

***Kamila Doktor-Bindas\****

*Katolicki Uniwersytet Lubelski Jana Pawła II*

PRE-CONSTITUTIONAL REFERENDUM AND  
THE ADMISSIBILITY OF AMENDING THE BASIC LAW  
PURSUANT TO ARTICLE 125 OF THE CONSTITUTION  
OF THE REPUBLIC OF POLAND OF 1997

DOI: <http://dx.doi.org/10.12775/TSP-W.2018.008>

Date of receipt: 1.07.2018

Date of acceptance: 14.10.2018

**Summary.** Recently the issue of amendment of the basic law under Article 125 of the Constitution has become a very important subject of political and legal-scientific debate in our country. It has re-emerged after the President of the Republic of Poland, Andrzej Duda, announced in August 2017 that on 10–11 November 2018 a consultative referendum will be held on the adoption of the new Constitution of the Republic of Poland. This idea aroused fundamental doubts of a legal nature, as there are serious concerns as to the compliance with the Constitution of the Republic of Poland to order and conduct such a referendum. Despite the fact that President Duda's initiative has little chance of success in this parliamentary term, as on 24 July 2018, the Senate rejected the presidential motion for its ordinance, this does not mean that similar initiatives will not be taken in the future. From this perspective, it is worth discussing at this point two basic matters related to the issue under consideration – first, the subject of the referendum on matters of particular importance for the state and the previous attempts to amend the Constitution of the Republic of Poland under Article 125.

**Keywords:** Constitution of the Republic of Poland; the procedure for amending the constitution; constitutional referendum; a nationwide referendum; Article 125.

---

\* Kamila Doktor Bindas – Ph.D., Department of Constitutional Law, Faculty of Law, Canon Law and Administration, The John Paul Catholic University of Lublin, e-mail: [kamdok@kul.lublin.pl](mailto:kamdok@kul.lublin.pl).

**Referendum przedkonstytucyjne i dopuszczalność zmiany ustawy zasadniczej w trybie artykułu 125 Konstytucji RP z 1997 r.** W ostatnich czasach kwestia zmiany ustawy zasadniczej w trybie art. 125 Konstytucji RP stała się bardzo ważnym przedmiotem debaty politycznej oraz prawnonaukowej w naszym kraju. Odżyła na nowo po tym, jak prezydent RP Andrzej Duda ogłosił w sierpniu 2017 r., że w dniach 10–11 listopada 2018 r. zostanie przeprowadzone referendum konsultacyjne dotyczące uchwalenia nowej Konstytucji RP. Pomysł ten wzbudził zasadnicze wątpliwości natury prawnej, gdyż istnieją poważne obawy co do zgodności z Konstytucją RP zarządzenia i przeprowadzenia takiego referendum. Mimo iż inicjatywa prezydenta Dudy ma nikłe szanse powodzenia w tej kadencji parlamentu, gdyż 24 lipca 2018 r. Senat odrzucił prezydencki wniosek o jego zarządzenie, nie oznacza to jednak, że w przyszłości nie będą podejmowane podobne inicjatywy. Z tego punktu widzenia warto w tym miejscu omówić dwie podstawowe kwestie związane z analizowanym zagadnieniem – po pierwsze przedmiot referendum w sprawach o szczególnym znaczeniu dla państwa oraz dotychczasowe próby podejmowania zmian w Konstytucji RP w trybie art. 125.

**Słowa kluczowe:** Konstytucja RP; procedura zmiany konstytucji; referendum konstytucyjne; referendum ogólnokrajowe; art. 125 Konstytucji.

1. Article 4 of the Constitution of the Republic of Poland of 2 April 1997 indicates that the supreme power in the Republic of Poland belongs to the Nation, which exercises it through its representatives or directly. In the first place, as can be seen, the basic law mentions representative (indirect) democracy as the basic and commonly used mechanism in a democratic state<sup>1</sup>. It is based on the fact that decisions are made by representative bodies authorized to act on behalf of the Nation, of its will and in its interest<sup>2</sup>. Direct democracy can therefore be called a subsidiary form of exercising power over indirect democracy, as evidenced both by the literal formulation of Article 4 of the Constitution and its other provisions regulating the issues indicated.

