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**CONSTITUTIONAL REFERENDUM IN POLAND
IN THE LIGHT OF CONSTITUTIONAL REGULATION
AND CONTROVERSY ARISING
FROM CONSTITUTIONAL PRACTICE**

1. The institution of referendum is the basic instrument of direct democracy (or, more broadly, participatory democracy) implemented and applied in modern states. It is defined differently in legal and political literature¹. However, assuming that the main aim of the referendum (as well as other direct democracy instruments) is to enable people to directly decide on matters important to the state, the narrower understanding of the institution seems to be more adequate, which does not include general voting of a consultative nature. Therefore, the referendum can be defined as a general voting, the purpose of which is to take a binding decision on an issue important to the state. Referendum results can automatically replace the decision of a state authority or oblige state authorities to implement it to the legal order. The concept of referendum can be determined by three criteria – a material criterion indicating the problematic nature of the referendum subject, a functional criterion that indicates the purpose of voting, which is the adoption of a binding decision by the sovereign nation and the institutional criterion².

The above definition allows to distinguish various types of referendums based on various criteria. From the point of view of the subject of this paper, the criterion of referendum subject is particularly important. On this basis, we can distinguish referenda directly related to legislation, including constitutional referendums regarding the approval, adopting, amending or repealing a constitution, legislative referendums in which citizens vote on the adoption, amendment or repealing

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¹ See: f. ex. a definition presented in: H. Groszyk, M. Granat, *Modele referendum w polskim prawie (próba optymalizacji)* [in:] *Prawo, a wartości. Księga jubileuszowa profesora Józefa Nowackiego*, eds. J. Bogucka, Z. Tobera, Kraków 2003, p. 87.

² See: *Référendums*, ed. F. Delpérée, Bruxelles 1985, p. 10.

a statute, referendums on international agreements, which usually take a form of expressing consent for their ratification and referenda on resolutions³. The second group consists of referendums on certain issues of significant importance to the state other than legislation. In the French and Swiss doctrine they are also called administrative referendums⁴. Nevertheless, depending on the adopted definition of a referendum, there are also other types of the institution that can be distinguished, such as an arbitrary referendum which aims at resolving disputes between state authorities directly by the sovereign people. Such referendum usually results in the end of the term of office of the authority which does not gain citizens' support.

Constitutional referendums, as indicated above, belong to the group of referendums referring to legal acts. They can be further divided due to the stage of the legislative procedure at which the popular voting takes place. On the basis of this criterion theoretically three situations can be distinguished. First of all, a constitutional referendum can take place before the act is adopted by the parliament. At that stage it can concern the general principles and assumptions of the draft law, as well as detailed solutions proposed in the draft. Depending on specific legal solutions adopted in a given country, such referendum can be carried out *ante legem* and in such case it results in the obligation of certain state organs to take the will expressed by citizens into account in further stages of the proceedings or has a direct effect equivalent to the adoption of the final act. On the other hand, constitutional referendums can be also carried out *post legem*. They take place after the constitution has been adopted or amended by the parliament, but before its entry into force. In such case, the constitutional referendum may have the nature of an approval or a veto. The latter case happens if the referendum is initiated by the request of a certain number of citizens or at the request of the head of state being in the opposition to the ruling majority.

By definition a constitutional referendum concerns a partial or total revision of the Constitution. It may refer to the adoption or approval of an entirely new constitution or to the amendment or repeal of the constitutional provisions already in force. In French, this distinction is emphasized by the use of different terms defining both types of voting – the *constituent referendum* and the *referendum constitutionnelle* respectively.

Specific solutions applied in individual countries also differ as to the manner of formulating the referendum subject. According to the Venice Commission, the text submitted to referendum may be presented in various forms: a specifically-worded draft of a constitutional amendment, repeal of an existing constitutional provision, a question of principle (for example: "Are you in favor of amending

³ M. Jabłoński, *Polskie referendum akcesyjne*, Wrocław 2007, p. 27 and next.

⁴ See: f. ex. M. Hauriou, *Précis de droit constitutionnel*, Paris 1929, p. 548; J.D. Delley, C. Mascotto, *Parler des droits populaires. Les discours des élites, des sciences sociales et des juristes sur la démocratie directe*, Genève 1997, p. 47.

the Constitution in order to introduce a presidential system of government?”) or a concrete proposal, not presented in the form of a specific provision and known as a “generally-worded proposal” (for example: “Are you in favor of amending the Constitution in order to reduce the number of seats in Parliament from 300 to 200?”)⁵.

