejm. The final resolution concerning the institution of a referendum in the Constitution of 1997 clearly showed that within the members of the National Assembly passing the Constitution the dominant conviction was that the sovereign, and thus the totality of citizens, are not only not “fully prepared for personal and direct governance” but, moreover, that the faint political culture of the sovereign means that he should not be provided by the basic law with the real possibility to influence the initiation of procedures that could result in participation in shaping the most important state decisions that concern him (the sovereign). It was recognised that such civic participation would lead to destabilisation and threaten the state of law rather than contribute to the development of civic democracy. And this was the principal reason why a nationwide referendum was turned into a merely decorative and secondary element. It should be straightforwardly admitted that the institution of referendum was marginalised in Poland by being assigned the features of a supplemental mechanism for indirect rule or responsible government.⁸ Hence, although the adopted nationwide referendum mechanism in Poland fulfils the task of protection against its too frequent and not always justified use, at the same time it does not eliminate the risk of its entirely instrumental *ad hoc* use by currently ruling political majority.⁹ However, the worst part is that this way the Polish political class expressed its real negative view on the need to “establish

7 See “Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego” [Bulletin of the Constitutional Committee of the National Assembly] 1997, vol. XLIV, p. 151–152. See also M. Rachwał, *Prawo do zarządzania referendum ogólnokrajowego w Polsce w latach 1992–2009. Przyjęte rozwiązania i postulowane zmiany* [The right to call a national referendum in Poland in the years 1992–2009. The adopted solutions and postulated changes], in: *Prawo wyborcze i wyboru. Doświadczenia dwudziestu lat procesów demokratyzacyjnych w Polsce* [The right of vote and election. The experience gained in the twenty years of democratisation processes in Poland], ed. A. Stelmach, Poznań 2010, p. 115–116, 120.

8 Cf. on that topic M. Jabłoński, *Polskie...*, p. 105.

9 Cf. M. Jabłoński, *Polskie...*, p. 106.

citizens,” the necessity to transform citizens into the actual public authority and not merely addressees and subjects/objects of its imperative actions.¹⁰ Moreover, according to the beliefs represented by the majority of politicians the institution of referendum may only be identified with the time-consuming and costly vote of no-confidence referring to actions undertaken by democratically elected representatives. Further, they also emphasised the lack of social recognition in voting, considering the fact that each vote may turn into a sort of a survey and not a substantive determination of a crucial national matter.¹¹ Simultaneously, attention was paid to the fact that a referendum is not a mechanism allowing for negotiations, thus it does not create the opportunities to foster consensus capable of satisfying the demands of all the stakeholders. On the contrary, it forces opting for a particular solution, which may lead to major societal conflicts. Unfortunately, constant references to the above arguments also prove that the political class does not treat citizens as equal and fully rightful partners in the processes of governance.¹²

The latest nationwide referendum so far took place on 6th September 2015 on the initiative of Bronisław Komorowski, the former President of the Republic of Poland.¹³ In this referendum, the citizens were requested to provide answers to three questions concerning: single-mandate electoral districts, political party funding and the principles of settling ambiguous issues in favour of the taxpayer. In a common view, this initiative, on account of the questions posed was treated as an attempt to take over Paweł Kukiz’ constituents and ensure reelection. However, less than three months before that time, before the referendum campaign commenced, the majority of Poles (58%) had no awareness of what it would be about. Only 39%

10 Cf. D. Dudek, *Konstytucyjna aksjologia wyborów* [Constitutional axiology of elections], in: *Sędziowie kustoszami wyborów* [Iudices electionis custodes], ed. F. Rymarz, Warszawa 2007, p. 47.

11 Cf. M. Jabłoński, *Referendum ogólnokrajowe w pracach Komisji Konstytucyjnej Zgromadzenia Narodowego (1993–1997)* [National referendum in the works of the Constitutional Committee of the National Assembly (1993–1997)], “Przegląd Prawa i Administracji” 2002, vol. XLIX, p. 99–118.

12 Cf. M. Jabłoński, *Referendum ogólnokrajowe w polskim prawie konstytucyjnym* [National referendum in the Polish constitutional law], Wrocław 2001, p. 135.

13 See the Decision of the President of the republic of Poland of 17th June 2015 on calling a national referendum, Dz.U. 2015, item 852.

of people declared to have knowledge on the issue, with only 17% being able to vouch for their knowledge.¹⁴ As the commentators emphasised, presidential decision ‘will not increase the citizens’ trust of democracy, but conversely, the citizens will distance themselves from politics, from democracy, and will not feel subjectified.’¹⁵ Eventually, the turnout was only 7.8% and has been the lowest of all recorded national elections held in Europe after 1945.¹⁶ The referendum became a symbolic defeat of entire Polish democracy, for which politicians hold responsibility.