The basic forms of direct democracy in Poland include a referendum (both at the central and local level) and a citizens' legislative initiative, but, in fact, none of them guarantees citizens the right to make decisions, since this ultimately belongs to the representative bodies<sup>3</sup>. This is because only they enforce the result of a binding and decisive referendum and are obliged to process (at least

---

<sup>1</sup> M. Florczak-Wątor, *Komentarz do art. 4 Konstytucji RP*, [in:] *Konstytucja RP. Komentarz do art. 1–86*, vol. I, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 274.

<sup>2</sup> Cf. Judgment of the Constitutional Tribunal of 12.01.2005, K 24/04, OTK-A 2005, No 1, item 3.

<sup>3</sup> M. Florczak-Wątor, *Komentarz do art. 4...*, p. 274.

as part of the first reading) the citizens' draft law. Citizens' actions will therefore only be an impulse for the authorities to take certain actions.

At this point it is also worth emphasizing that the Constitution of the Republic of Poland does not know the concept of a mandatory referendum. The decision on its ordinance also depends on the legislative or executive authorities, and any motion on this subject submitted by citizens will not have any legal effects. This was also noted by the Constitutional Tribunal, which stressed in one of its judgments that Polish citizens do not have the right to a referendum, but only the right to participate in it<sup>4</sup>.

2. In the Polish constitutional system there are four types of referendum. The first is a referendum on matters of particular importance for the state, regulated by Article 125 of the Constitution. It is of the most general nature, has a nationwide scope, is optional and may be ordered by the Sejm by an absolute majority of votes in the presence of at least half of the statutory number of MPs, or by the President of the Republic of Poland with the consent of the Senate also expressed by an absolute majority of votes in the presence of at least half of the statutory number of senators. However, its subject matter has not been defined either in the basic law itself or in parliamentary acts (in particular in the act on national referendum<sup>5</sup>), hence the thesis according to which the purpose of subjecting a particular issue to a general vote is decided by the entity managing the referendum is justified<sup>6</sup>. The lack of a clearly defined subject matter of a national referendum, or at least an exemplary list of matters covered by it, is the reason for many problems of interpretation, which appear in the context of its approval. One of the main problems of this type is precisely the possibility of amending the Constitution of the Republic of Poland in accordance with Article 125, which is subject to the analysis presented in this article.

The subject of a nationwide referendum may also be the question of consent of the President of the Republic of Poland to the ratification of an international agreement on the basis of which Poland delegates the competences of state authority bodies in certain matters to an international organization or international body (Article 90(1) of the Constitution)<sup>7</sup>. Such a referendum is in principle

---

<sup>4</sup> Judgment of the Constitutional Tribunal of 27.05.2003, K 11/03, OTK-A 2003, No 5, item 43.

<sup>5</sup> Act of 14 March 2003 on the national referendum, consolidated text: Journal of Laws of 2015, item 318.

<sup>6</sup> P. Sarnecki (ed.), *Prawo konstytucyjne RP*, ed. 8, Warszawa 2011, p. 212.

<sup>7</sup> The above regulations were applied in the case of the referendum commonly referred to as „the accession referendum”, which took place on 7 and 8 June 2006 and consisted in expressing

a variant of the referendum under Article 125, but its differentiation is necessary because of the importance of its resolutions and certain differences as regards its management<sup>8</sup>. In a nutshell, the ordering of such a referendum is subject to an earlier decision on the procedure by which consent to ratification is to be given (Article 90(3)). This decision is made by a resolution adopted by an absolute majority of votes of MPs in the presence of at least half of the statutory number of MPs, specifying whether consent is to be given by law (adopted pursuant to Article 90(2) of the Constitution) or by the people in a referendum. Such a referendum shall be ordered by the Sejm or the President with the consent of the Senate, and a resolution of the Sejm on granting consent to ratification is only a prerequisite for the adoption of a decision by the indicated bodies.

Another type of referendum is the local referendum indicated in Article 170 of the Constitution<sup>9</sup>. This was regulated in detail in the Act of 15 September 2000 on local referendum. In accordance with Article 6 of this Act, a local referendum may be held at any level of the self-government community concerned, i.e. municipality, powiat and voivodeship. Generally speaking, the essence of a local referendum is to express the will of residents – members of a given local government community to resolve a matter concerning this community within the scope of tasks and competences of the bodies of a given unit or to dismiss a body constituting this unit, and in the case of a municipality also a *voit* (mayor, president of the city)<sup>10</sup>. The local referendum act distinguishes between mandatory and optional referendums, and while the subject matter of the former has been exhaustively defined in the act and is not subject to broad interpretation, in the latter case its scope is interpreted in a broad way in the judiciary's case law<sup>11</sup>. This is because it concerns not only matters falling within the tasks and competences of the organs of a given unit, but also – in accordance with Article 170 of the Constitution – deciding on all matters important for the community<sup>12</sup>.