The text of the Constitution can provide that certain amendments shall be automatically submitted to popular voting after their adoption by the parliament (mandatory referendum). There are also cases in which referendum follows a popular initiative (either a section of the electorate puts forward a text which is then submitted to popular vote or a section of the electorate requests that a text adopted by Parliament be submitted to popular vote). However, the most common solution is that referendum can be called by a state authority such as the parliament, the head of state or the government as well as one or several territorial entities⁶.

The constitutional referendum may take the form of an obligatory referendum, if it is an indispensable element of the constitutional procedure, or an optional referendum ordered at the request of eligible entities. As far as the obligatory referendum is concerned, there are two groups of constitutional matters which may be subject to referendum, each of them having a different justification. The referendum as an element necessary to make changes of the basic principles of the constitution is primarily aimed at guaranteeing the stability of substantive constitutional provisions that constitute the foundations of the constitutional system of the state. The second group includes provisions regulating the procedure of amending the constitution which aim is to ensure the stability of the constitution in the formal sense. However, it should be emphasized that in some countries (Romania, Denmark, Switzerland) an obligatory referendum is required in case of each constitutional amendment.

2. The admissibility of the direct way of deciding by citizens about the most important political issues by voting on the adoption of a new constitution or on the introduction of amendments to the current constitution is a part of a more general discussion in the doctrine on the mutual correlation between the principle of national sovereignty and the principle of constitutionalism.

The superiority of the idea of constitutionalism is traditionally recognized as a characteristic American approach, where constitutionalism has been understood as a belief that the basic principles of governing the state should have

⁵ Referendums in Europe – an Analysis of the Legal Rules in European States, Report adopted by the Council for Democratic Elections at its 14th meeting (Venice, 20 October 2005) and the Venice Commission at its 64th plenary session (Venice, 21–22 October 2005), Study No. 287/2004, Strasbourg, 2 November 2005, CDL-AD(2005)034, par. 64.

⁶ Guidelines for Constitutional Referendums at National Level adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6–7 July 2001), Strasbourg, 11 July 2001, CDL-INF(2001)10.

a written form, materialized in the constitution as an act of the highest legal force. Not only state authorities but also people – the sovereign who established the constitution – are absolutely subject to its provisions⁷. Such approach is conditioned primarily by the American history in which the constitution played an extremely important role in the process of building the state. The American constitution as a unique legal act and the object of state pride can be changed only in the procedure regulated in the constitution which does not provide for the direct participation of the sovereign (the people)⁸. However, it should be noted that despite the fact that there is no institution of the constitutional referendum (as well as the referendum in general) at the federal level in the USA, a mandatory constitutional referendums are envisaged in legal regulations of 49 out of 50 US states⁹.

A different attitude is presented by the traditional French doctrine which, with the concepts of J.J. Rousseau in the background, perceives constitutionalism more in the context of people's right of the people to make a constitution than the final legal act, thus giving priority to the principle of national sovereignty as the power-wielding nation is the source of all power in a democratic system. It can decide, delegate, sanction, control or judge but it cannot be judged or controlled. If it was controlled it could not remain a sovereign¹⁰.

In the constitutional practice of European states, constitutional referendums are quite common type of this institution, both in terms of their normative regulation and practice. For example, they were often used in the post-socialist states of Eastern and Central Europe as the adoption or approval of new constitutions directly by the people strengthened their democratic legitimacy which was important in the process of building new democratic foundations of the states. Such referendums took place in Romania (8 December 1991), Estonia (28 June 1992), Lithuania (23 May 1992) and Poland (25 May 1997). It is also typical that the new constitutions of post-socialist Central and East European states adopted in the 1990-ties have quite broadly regulated the institution of referendum, including the constitutional referendum. The mandatory constitutional referendum is provided by art. 148 of the Lithuanian Constitution (with regard to the change of chapters I and XIV)¹¹, art. 77 of the Constitution of Latvia (with regard to approv-

⁷ See: A. Pułło, *Idea konstytucjonalizmu w systemie zasad prawa konstytucyjnego* [in:] *Zasady ustroju Rzeczypospolitej Polskiej w nowej konstytucji*, ed. K. Wójtowicz, Wrocław 1997, p. 30 and next; Idem, *Z problematyki zasad prawa: idee ogólne w prawie konstytucyjnym*, „Przegląd Sejmowy” 1996, No 1(13), p. 13 and next.