Another attempt at an instrumental use of the institution of referendum could be the initiative of the President of the Republic of Poland, Andrzej Duda, by conducting a referendum with regard to changes in the Constitution. According to the President, the Poles should be able to comment on the constitution that has been in force for 20 years and the political system defined in it. Moreover, the President wants the referendum on constitutional changes to be held next year on November 11th or to be extended to two days: November 10th and 11th. The said referendum is to be nationwide and intended as a consultative referendum. The constitutionalist stressed that, according to the rules in force, an outcome of a national referendum may be of a consultative or advisory character when the turnout is less than 50% of those entitled to participate, whereas a higher turnout means that the referendum is binding. Thus, one can ask the following question: what happens if the referendum – meant by the President as consultative, yet conducted in the area of the constitution – is binding? This would mean that the Sejm and the Senate are required to adopt the constitution in concord with the results of the referendum, however in order to adopt amendments to the constitution it is required to obtain two-thirds (votes) in the Sejm and an absolute majority in the Senate. At the moment it seems impossible to achieve such a majority. Thus, what would this commitment of the Sejm and the Senate mean? In political terms, such a referendum makes sense,

14 Cf. CBOS survey message No. 89/2015 Referendum – first reactions before the commencement of the campaign, < https://www.cbos.pl/SPISKOM.POL/2015/K_089_15.PDF >.

15 Cf. A. Szczęśniak, *Referenda Became a Toy in the Hands of Politicians*, < <http://wiadomosci.onet.pl/szczesniak-referenda-staly-sie-zabawka-w-rekach-politykow/kvs33q> >.

16 Cf. G. Osiecki, M. Potocki, *Referendum przeszło do historii* [Referendum went down in history], “Dziennik Gazeta Prawna” 8th September 2015.

for example, as a challenge to ensure such a majority with regard to constitutional changes in the present and upcoming parliament. On the legal side, with regard to this particular parliament it seems that it would be difficult to enforce the results of the referendum if it were binding. This would mean a commitment that in practice would be difficult to keep. The discussion on the constitution and its possible changes is needed, although to many people these issues are very difficult. Another problem is concerned with a constitutional referendum which is to acknowledge the amendments to the constitution adopted by the parliament. According to the provisions of the constitution such a referendum may – but does not have to – be ordered if the amendments pertain to the provisions stipulated in chapters I, II or XII of the Constitution. These are chapters concerned with the principles defining the political system of the state, freedoms, rights and obligations of persons and citizens, and the procedures for amending the constitution. Indeed, it is clearly visible that the procedure of introducing changes in the constitution was intended for the purpose of correcting the constitution rather than changing it completely. In the situation where the entire constitution is subject to modification, *i.e.* also chapters I, II and XII, the matter of conducting a confirmatory referendum thus becomes more complicated. Therefore a question arises: what should be the object of such a referendum? Should it be chapters I, II and XII exclusively or the entire constitution? It seems that the latter, as what would it mean, for example, if the amendments to the three chapters were rejected (in the referendum)? In such a situation the entire constitution should be submitted to a referendum as a completely new normative act. A confirmatory referendum is not obligatory and if an agreement is reached on the political scene such as referendum is not conducted. However, with current extensive and sharp political disputes, it can be assumed that there will be a will to hold a referendum that is “constitutional by character” to end the procedure of changing the constitution.

As practice shows, the issues that were the subject of voting were not sufficiently recognised by a larger part of the society. From the society’s point of view, the referenda did not appear as procedures of direct participation in the process of exercising power but as a call for taking sides or even

granting political support to a particular person or political group. A referendum, on account of the properties of human psyche, has a tendency to turn into a personal plebiscite which aims at building or denying support to a particular politician, or a group of politicians who authored the draft that has been put to vote. The draft and its properties, advantages and disadvantages are of secondary importance. As shown in practice, most frequently it becomes an act of investiture, approval or disapproval of the representatives.

3. “Political offenses” against the nationwide referendum in Poland

A referendum has been and still is commonly treated by the political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their ongoing purposes. Different political hubs attach different expectations to referenda. Some politicians treat them solely as a test of popularity of their own group. Hence, a referendum is oftentimes considered as a test for political elites, which provides more of an indication of what the current distribution of powers on the political scene is, rather than binding solutions on issues that are essential to the state. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the ‘game of power.’ The institution of the referendum has thus become another means for running their political campaign on an extended scale, which enables gathering numerous constituents rather than a real procedure that ensures direct exercise of power for the public.¹⁷ It is not uncommon for the political classes to use the institution of a referendum as a tool that ensures political success for the purpose of achieving a particular electoral goal. A further point concerns taking advantage of a referendum to build a position on a political scene by the actors of political life who wish to remind the voters about their existence. This certainly does not build the authority of the institution contributing to a low turnout and its gradual devaluation.