---

consent to granting the President of the Republic of Poland the right to ratify the European Treaty on the extension of the European Union by 10 new states, including Poland.

<sup>8</sup> P. Sarnecki (ed.), *Prawo...*, p. 314–215.

<sup>9</sup> Journal of Laws. 2000, No. 88, item 985, as amended; this act was amended by the act of 8 July 2005 amending the act on municipal self-government and certain other acts of 2005, Journal of Laws. No. 175, item 1457.

<sup>10</sup> A. Bień-Kacała, *Referendum i obywatelska inicjatywa ustawodawcza*, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2011, p. 253.

<sup>11</sup> M. Granat, *Prawo konstytucyjne. Pytania i odpowiedzi*, Warszawa 2018, p. 217.

<sup>12</sup> The scope of the local referendum has been extended pursuant to the judgment of the Constitutional Tribunal of 26.02.2003 K 30/02, OTK-A 2003/02, item 16; see more: M. Granat, *op. cit.*, p. 217.

The last type of referendum is the so-called constitutional referendum, while its proper name is the referendum on the approval of constitutional changes, since it is a successor to the previous arrangements in this area made by the bodies competent to amend the basic law. It can be carried out only if the Sejm and Senate adopt in the same wording the act on the amendment of the Constitution in the course of the procedure specified in Article 235 of the Constitution. This referendum may be conducted only with respect to changes made in chapters 1, 2 and 12 of the Constitution, and shall be ordered immediately by the Speaker of the Sejm at the request of at least one-fifth of the statutory number of MPs, the Senate or the President of the Republic of Poland. The referendum is held within 60 days from the date the motion is submitted. An important element of the procedure of its ordinance is the skipping of the procedure in which the decision on its possible rejection would be made. The Speaker is obliged to order a referendum always at the request of authorized entities and is not entitled to change the questions submitted by the applicants<sup>13</sup>. Adoption of an amendment to the basic law in a referendum will take place when a majority of voters support it, so in this case the requirement concerning the two remaining national referenda with regard to an appropriate turnout will not apply.

There is no doubt that each of the four types of referendums presented above has its own specific subject matter and mode of conduct and the objective it aims to achieve. This article will present a subject, which, one could say, is the issue of „the meeting point” of two types of referendum, i.e. one administered on matters of particular importance for the state and the other approving changes in the Constitution. Recently, just like several times before, the issue of amendment of the basic law under Article 125 of the Constitution has become a very important subject of political and legal-scientific debate in our country. It has re-emerged after the President of the Republic of Poland, Andrzej Duda, announced in August 2017 that on 10–11 November 2018 a consultative referendum will be held on the adoption of the new Constitution of the Republic of Poland. This idea aroused fundamental doubts of a legal nature, as there are serious concerns as to the compliance with the Constitution of the Republic of Poland to order and conduct such a referendum. Despite the fact that President Duda’s initiative has little chance of success in this parliamentary term, as on 24 July 2018, the Senate rejected the presidential motion for its ordinance, this does not mean that similar initiatives will not be taken in the future. From this perspective, it is worth discussing at this point two basic matters related to the issue under consideration – first, the subject of the referendum on matters of particular importance for

---

<sup>13</sup> M. Jabłoński, *Polskie referendum akcesyjne*, Wrocław 2007, p. 111.

the state and the previous attempts to amend the Constitution of the Republic of Poland under Article 125.

4. The Constitution of the Republic of Poland of 1997, as I have already indicated, uses the very general phrase „in matters of particular importance for the state” to define the scope of the referendum under Article 125 of the Constitution. The basic law neither specifies this notion, nor does it contain an enumerative or even an exemplary determination of such matters. The only limitation as to the subject matter of the referendum of a problematic nature is provided for in Article 63(2) of the act on national referendum, which prohibits citizens from taking the initiative to order a referendum on expenses and income (in particular taxes and other public levies), as well as on state defense and amnesty. However, due to the fact that this provision explicitly specifies the group of recipients of this prohibition, it no longer applies e.g. to the President of the Republic of Poland and other entities that may apply for a referendum order<sup>14</sup>.

