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THE SHORTCOMINGS OF A NATIONWIDE  
REFERENDUM. REFLECTING UPON THE  
POSSIBILITY OF INTRODUCING AN ABROGATIVE  
REFERENDUM INTO THE POLISH LEGAL SYSTEM\*\*

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**Summary.** The article concerns the possibility of introducing of a law-repealing referendum into the Polish legal order. The author presents own opinions on the legal regulations of the nationwide referendum referred to in article 125 of the Constitution of the Republic of Poland. The author formulates postulates regarding to establish of a law-repealing referendum to the Polish legal order.

**Keywords:** nationwide referendum; abrogative referendum; Constitution of the Republic of Poland; sovereignty.

**Niedoskonałości związane z funkcjonowaniem referendum ogólnokrajowego. Rozważania nad możliwością wprowadzenia referendum abrogacyjnego do polskiego porządku prawnego.** Artykuł dotyczy rozważań nad wprowadzeniem do polskiego porządku prawnego referendum abrogacyjnego. Autorka przedstawia własne opinie dotyczące uregulowań prawnych ogólnokrajowego referendum z art. 125 Konstytucji

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Rzeczypospolitej Polskiej. Formułuje postulaty dotyczące ewentualnego wprowadzenia referendum derogacyjnego do polskiego porządku prawnego.

**Słowa kluczowe:** referendum ogólnokrajowe; referendum abrogacyjne; Konstytucja RP; suwerenność.

## 1. INTRODUCTORY ISSUES

The article reflects upon the possible introduction of an abrogative referendum into the Polish legal system. An analysis of the existing normative regulations concerning, first of all, the referendum in respect of matters of particular importance for the State and the numerous imperfections related to it (which will constitute a starting point for further deliberations) have given rise to reflections on the possible introduction of this type of referendum into Polish legal regulations<sup>1</sup>. It is not the author's intention to undertake a detailed analysis of legal regulations concerning the national referendum in Poland or such considerations concerning the abrogative referendum in Italy<sup>2</sup> or Switzerland<sup>3</sup>. The author's intention is only to present a few theses which may constitute a starting point for further, more detailed research and analysis.

It is common knowledge that one of the basic principles of a democratic state is the adoption of the principle of the sovereignty of the nation. Today's understanding of the principle of the nation's sovereignty derives from J.J. Rousseau and his concept of the social contract, where the highest authority of the state is in the hands of the people. In the light of the provisions of Article 4 of the Con-

<sup>1</sup> This is discussed in more detail in: P. Uziębło, *Demokracja partycypacyjna*, Gdańsk 2009, pp. 155–183; P. Winczorek, *Kilka uwag o polskich referendach*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2014, n. 2, pp. 143–160.

<sup>2</sup> J. Zakrzewska, *Ustrój polityczny Republiki Włoskiej*, Warszawa 1986, pp. 109–120; I. Bokszczanin, *Referendum we Włoszech*, [in:] *Referendum w państwach Europy*, eds. E. Zieliński, I. Bokszczanin, J. Zieliński, Warszawa 2003, s. 347–388; S. Grabowska, *Formy demokracji bezpośredniej w wybranych państwach europejskich*, Rzeszów 2009, s. 230–239. M. Lorencka, *Rola i znaczenie instytucji referendum we współczesnych Włoszech*, „Przegląd Prawa Konstytucyjnego” 2010, n. 1, pp. 177–189; G. Mangione, *Conference presentation: brief remarks on referendum in Italy*, „International Comparative Jurisprudence” 2018, vol. 4, Issue 1, pp. 7–16.

<sup>3</sup> E. Zieliński, *Referendum w Szwajcarii*, [in:] *Referendum w państwach Europy...*, pp. 305–322; M. Kwella, M. Marcia, *Instytucja weta ludowego w Szwajcarii w kontekście projektu ustawy „Gripen-Fonds-Gesetz”*, [in:] *Instytucje demokracji bezpośredniej w praktyce*, eds. O. Hatub, M. Jabłoński, M. Radajewski, Wrocław 2016, p. 53; E. Kuźelewska, *Referendum konstytucyjne we Włoszech. Jak głosowanie ludowe wpływa na system polityczny państwa?*, „Przegląd Europejski” 2017, n. 2, p. 111.