⁸ M. Gallagher, *Popular Sovereignty and Referendum* [in:] *Direct Democracy: The Eastern and Central European Experience*, eds. A. Auer, M. Butzer, Ashgate 2001, p. 230.

⁹ See: K. Zwierchowski, *Amerykańskie instytucje demokracji bezpośredniej*, Białystok 2005, p. 22.

¹⁰ D. Rousseau, *Sądownictwo konstytucyjne w Europie*, Warszawa 1999, p. 11.

¹¹ According to art. 148 of the Constitution of Lithuania of 1992, “the provision “The State of Lithuania shall be an independent democratic republic” of Article 1 of the Constitution may be altered only by referendum if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof. The provisions of the First Chapter “The State of Lithuania” and the Fourteenth Chapter “The Alteration of the Constitution” may be altered only by referendum [...]”. On the procedure of

ing amendments to art. 1, art. 2, art. 3, art. 4, art. 6 and art. 77)¹², § 162 of the Constitution of Estonia (with regard to the amendment of Chapter I „General principles” and Chapter XV regulating the procedure of amending the Constitution)¹³, art. 93 p. 1 of the Constitution of Slovakia (regarding the accession and presence of Slovakia in „state association” with other countries)¹⁴ and art. 51 of the Romanian Constitution (providing the need to hold a referendum in regard to every constitutional amendment)¹⁵. In addition, the possibility of conducting a constitutional referendum of an optional nature is provided for in art. 148 of the Constitution of Lithuania and § 163 of the Constitution of Estonia with regard to the change of chapters not covered by the mandatory referendum, § 28B of the Constitution of Hungary according to which constitutional referendum is carried out on general principles, as well as art. 170 of the Constitution of Slovenia on any amendment of the Constitution¹⁶.

At the same time, it should be emphasized that although the above states accepted that the sovereign people should be able to directly influence the procedure of amending the constitution it was claimed that the people do not stand above the basic law so all their actions must be compatible with the constitution. This approach is consistent with the statement that „democracy can be fully realized when power is exercised only on the basis of law and is subordinated to law, and when law is the main instrument of exercising power”¹⁷. Otherwise, one of

amending Lithuanian Constitution see: D. Górecki, *Zasady zmiany Konstytucji Republiki Litewskiej* [in:] *Zasady zmiany konstytucji w państwach europejskich*, eds. S. Grabowska, R. Grabowski, Warszawa 2008, p. 193 and next.

¹² According to art. 77 of the Constitution of the Republic of Latvia of 1922, “If the *Saeima* has amended the first, second, third, fourth, sixth or seventy-seventh Article of the Constitution, such amendments, in order to come into force as law, shall be submitted to a national referendum”. On the procedure of amending Latvian Constitution see: R. Grabowski, *Zasady zmiany Konstytucji Republiki Łotewskiej* [in:] *Zasady zmiany...*, p. 208 and next.

¹³ According to § 162 of the Constitution of the Republic of Estonia of 1992, “Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) of the Constitution may only be amended by referendum”. On the procedure of amending Estonian Constitution see: R. Balicki, *Zasady zmiany Konstytucji Republiki Estonii* [in:] *Zasady zmiany...*, p. 116 and next.

¹⁴ According to art. 93 p. 1 of the Constitution of the Slovak Republic of 1992, “A constitutional law on joining a union with other states or the secession from it, shall be confirmed by a referendum”.

¹⁵ According to art. 151 p. 3 of the Constitution of Romania of 1991, “The revision shall be final after the approval by a referendum held within 30 days of the date of passing the draft or proposal of revision”. On the procedure of amending Romanian Constitution see: W. Brodziński, *Zasady zmiany Konstytucji Republiki Rumunii* [in:] *Zasady zmiany...*, p. 296.

¹⁶ According to art. 170 of the Constitution of the Republic of Slovenia of 1990, “The National Assembly must submit a proposed constitutional amendment to voters for adoption in a referendum if so required by at least thirty deputies. A constitutional amendment is adopted in a referendum if a majority of those voting voted in favor of the same, provided that a majority of all voters participated in the referendum”. On the procedure of amending Romanian Constitution see: P. Uziębło, *Zasady zmiany Konstytucji Republiki Słowenii* [in:] *Zasady zmiany...*, p. 325 and next.