It is also emphasized that a certain systemic limitation of the full freedom of the referendum governing body will be the exclusion of a change in the democracy model adopted in Poland – primarily the representative one<sup>15</sup>. An important sign of this is precisely the fact that it is the representative bodies that are guaranteed the exclusive and final right to decide on the ordering of this referendum. There is also no doubt that a matter submitted to a general vote by the Nation cannot be a law-making act (in particular, a law or any other normative act), regardless of the form adopted by it and the stage of the procedure for its establishment<sup>16</sup>.

Such an abstract constitutional regulation as that applied by the authors of the basic law of 1997 in fact only specifies that a referendum cannot be held on every matter requiring a decision, but only on those which are of particular importance for the state<sup>17</sup>. It would be helpful to use the views of the doctrine to develop this concept, yet unfortunately they are not uniform<sup>18</sup>.

---

<sup>14</sup> A. Rytel-Warzocho, *Zarządzanie referendum ogólnokrajowego przez Prezydenta RP*, [in:] *Referendum ogólnokrajowe w Polsce. Wybrane zagadnienia*, eds. A. Gajda, A. Rytel-Warzocho, P. Uziębło, Gdańsk 2016, p. 14. See also Z. Witkowski, M. Serowaniec, *The views of the Polish Political Class on the Institution of a Nationwide Referendum*, „Kultura i Edukacja” 2016, n. 4, p. 165–174.

<sup>15</sup> B. Naleziński, *Komentarz do art. 125 Konstytucji RP*, [in:] *Konstytucja RP. Komentarz do art. 87–243*, vol. II, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 556.

<sup>16</sup> *Ibidem*, p. 556.

<sup>17</sup> B. Banaszak, *Konstytucja RP. Komentarz*, Warszawa 2012, p. 721.

<sup>18</sup> See more: P. Uziębło, *O dopuszczalności konstytucyjnego referendum konsultacyjnego*, „Krajowa Rada Sądownictwa” 2018, n. 1, p. 8.

One can encounter, among others, a view according to which it is possible to construct an exemplary catalogue of such matters referred to in Article 125, which include: constitutional regulations (with the reservation that the Constitution provided for an autonomous constitutional referendum and an optional referendum under Article 125 can be conducted in the scope of part of the regulation), the state system issues (such as local government reform), permission to use modern technology (nuclear energy production), moral behavioral freedom (such as protecting conceived life), decisions on specific public matters<sup>19</sup>.

There is also a position according to which Article 235(6) of the Constitution<sup>20</sup> may prove useful when interpreting the notion of matters of particular importance for the state. According to this provision, only the changes made to the Constitution by the Sejm and Senate on the basis of Article 235(4) and (5) in Chapters 1, 2 and 12 of the Constitution have to be approved in a referendum. In this case, the importance of matters to be settled by direct democracy is indicated. In the light of this view, matters of particular importance for the state should concern systemic principles, rights and liberties of the individual and the amendment of the Constitution, which may justify any attempt to amend the Constitution by way of a referendum under Article 125, including the most recent referendum of President Andrzej Duda. However, this is an isolated view and difficult to accept, if only because it would call into question the existence of a referendum under Article 235 of the Constitution<sup>21</sup>.

One can also encounter the opinion that what is a matter of special interest to the state will be decided, within the framework of their constitutional powers, by the bodies managing the referendum. As a result of this approach, they are granted a high degree of freedom, though at the same time it needs to be emphasized that these matters must not only be important for the state, but also for its citizens<sup>22</sup>.

---

<sup>19</sup> E. Zieliński, *Referendum w państwie demokratycznym*, [in:] *Referendum w Polsce współczesnej*, eds. D. Waniek, M.T. Staszewski, Warszawa 1995, p. 16–22.

<sup>20</sup> A. Zoll, *Zgodność z Konstytucją RP materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum (druk senacki nr 1054)*, [in:] *Opinie prawne w przedmiocie zgodności*

*z Konstytucją RP materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu referendum*

(druk senacki nr 1054), „Opinie i Ekspertyzy” 2015, n. 239, p. 52.

<sup>21</sup> P. Uziębło, *O dopuszczalności... [On the admissibility...]*, p. 8.

<sup>22</sup> R. Piotrowski, *Opinia prawna w przedmiocie zgodności z Konstytucją RP materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu referendum (druk senacki nr 1054)*, [in:] *Opinie prawne w przedmiocie zgodności z Konstytucją RP materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu referendum (druk senacki nr 1054)*, „Opinie i Ekspertyzy” 2015, n. 239, p. 24.