17 Cf. Z. Witkowski, *Siedem grzechów głównych polskiej klasy politycznej wobec wyborców, wyborów i prawa wyborczego* [Seven cardinal sins of the Polish political class in relation to their voters and the election law], Toruń 2015, p. 7.

The issue of a cryptic formulation of questions that are the subject of the referendum needs to be addressed. Regardless of their intentionality, such vague and imprecise formulation of questions obliterates the potential effect of the referendum from the start. Political parties try to convert the issue posed at the referendum into a plebiscite around particular people or political orientations that support or contest a given solution. In the experience to date, vague questions, ambiguity, insufficient, substantive and organisational preparation of the voting contribute to a low turn out in a referendum. It thus may be *a priori* assumed that the answers to questions formulated in such a vague manner will not lead to any accurate conclusions. Worse still, the result of such a referendum will do very little in practice, but it will surely become a subject of political disputes between the governing party and the opposition. In such atmosphere the citizens may be dissuaded from taking part in law-making procedures in this form. If the decision-makers assume that social engineering of that kind will help them reach their intended goals, then the referendum will not bring the desired result. If a referendum is to fulfil what is expected of it, then the questions must be formulated with the highest possible degree of precision, as only then the correct interpretation of its results will be possible. Otherwise, it is possible to imagine a situation in which a referendum turns into a plebiscite of popularity and resentment, and not a way of making binding decisions.¹⁸

The political class loses campaigns for referenda with a systematic precision. The entities that take part in them should demonstrate and explain the benefits and dangers of the proposed solutions to the public. However, political parties in our country are unable to present the advantages of the proposed solutions to an average citizen. Political powers in this country treat referendum campaigns not as debates about a pivotal issue for the state, but as a way of building electorate and mustering up the voters. The studies also show that campaigns that propagate the referendum in mass media have been delivered to the public in a limited manner. It is far from being optimistic to realise that the campaigns prior to the referenda have been a display of demagoguery rather than a substantial

18 Cf. M. Jabłoński, *Referendum de lege lata i de lege ferenda*, "Przegląd Prawa i Administracji" 1997, vol. XXXIX, p. 84.

and factual debate with arguments. A referendum has thus become a tasty morsel for politicians in their fight to strengthen the position of their parties rather than educate the voters. However, what is even more surprising, the referendum-holding authority, as seen in previous cases, refrains from running an extensive referendum campaign and utilising the dedicated transmission time. In such a situation, the subject of the referendum becomes less important as the main goal of the participation in the referendum campaign is the emphasis of one’s own political independence and distinctness. It should come as no surprise that the information campaigns held to date have been shallow in terms of substance, chaotic and focused on political competition. An obvious underlying political context, badly prepared questions and the lack of a real referendum campaign held in media and the largest parties, translate into a very low turnout. Thus, the voters’ indifference with regard to the possibility to make decisions about the affairs of the state comes as no surprise. They have lost a sense of any real impact on the actions of the authorities as they have no guarantees that, regardless of the governing political elites, they will make decisions on the affairs that are essential to the state and, most importantly, for themselves.

4. Conclusions

A general reflection on the lost opportunities in terms of the functioning of political institutions due to insufficient professionalism both in the process of shaping appropriate legal measures as well as applying them in practice, remains. In order for a referendum to be able to fulfil its basic functions, certain requirements need to be met. Firstly, the issues that are to be regulated must be clearly and precisely formulated. It must also be preceded by a sufficiently long and thorough campaign, in which the society will have a chance to be confronted with different standpoints. This way it becomes subjectified and at the same time the possibility of any manipulations that political parties may be tempted to inflict is diminished.¹⁹

¹⁹ See M. Rachwał, *Demokracja bezpośrednia w procesie kształtowania społeczeństwa obywatelskiego w Polsce* [Direct democracy in the process of shaping the civil society in Poland], Warszawa 2010, p. 89–90.

Summary

After the introduction of the principle of nation sovereignty in the Constitution of the Republic of Poland, it seemed that a nationwide referendum was bound to become an important instrument allowing the expression of opinions and formulation of decisions by the sovereign. The nation is a source of power and may assume the role of an arbitrator in conflict situations between constitutional state organs but also in disputes between the subjects of the political scene, which is reflected in aiming the activities of public authorities according to the will expressed via a referendum. The conclusions that can be drawn from the use of nationwide referendum in Poland are much less optimistic. From the very beginning of its implementation, it was accompanied by political horse-trading. A referendum has been and still is commonly treated by the Polish political classes as an element of political struggle between particular parliamentary and extra-parliamentary groups that take advantage of it for their current purposes. Referenda have become toys in the hands of politicians who use them as tools in electoral competition and an element of the 'game of power.'

Keywords: the principle of nation's sovereignty, nationwide referendum, public authorities, Polish political class

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