¹⁷ W. Sokolewicz, *Demokracja, rządy prawa i konstytucyjność w postsocjalistycznym społeczeństwie Europy Wschodniej* [in:] *Zagadnienia prawa konstytucyjnego. Księga pamiątkowa ku czci Profesora Tadeusza Szymczaka*, ed. M. Domagała, Łódź 1994, p. 31.

the basic concepts of the constitutional system would be violated – the idea of a state based on the rule of law.

3. The current Constitution of the Republic of Poland of 1997 provides for three types of referendum at the national level that are distinguished on the basis of their subject. These are: a referendum on matters of significant importance to the state, a referendum on ratifying certain international agreements and a constitutional referendum. In all cases, the referendum is optional.

The constitutional referendum has been regulated in art. 235 para. 6, which provides a number of differences in relation to the referendum referred to in art. 125. The subject of a constitutional referendum is the constitutional law already adopted by the Sejm and the Senate. Therefore, *de lege lata* constitutional referendum is of „approving” character, because its subject is not a draft law, but the final act itself, enacted in the qualified procedure provided in art. 235. Constitutional referendum in Poland is optional, as it becomes a part of the constitutional procedure only if one of the eligible entities makes an appropriate application. Entities eligible to submit such application are listed in art. 235 p. 1 (the same entities who are granted with the right to propose constitutional amendments) – at least 1/5 of deputies, the Senate and the President of the Republic. It should be emphasized that each of them can request ordering the constitutional referendum no matter who initiated constitutional amendment in particular case¹⁸. The application for ordering the constitutional referendum is addressed to the Marshal of the Sejm and is binding for him. Therefore, the Marshal is obliged to immediately order such voting as it should take place within sixty days from submitting the request.

Depending on who initiates the constitutional referendum, it may fulfill various functions. The referendum initiated by the President or deputies of the opposition usually is a form of questioning the constitutional act passed by the parliament. In case of the president it is also the equivalent of the right of veto which cannot be used in regard to constitutional amendments but only ordinary laws. The motivation of the Senate initiating referendum is usually different. The reason of such action may be the will to strengthen the democratic legitimacy of the undertaken decision. The institution of a referendum approving amendments to the Constitution may take the form of „both a brake intended to stop one from making changes to the constitution and a form of confirming the correctness of the changes”, depending on whether the entity submitting the referendum request is in the opposition to the changes introduced to the Constitution or it is its author¹⁹. It should be noted that there are no citizens themselves among the entities who can initiate the constitutional referendum in Poland and thus send

¹⁸ See: A. Szmyt, *Zasady zmiany konstytucji Rzeczypospolitej Polskiej* [in:] *Zasady zmiany...*, p. 48.

¹⁹ S. Służalek, *Instytucja referendum zatwierdzającego zmiany Konstytucji Rzeczypospolitej Polskiej z 1997 roku*, „Przegląd Sejmowy” 2004, No 3 (62), p. 49 and next.

the constitution to its final evaluation by the nation, which may indicate a certain distrust of the legislator to the instruments of direct democracy.

Eligible entities may require the holding of a confirmatory referendum within 45 days from the adoption of the bill by the Senate. However, the Constitution restricts the scope of constitutional amendments that may be subject to a referendum to amendments which "relates to the provisions of Chapters I, II or XII of the Constitution". The above chapters are devoted to the most important constitutional matters such as general principles, the status of an individual in the state and the amendment of the Constitution. However, even that it is not explicitly mentioned, in certain situations citizens will be able to decide also on the approval of the amendments of the provisions included in other chapters. That is because when voting in a constitutional referendum, citizens decide on the whole bill subject to voting and express their will to approve it or not. Thus, voters do not have the opportunity to express their opinions on particular provisions of the act subject to voting²⁰. As a consequence, if the amendment of the Constitution submitted for voting concerns Chapters I, II or XII and at the same time other chapters, in the constitutional referendum on that amendment citizens will decide on the approval of the whole act. A similar situation will occur in case of a very complex amendment of the Constitution covering all its provisions²¹. The possibility of holding an approving referendum in such case is not questioned as such type of an amendment also relates to, among others, the provisions of Chapters I, II and XII²². What is more, it also seems possible that in some cases the approving constitutional referendum could take place despite the fact that the amendment adopted by the parliament formally concerns the provision or another chapter than I, II or XII. The core of the problem is the way of interpretation of the term "relates to the provisions of Chapters I, II or XII" used in art. 235 p. 6. According to A. Szmyt, the above phrase cannot be interpreted in a simply technical sense. Instead, the content of the amendment should be taken into account, so the admissibility of the constitutional referendum should depend on the fact if the amendment concerns the "matter" regulated by one of the three above mentioned chapters²³. However, there are also opposite opinions presented in the literature²⁴.