According to another concept, the subject of a referendum under Article 125 of the Constitution should be matters understood only as problems of a more general or directional nature<sup>23</sup>. A referendum cannot involve the adoption of a specific act or decision if the competences in this matter belong to another state authority, because its role is to decide on the direction of state decisions, but not to replace state authorities in the adoption of specific decisions. It is not possible to use a referendum for e.g. ratification of an international agreement, dismissal of the government, filling a specific position or state office. Since the referendum in Poland is an instrument supplementing the principle of the representative form of government and cannot replace the parliament in taking acts and decisions assigned to it, it is also not possible to pass laws in this mode. Since it was also considered necessary to create a specific basis for a referendum which is to result in the adoption of an amendment to the Constitution (Article 235(6)) or the adoption of the ratification law (Article 90(3)), this means that Article 125(1) does not provide a sufficient basis for the introduction of „referendum laws”.

Science of the law also emphasizes that, while it is indeed the referendum administering bodies that decide in a particular case whether a given issue can be considered to be of particular importance for the state, certain issues should be excluded from the general vote under Article 125 of the Constitution. First of all, this concerns matters where a referendum would require a specific constitutional basis<sup>24</sup>. It will therefore be unacceptable to dismiss public authorities or, more generally, to resolve personal matters, including central bodies (removal of the President of the Republic of Poland from office, shortening the term of office of parliamentary chambers). These issues have been regulated at the constitutional level and the possibility of resolving them by referendum voting is excluded. Secondly, it would be impossible to administer a referendum under Article 125 of the Constitution on local, regional and certain professional and social issues<sup>25</sup>.

5. The issue of the application of Article 125 of the Constitution in order to amend the Polish Constitution has caused much controversy among constitutionalists already many times in the past. One such discussion was initiated by a citizens' motion, which was submitted to the Sejm on 12 September 2004. It called for a national referendum, which proposed four questions concerning amendments to the Constitution of 1997, such as: liquidation of the Senate, halv-

<sup>23</sup> L. Garlicki, *Komentarz do art. 125 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, ed. L. Garlicki, Warszawa 2001, p. 6–7.

<sup>24</sup> P. Uziębło, *O dopuszczalności...*, p. 9.

<sup>25</sup> *Ibidem*, p. 10.



ing the number of MPs, introduction of single-mandate constituencies in parliamentary elections and lifting parliamentary immunity. This initiative divided the doctrine of the law into two camps – opponents and supporters of constitutional amendments under Article 125<sup>26</sup>.

According to the position of opponents of such a solution, adoption of constitutional changes by the Sejm and Senate may be initiated only at the request of entitled entities, to which a group of citizens does not belong, and holding a pre-constitutional referendum on this matter should be treated as political pressure<sup>27</sup>. Since it is simply impossible to carry out such changes on the basis of Article 125, any resolution of the Sejm adopted in the scope of ordering such a referendum would be against the Constitution<sup>28</sup>. The unconstitutional application of the procedure of Article 125 of the Constitution is evidenced by a number of arguments, including: problems with determining the entity obliged to submit a formal draft amendment to the Constitution, lack of sanctions for non-performance of such an obligation, inability to assess whether the draft prepared is consistent with the will expressed during the referendum vote<sup>29</sup>. The content of Article 235 of the Constitution clearly indicates that it is possible to conduct only a subsequent referendum, i.e. one whose subject matter is the approval of a law already passed.

The supporters of such a solution, in turn, decided that while Article 125 of the Constitution cannot be the basis for holding a constitutional referendum, a motion for changes in the political system of the Republic of Poland can be processed in this course<sup>30</sup>. This opinion is argued in such a way that Article 63 of the act on national referendum contains specific exclusions concerning the initiation of a referendum by citizens which do not include systemic changes

---

<sup>26</sup> See more: M. Jabłoński, *Polskie referendum...*, p. 114.

<sup>27</sup> K. Działocha, *Stabilność i trwałość godna najwyższej ustawy państwa [Stability and sustainability worthy of the highest state law]*, [in:] „Rzeczpospolita” of 28 October 2004; similarly W. Sokolewicz, *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68), p. 108.

<sup>28</sup> P. Winczorek, *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68), p. 111.

<sup>29</sup> P. Sarnecki, *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68), p. 118–120.