stitution of the Republic of Poland<sup>4</sup>, the power in the Republic of Poland belongs to the nation who exercise it through its representatives or directly. The order in which these forms of democracy are listed suggests that the leading role should be attributed to representative democracy, while the procedures of direct democracy are complementary to the activities of representative bodies. However, the mere expression of the nation's sovereignty principle in the Constitution does not seem to sufficiently guarantee the participation of the sovereign body in the exercise of power. The constitutionalization of the concept of direct democracy makes it possible to appeal to all known institutions of this form of democracy, but only if their nature and procedures are specified in the other provisions of the Constitution and extended at the statutory level. This is also the case under Polish law. Thus, the following should be indicated here: firstly, Article 125 of the Constitution of the Republic of Poland concerning a national referendum in respect of matters of particular importance to the State; secondly, Article 90(3) of the Constitution of the Republic of Poland concerning a nationwide referendum on granting consent for ratification of an international agreement which delegates the competence of organs of State authority in relation to certain matters to an international organization or international institution; thirdly, Article 235(6) of the Constitution of the Republic of Poland concerning a nationwide referendum on the confirmation of a bill amending the Constitution; fourthly, Article 118(2) of the Constitution of the Republic of Poland concerning a citizens' initiative to introduce legislation; fifthly, Article 170 of the Constitution of the Republic of Poland concerning a local referendum.

As far as representative democracy is concerned, it should be stressed that, in this form, the role of the voter (sovereign body) is limited to indicating which party is to take over power and take responsibility for the state once every few years. In fact, this situation causes citizens to lose the sense of having real influence on public life over time, the consequence being that they withdraw from politics and treat it as something alien, not fully accepted. This kind of solution ultimately results in a growing state of tension between citizens and the so-called political class, which in times of crisis leads to revolt and loss of legitimacy over the system, which manifests itself in low turnout at the ballot boxes. The practice of representative democracy provides many disappointments, which are related to, among other things, the abuse of public positions and a low level of political participation. This raises concerns that the decisions made by the representatives of the sovereign body are the voice of the minority, not the majority, hence the

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<sup>4</sup> Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, n. 78, t. 483, as amended Hereinafter referred to as the Constitution of the Republic of Poland.

opinions that decisions taken by way of a referendum by the People themselves are more important owing to the fact that the political elites are not willing to debate and make decisions on politically risky issues. A decision taken by the sovereign body itself reflects that body more than if it were to be taken by political elites. The decisions taken by way of referendums are public in contrast to those taken behind the scenes by politicians. When the public is given an opportunity to participate in politics, an active type of citizen is promoted, responsibility for actions taken for the benefit of the state is developed, and the power of political parties is limited<sup>5</sup>.

## 2. THE REFERENDUM IN RESPECT OF MATTERS OF PARTICULAR IMPORTANCE TO THE STATE IN THE POLISH LEGAL SYSTEM

The subject of further consideration will be the content of Article 125 of the Constitution of the Republic of Poland, which provides for holding a nationwide referendum in matters of particular importance for the state. It follows from the nature of the analysed provision that the above mentioned referendum (like other nationwide referendums) is optional. Only matters of particular importance for the state may be the subject of a referendum. The Act on a nationwide referendum<sup>6</sup> does not specify this notion. The assessment of a given case from the point of view of its particular importance is the responsibility of the entities that manage the referendum. At the same time, it should be emphasized that there are no procedural possibilities to question the admissibility of holding a referendum on the grounds of an allegation that the matter which is the subject of the referendum is devoid of special significance for the state. The subject of a referendum can only be a matter understood as an issue of a general nature or one that defines a direction for the State<sup>7</sup>. In the present legal situation a referendum must not concern the adoption of a specific normative act, or its repeal, if competences in this respect belong to other state bodies (by virtue of the Constitution or laws)<sup>8</sup>. Moreover, the binding legal regulations concerning the nationwide referendum under Article 125 of the Constitution of the Republic of Poland contain other

<sup>5</sup> Z. Witkowski, M. Serowaniec, „*Political offenses*” against the nationwide referendum in Poland, „Przegląd Konstytucyjny” 2018, n. 2, pp. 58–69.

<sup>6</sup> Act of 14 March 2003 on nationwide referendum, i.e. of 2015, it. 318, as amended. Hereinafter: Act on nationwide referendum.

<sup>7</sup> L. Garlicki, *Komentarz do art. 125 Konstytucji*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, ed. L. Garlicki, Warszawa 2001, p. 6.

<sup>8</sup> L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2010, p. 185.

solutions that cannot be rationally explained, which *de facto* cause this institution to be used reluctantly, and make it merely an artificial legal creation for the needs of theoretical implementation of the principle of a democratic state.