²⁰ Z. Jarosz, *Prawne problemy referendum konstytucyjnego* [in:] *Referendum konstytucyjne w Polsce*, ed. M.T. Staszewski, Warszawa 1997, p. 45.

²¹ However, it should be noted that the admissibility of the complete change of the Polish Constitution has been discussed in the Polish doctrine of constitutional law.

²² See: P. Winczorek, *Projekt ustawy o referendach ogólnokrajowych*, „Państwo i Prawo” 2002, z. 12, s. 31.

²³ A. Szmyt, *O zmianach Konstytucji RP z 1997 r. (w 10-lecie jej obowiązywania)* [in:] *Dziesięć lat obowiązywania Konstytucji Rzeczypospolitej Polskiej*, eds. E. Gdulewicz, H. Zięba-Załuca, Rzeszów 2007, p. 309 and next.

²⁴ See: M. Jabłoński, *Ogólna charakterystyka instytucji referendum ogólnokrajowego po uchwaleniu nowej konstytucji RP*, „Przegląd Prawa i Administracji” 1999, No. 42, p. 150.

The problem obtained a practical dimension in 2006, when a draft of a constitutional amendment was introduced to the parliament by one of the conservative political parties. The proposal aimed to expand the constitutional protection of human life on the prenatal period. As a result the Constitution would guarantee the protection of life also to unborn children from the moment of fertilization. Initially, the proposal directly referred to art. 38 of the Constitution. Its wording "The Republic of Poland shall ensure the legal protection of the life of every human being" was to be supplemented by "from the moment of fertilization". Such a proposal met with a negative reaction of the liberal opposition. Since the proposed regulation directly referred to the provision contained in Chapter II, opposition deputies announced that they would apply to the Marshal of the Sejm to hold a referendum, if such constitutional amendment was passed. As indicated above, the application signed by at least 1/5 of deputies would have binding character for the Marshal, obliging him to order a referendum on this matter. With this in mind, in the course of legislative proceedings in the Sejm the proposal of the amendment was modified. According to that, the new regulation was not to be included in art. 38 but in art. 236a, which was to be in chapter XIII. In the above situation, the Chancellery of the Sejm asked experts for the opinion whether in a situation in which constitutional amendments in a substantive way concern chapter I, II or XII of the Constitution but formally they result in the amendment of another chapter, a constitutional referendum can be conducted on the basis of art. 235 p. 6 or not. In general, the experts' opinions were positive. They pointed out that even if this second solution was adopted, the referendum would be admissible, because despite the inclusion of a new provision in Chapter XIII it still, as to the merits, concerned the provision of Chapter II, regulating the protection of human life. Nevertheless, there were also opposite approaches. Therefore, the aforementioned dilemma has not been finally settled out by the doctrine or practice. The legislative proceedings concerning the above-mentioned proposal were discontinued, due to the end of the Sejm's term of office and the principle of the discontinuation of the parliament's work which was applied in that case.

An important difference between the constitutional referendum and the referendum provided for in art. 125 is the lack of minimum turnout, which determines the binding nature of the vote. Regardless of the number of persons who take part in the constitutional referendum, they undertake a valid decision to approve the amendment or not. The positive result is when the majority of voters are in favor of the amendment, so the number of positive votes exceeds the sum of negative and invalid votes²⁵. Taking into account the specificity of the constitutional referendum, the above solution seems to be justified. As K. Wójtowicz has pointed out, in relation to the constitutional referendum "the requirement of 50% attendance cannot be treated as *conditio sine qua non*, because the docu-

²⁵ See: J. Jarosz, *Prawne problemy referendum konstytucyjnego* [in:] *Referendum konstytucyjne...*, p. 51 and next.

ment has already received the support of the parliamentary majority in a qualified manner”²⁶. Nevertheless, it is significant that the practice of other countries is different in this respect, establishing stricter conditions for the effectiveness of the constitutional referendum than in case of other referendum types.