<sup>30</sup> B. Banaszak, *Opinia dotycząca wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68), p. 124.

in Poland. Moreover, a referendum under Article 125 is of an optional nature, depending on the will of the authorized entities, and its outcome is only intended to indicate the appropriate actions of the competent authorities<sup>31</sup>. Such a referendum may be treated not so much as the first stage of the procedure for amending the Constitution, but as a mechanism for citizens to express their opinions on the future shape of the political system of the state with all legally binding effects of such a referendum<sup>32</sup>.

The referendum ordered by the President of the Republic of Poland Bronisław Komorowski, which took place on 6 September 2015, also raised many doubts in the science of law. Eventually, the President obtained permission from the Senate to conduct the referendum, which proves that in practice the bodies with the right to manage the referendum have the unrestricted right to define the subject of the referendum vote. However, doubts were raised both by the very idea of ordering this referendum (in the middle of the referendum campaign), as well as the questions which were the subject of it: introduction of single-mandate constituencies, maintaining the current method of financing political parties from the state budget; introduction of the principle of general settlement of doubts as to the interpretation of tax law in favor of the taxpayer<sup>33</sup>. The first question in particular is debatable from the point of view of the problems discussed here, as it concerns the change of the electoral system from a proportional to a majority one (change of electoral rules).

In view of the above, one should consider at this point whether the current proposal of the President of the Republic of Poland concerning amendments to the current basic law is legally possible at all by way of a referendum under Article 125 of the Constitution.

---

<sup>31</sup> K. Skotnicki, *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68), p. 113.

<sup>32</sup> P. Radziewicz, *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68), p. 121.

<sup>33</sup> The admissibility of the referendum on changing the electoral system for the Sejm from proportional to majority one, although a positive answer to this question would be inconsistent with the Constitution of the Republic of Poland, was supported by M. Chmaj and W. Orłowski, while M. Wiszowaty and R. Piotrowski presented an opposite view. B. Banaszak generally allowed the possibility of holding a referendum on a constitutional issue, but not in this particular case; expert opinions have been published [in:] *Projekt postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum – opinie prawne*, „Opinie i Ekspertyzy”, OE-234, Warszawa, May 2015; see more A. Rytel-Warzocho, *Zarządzanie referendum...*, p. 30–31.

Beginning with the most fundamental issues, the very systematics of the Constitution of the Republic of Poland of 1997 indicates that out of the four types of referendum provided for in our legal system, the legislator regulated in Article 235 of the Constitution also the referendum validating changes in that particular act. A clear separation of this matter may suggest, then, that its purpose was not to include changes to the basic law in the catalogue of matters of particular importance for the state, which are the subject of Article 125 of the Constitution. Our basic law does not provide for any other form of citizens' influence on the shape of the binding constitution than the subsequent approval of its amendments by the Sejm and Senate in the referendum procedure under Article 235 sec. 6. The participation of citizens in the adoption of a completely new constitutional charter has not been regulated in the constitutional provisions either, although this is an issue which should be treated separately from the issues discussed here. It is also worth emphasizing that although attempts to conduct the so-called pre-constitutional referendum under Article 125 were made in the past and the views of the doctrine are not uniform on this issue, such a procedure was not clearly regulated in the current Constitution, and consequently, it has no legal basis<sup>34</sup>. One can even say more – the very regulation of Article 235 clearly shows that the will of our legislator was to limit the participation of citizens in making changes to the Constitution only to Chapters 1, 2 and 12 and only to express an opinion of a subsequent, approving nature. There is no mention in this provision of the initiation of such changes. The thesis that granting citizens additional rights in this matter, i.e. expressing the will in referendum voting on future constitutional changes, may be considered as illegitimate, seems all the more justified.

When analyzing the subject matter of Article 125 of the Constitution, it must be admitted, however, that the constitutional matter is, to all intents and purposes, „a matter of particular importance for the state”, even though, as I have already mentioned, it is a very abstract term and it is difficult to create a catalogue of such matters. The doctrine of law has been trying for years to clarify it, or at least to point to certain exclusions from the catalogue of matters referred to in Article 125. However, the majority of scholars agree with the thesis that in practice, the entity managing the referendum will have the most to say on this issue. From this point of view, one could justify both the initiative of President Bronisław Komorowski and Andrzej Duda. In my opinion, however, this argument is insufficient. It would be necessary to consider what the effect of such

---

<sup>34</sup> See more on the relationship between Article 125 and 235 of the Constitution, P. Uziębło, *O dopuszczalności...*, p. 10–12.

a referendum would be. According to Article 125(3) of the Constitution, the outcome of a referendum on matters of particular importance to the state is binding if more than half of those eligible to vote have taken part in it. Article 67 of the act on national referendum specifies, however, that the competent state authorities shall immediately take action in order to implement the binding outcome of the referendum in accordance with its result by issuing normative acts or making other decisions, but no later than within 60 days from the date of the announcement of the Supreme Court's resolution on the validity of the referendum in the Journal of Laws of the Republic of Poland.