It should be noted that one of the entities requesting a referendum is the citizens (numbering 500,000). However, it should be stressed that submitting an application alone does not result in ordering a referendum. The decision on its ordering lies with the Sejm which adopts a resolution with regard to this matter by an absolute majority of votes in the presence of at least half of the statutory number of MPs. Consequently, it may be assumed that matters which are uncomfortable for the parliamentary majority will never be put to the vote of the citizens. Such legal solutions mean that grassroots legislative initiatives by the sovereign body are suppressed at the very beginning of its involvement in public affairs, which undoubtedly also affects its passive attitude towards submitting further motions for referendums. Besides, not every issue can be the subject of a referendum request submitted by the citizens. The exclusions set out in the law on nationwide referendum refer to: expenditure and income, and in particular taxes and other public levies, state defence, amnesty.

Another issue which makes the legal solutions adopted to guarantee the effective participation of the sovereign body in the exercise of power a mere 'dummy' is the requirement of attendance which makes the referendum binding. In order for a referendum to be binding, more than half of those entitled to vote must take part in it (which is unrealistic in the Polish conditions of low involvement of citizens in public life<sup>9</sup>).

In addition, the legislator has introduced such legal solutions as make the decision under the referendum preliminary. According to the Act on the nationwide referendum, the competent state authorities take immediate action to implement the referendum result by issuing legal acts or taking other decisions, not later than within 60 days from the date of announcing the Supreme Court's resolution on the validity of the referendum in the Journal of Laws of the Republic of Poland. It should be noted that the 60-day deadline is not a final date, which means that exceeding it does not give rise to any negative legal effects. In addition, it is unclear which state body is responsible for the implementation of the decision. Thus, the question arises as to who is to take the legislative initiative as regards the amendment or the introduction of the decision settled by the referendum. All the presented circumstances raise a question about the sense of such regulations.

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<sup>9</sup> Statistics on voter turnout are available on the following website: <https://www.idea.int/data-tools/question-view/521> (access:10.11.2018).

### 3. ABROGATIVE REFERENDUM

Therefore, the author believes that consideration should be given to the possibility of introducing an abrogative/popular referendum<sup>10</sup> into the Polish legal system, which would constitute a possibility for a relevant group of citizens to challenge an already adopted law within a specified time. The popular referendum strengthens citizens' ability to influence law-making by the legislator, as they can effectively block a law passed by Parliament. As a result, there is a real chance to raise an objection in a situation where elected representatives of the people establish solutions that are not in accordance with the will of the sovereign body.

The author believes that it is necessary to introduce legal provisions enabling real, civic control over the activities of Parliament, thereby limiting indirect rule, in favour of a direct mechanism for the implementation of the principle of the sovereignty of the People. The author also believes that the introduction of the institution of an abrogative referendum (popular referendum) to the constitutional system will constitute a certain 'safety valve' against the arbitrariness of representative chambers (Parliament), and in particular, of the First Chamber – the Sejm, which under the applicable provisions of the law (as long as it has an appropriate majority) is able to take over the entire procedure of legislation and impose its will not only on the Second Chamber of the Senate, but also on the President of the Republic of Poland. The author recognizes the fears of those who claim that putting the decision in the hands of voters often means taking away the right to make a decision from Parliament. From this point of view, a referendum has some anti-parliamentary potential, especially when it can be ordered without the participation of Parliament. However, the author is of the opinion that these fears are unfounded. The introduction of appropriate legal regulations that make the referendum binding, such as, first of all, the requirement as to the number of citizen signatures needed to initiate the popular referendum procedure, as well as requiring high turnout threshold, would be enough of a restriction. Above all, the author would like to stress that holding a referendum is of great importance for political education and the creation of a civil society. The author also believes that in times of crisis for representative democracy (which can be seen at the ballot boxes), the possibility for citizens to use the institution of an abrogative referendum will be met with a positive reaction. It should be remembered that

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<sup>10</sup> It should also be stressed that attempts have already been made in the past to introduce this institution into the Polish legal system. More details in: M. Jabłoński, *Referendum ogólnokrajowe w polskim prawie konstytucyjnym*, Wrocław 2001, pp. 20–22, 48–49.

the decisions taken under the referendum procedure are the most democratic form of ruling because of to the direct participation of citizens in the decision-making process.

Thus P. Winczorek is correct when stating that „when a sovereign body speaks, those who are its mere representatives must remain silent”<sup>11</sup>.

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<sup>11</sup> W.T. Kulesza, P. Winczorek, *Demokracja u schyłku XX wieku*, Warszawa 1992, p. 41.