It should be noted that before signing the act on the amendment of the Constitution, also when the amendment has been approved by citizens, the President of the Republic can refer to the Constitutional Tribunal in order to review its constitutionality. Of course, in case of constitutional law amending the Constitution which has the same legal force as the Constitution itself, the Constitutional Tribunal cannot consider the constitutionality of its content but only formal aspects related to the procedure of its adoption specified in art. 235 of the Constitution.

The current statutory regulation of the institution of national referendum in Poland is included in the Act of 14 March 2003 on the nationwide referendum²⁷, which replaced the referendum law of 1995²⁸. In regard to the constitutional referendum, the act *de facto* repeats the relevant provisions of the Constitution, not going beyond its scope, but only concretizing constitutional provisions. After receiving the request to hold a constitutional referendum, the Marshal of the Sejm shall immediately order it in a form of a decision which, pursuant to art. 65 p. 1 – p. 3 in conjunction with art. 77 p. 3 of the act, should contain the indication of the legal basis (in case of that type of referendum it is art. 235 p. 6 of the Constitution), a referendum question, the date of the referendum, which must fall on a day off from work within sixty days from the date of submission the application (one or two-day voting) and a calendar of activities related to the holding of the referendum. The specific wording of the referendum question, has been specified in art. 78 p. 1 of the act: „Are you for the adoption of the amendment to the Constitution of the Republic of Poland of 2 April 1997, made by the Act of ... (title of the Act)?”, The publication of the decision of the Marshal of the Sejm in the Official Journal of Laws “Dziennik Ustaw” starts a referendum campaign.

4. As a result of the completion of parliamentary works on the new Constitution and its adoption by the National Assembly in May 1997, a constitutional referendum was held in Poland. The approval of the Constitution in a referendum was a necessary condition for its entry into force resulting from the act on the preparation and adoption of the Constitution of the Republic of Poland in 1992. According to its provisions, the voting was to be decisive irrespective of the number of voters who took part in it. In accordance with the constitutional regu-

²⁶ K. Wójtowicz, *Prawo międzynarodowe w systemie źródeł prawa RP* [in:] *System źródeł prawa w Konstytucji Rzeczypospolitej Polskiej. Materiały konferencyjne (Nałęczów 1–3 VI 2000)*, ed. M. Granat, Lublin 2000, p. 127.

²⁷ Ustawa z dnia 14 marca 2003 r. o referendum ogólnokrajowym (The law of 14 March 2003 on national referendum), Official Journal of Laws (Dz. U. Nr 57, poz. 507).

²⁸ Ustawa z dnia 29 czerwca 1995 r. o referendum (The law of 29 June 1995 on referendum), Official Journal of Laws (Dz. U. Nr 99, poz. 487).

lation, the president set the date of the referendum on May 25, 1997 and for the referendum question was „Are you in favor of the Constitution of the Republic of Poland adopted by the National Assembly on April 2, 1997?” The turnout in the referendum was 42.86%. The new constitution was supported by 52.71% of voters who cast valid votes. The adoption of the Constitution despite the turnout of less than half of all eligible to take part in the referendum, aroused much controversy articulated, among others, in protests against the validity of the referendum submitted to the Supreme Court, which for obvious reasons were considered unfounded. The controversial solution that distinguished the constitutional referendum from the other types of nationwide referendums was a solution deliberately adopted by the legislator, as the parliamentary debate showed that the adoption of a new Constitution was considered more important than the risk of supporting it by a minority of the electorate. At the same time, the referendum attendance exceeding the threshold of 50% of eligible persons was assessed as unrealistic.

The possibility to conduct a constitutional referendum, in accordance with the requirements provided for in art. 235 para. 6 of the Constitution, appeared in 2006. The first constitutional amendment was adopted by the Sejm on 8 September 2006, so after nine years since the Constitution entered into force, as a result of an initiative made by the President. The adopted change concerned the content of art. 55 of the Constitution which originally provided an absolute ban on the extradition of a Polish citizen. The new regulation upheld the general rule prohibiting the extradition of Polish citizens, however, there are two exceptions, in which such extradition is admissible. The added par. 2 provides that the extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organization of which the Republic of Poland is a member, provided that the act covered by a request for extradition was committed outside the territory of the Republic of Poland and constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request. It should be noted that this provision is contained in Chapter II of the Constitution and therefore a constitutional referendum on the approval of the amendment adopted by parliament was permissible. However, such referendum did not take place because none of the authorized entities came forward with such an initiative. The subject of the adopted amendment was not controversial and the amendment of the Constitution was necessary due to the need to adapt the provisions of Polish national law to the law of the European Union²⁹.

²⁹ R. Stawicki, *Zmiany Konstytucji Rzeczypospolitej Polskiej w latach 1997–2011 w świetle projektów ustaw oraz uchwalonych nowelizacji*, Opracowania Tematyczne OT-605, Biuro Analiz i Dokumentacji, Kancelaria Senatu RP, Warszawa 2011, p. 5 and next.

The discussion regarding the admissibility, in the light of current regulations, of a referendum on matters which are directly regulated in the provisions of the Constitution appeared in the Polish legal doctrine as well as public debate in 2015 on the background of the referendum proposal presented by the President. The problem primarily concerned the first of the three questions subject to voting which was: "Are you in favor of introducing single-member constituencies in elections to the Sejm of the Republic of Poland?"³⁰. In that case the referendum subject directly referred to issues *expressis verbis* regulated in the text of the Constitution. According to art. 96 p. 2 of the Constitution, "Elections to the Sejm shall be universal, equal, direct and proportional and shall be conducted by secret ballot". The controversies were caused not only by the content of referendum questions but also by the circumstances of its ordering. The referendum was ordered on the basis of art. 125 of the Constitution, which provides that "1. A national referendum may be held in respect of matters of particular importance to the State. 2. The right to order a nationwide referendum shall be vested in the Sejm (...) or the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators". The referendum was ordered by the previous president Bronisław Komorowski, between the first and second round of presidential elections (both lost with the current president Andrzej Duda) and was clearly an attempt to gain more votes in the second round. After a debate, the Senate, in which the majority of senators was from the same party as the President, granted consent for the referendum despite the fact that experts' opinions on its admissibility were divided, and most of them in fact were very critical. Most experts raised serious legal doubts regarding the introduction of single-member constituencies without (or before) amending the Constitution. It was pointed out that the change of the electoral system to the Parliament cannot be done by statutory law as the procedure required for changing the Constitution is described in detail in Chapter XII. Therefore, the change of the electoral system from proportional to majority including single-mandate constituencies requires the amendment of the Constitution and it cannot be done only by statutory law. The referendum was held on 6 September 2015 and turnout out to be a complete failure as the turnout was extremely low (only 7,8%). As the referendum results were not binding the problem of how to deal with the citizens' decision on constitutional matters undertaken in national referendum called upon art. 125 of the Constitution disappeared.

Nevertheless, the above case provokes reflections on the need to introduce essential changes of the constitutional regulation of referendum. First of all, the scope of the admissible subject of the referendum called upon art. 125 should be clearly defined. At the moment, despite the fact that the Constitution does not

³⁰ The two other questions were "Are you in favor of maintaining the current method of financing political parties from the national budget?" and "Are you in favor of introducing a general rule of resolving doubts regarding the interpretation of taxation law in favor of the tax-payer?"

directly specify matters excluded from the subject of the referendum called upon art 125, it is commonly indicated by the legal doctrine that there are some limitations of the referendum subject. The referendum cannot concern the methods of implementation of public authorities' competences and it cannot substitute constitutionally defined decision-making procedures, such as the legislative process, the ratification of an international agreement or the constitutional review of law³¹. Second, the Constitution should clearly define the manner of implementation of the binding referendum result. In particular, it should determine the corresponding obligations of state authorities in this regard and the guarantees of realizing the directly expressed will of the sovereign nation.

The dispute on the admissibility of applying art. 125 of the Constitution as the base of the referendum on constitutional issues came back two years later in the context of president Andrzej Duda's announcement of 3 May 2017 of his intention to order a "constitutional referendum" in 2018. This referendum is planned to take place along with elections to the local self-government bodies on 11 November 2018 which is at the same time a symbolic day of the 100th anniversary of regaining the independence by Poland. The referendum subject is supposed to express citizens' general will to change the current constitution or prepare and adopt an entirely new constitution. The specific questions will relate to particular changes to be implemented to the Constitution. The concrete content of the referendum questions is supposed to be a result of a number of consultations and meetings with citizens conducted by the presidential administration throughout the year. Such consultation campaign was launched during the conference organized by the "Solidarity" Trade Union in Gdańsk in August 2017.

There are at least two legal problems concerning the referendum planned by the President. As it has been already mentioned, the Polish Constitution provides only one very restrictive case of constitutional referendum which according to art. 235 p. 6 can take place only after the adoption of the constitutional amendment by the parliament. In that case the referendum would take place before the parliament decide on the matter. What is more, the referendum will have, according to information presented by the ministers from the President's office, a „consultative" nature, which is not admissible in the light of the current law in Poland. The very idea of a consultative constitutional referendum is not bad, in certain circumstances it can be even very useful, and the Constitution itself does not prohibit this form of popular consultations, however, it must be pointed out that in order to conduct such referendum in Poland, the prior adoption of relevant laws is required. At the moment, there are no legal provisions - contained in the Constitution or statute - which would regulate such voting and its effects. In this regard, the President's plans raise serious doubts as to the admissibility of such referendum on the basis of the current law in Poland. There is also a danger that the

³¹ Winczorek P., *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2008, p. 164.

planned referendum is an attempt to circumvent the procedure of amending the Constitution described in detail in Chapter XII. Article 235 constitutes an important guarantee of the stability of the Polish Constitution, providing relatively high requirements for its amending such as the qualified 2/3 majority of votes required in the Sejm which is a threshold that the current ruling party cannot overcome.

That leads to the conclusion that the institution of referendum, once more (as in 2015) is to be instrumentally used by political forces to achieve their political goals. Its admissibility is also questionable in the light of constitutional principles in general and the purposes and essence of direct democracy in particular. As indicated few years ago by the Venice Commission, the institution of a referendum must be part of the rule of law. Therefore, the use of referendums must comply with the legal system as a whole, and especially with procedural rules. However, taking into account the procedure provided for initiating a national referendum in art. 125 of the Constitution as well as the fact that the ruling party has not only their President but also a majority of seats in the Senate, it is quite obvious that despite many legal doubts such referendum will be organized if there is such political will.

Anna Rytel-Warzocha

REFERENDUM KONSTITUCYJNE W POLSCE W ŚWIETLE REGULACJI KONSTITUCYJNEJ I KONTROWERSJI POWSTAŁYCH NA TLE PRAKTYKI USTROJOWEJ

Institucja referendum, w tym przede wszystkim referendum konstytucyjnego, jest podstawowym instrumentem demokracji bezpośredniej (lub szerzej demokracji partycypacyjnej) stosowanym we współczesnych państwach. W Polsce, referendum konstytucyjne zostało uregulowane w art. 235 ust. 6, który przewiduje szereg odrębności w odniesieniu do referendum o charakterze problemowym określonego w art. 125. Odrębności te dotyczą zakresu podmiotów uprawnionych do wykonania inicjatywy referendalnej, procedury zarządzenia referendum, przesłanek wiążącego charakteru referendum, jak również przedmiotu, który został ograniczony do zatwierdzenia zmian przepisów dotyczących rozdziału I, II lub XII. Możliwość przeprowadzenia referendum konstytucyjnego, pierwsza i jak do tej pory jedyna, pojawiła się w 2006 r. w związku ze zmianą art. 55 Konstytucji RP, aczkolwiek wobec braku inicjatywy ze strony uprawnionych podmiotów referendum takie się wówczas nie odbyło. Przedmiot uchwalonej nowelizacji nie budził kontrowersji, a zmiana Konstytucji RP była niezbędna z uwagi na konieczność dostosowania przepisów polskiego prawa krajowego do prawa Unii Europejskich. Wątpliwości prawne i kontrowersje pojawiły się natomiast w 2015 r. na tle zarządzonego przez Prezydenta RP referendum w sprawie materii bezpośrednio uregulowanej w Konstytucji RP, jak również w 2017 r. wobec zapowiedzi Prezydenta RP przeprowadzenia w 2018 r. referendum konstytucyjnego o charakterze konsultacyjnym.