I think that it is undisputable that in such a short period of time it is impossible to pass amendments to the Constitution on the basis of the Article 235 procedure. It is not even possible, in my opinion, to prepare a good draft amendment to the Constitution, which would be accepted by the majority of political parties of the parliament. From this point of view, it would therefore be necessary to recognize that the President of the Republic of Poland could only immediately initiate certain actions that could lead to a constitutional change in the future. Another issue that would require a separate analysis is that the Polish legal system lacks formalized procedures to verify the obligation under Article 67 of the act on national referendum. In this case, one can only speak of political responsibility enforced during the elections.

It should therefore be recognized that Article 125 cannot constitute a legal basis for holding the so-called pre-constitutional referendum, which could lead to amendments to the Constitution of the Republic of Poland in accordance with Article 235. In my opinion, all initiatives taken so far in this area are of political nature and are more like a social survey than a legally binding general vote. Time will show what the proposal for a constitutional referendum of the currently incumbent President of the Republic of Poland will finally come to and whether he will make further similar attempts in the future. Undoubtedly, the draft presented by him is, so far, the biggest and probably also the most controversial initiative of this type.

#### BIBLIOGRAPHY:

- Banaszak B., *Konstytucja RP. Komentarz*, Warszawa 2012.  
Banaszak B., *Opinia dotycząca wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3 (68).

- Bień-Kacała A., *Referendum i obywatelska inicjatywa ustawodawcza*, [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2011.
- Działocha K., *Stabilność i trwałość godna najwyższej ustawy państwa*, „Rzeczpospolita” of 28 October 2004.
- Florczak-Wątor M., *Komentarz do art. 4 Konstytucji RP*, [in:] *Konstytucja RP. Komentarz do art. 1–86*, vol. I, eds. M. Safjan, L. Bosek, Warszawa 2016.
- Garlicki L., *Komentarz do art. 125 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, ed. L. Garlicki, Warszawa 2001.
- Granat M., *Prawo konstytucyjne. Pytania i odpowiedzi*, Warszawa 2018.
- Jabłoński M., *Polskie referendum akcesyjne*, Wrocław 2007.
- Naleziński B., *Komentarz do art. 125 Konstytucji RP*, [in:] *Konstytucja RP. Komentarz do art. 87–243*, vol. II, eds. M. Safjan, L. Bosek, Warszawa 2016.
- Piotrowski R., *Opinia prawna w przedmiocie zgodności z Konstytucją RP materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu referendum (druk senacki nr 1054)*, „Opinie i Ekspertyzy” 2015, n. 239.
- Projekt postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum – opinie prawne*, „Opinie i Ekspertyzy”, OE-234, Warszawa, May 2015.
- Radziejewicz P., *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3 (68).
- Rytel-Warzocho A., *Zarządzanie referendum ogólnokrajowego przez Prezydenta RP*, [in:] *Referendum ogólnokrajowe w Polsce. Wybrane zagadnienia*, eds. A. Gajda, A. Rytel-Warzocho, P. Uziębło, Gdańsk 2016.
- Sarnecki P. (ed.), *Prawo konstytucyjne RP*, ed. 8, Warszawa 2011.
- Sarnecki P., *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3 (68).
- Skotnicki K., *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3 (68).
- Sokolewicz W., *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3 (68).
- Uziębło P., *O dopuszczalności konstytucyjnego referendum konsultacyjnego*, „Krajowa Rada Sądownictwa” 2018, n. 1.
- Winczorek P., *Opinia w sprawie wniosku obywatelskiego o podjęcie przez Sejm uchwały przeprowadzenia referendum ogólnokrajowego w sprawie zmian w ustroju Rzeczypospolitej Polskiej*, „Przegląd Sejmowy” 2005, n. 3(68).
- Witkowski Z., Serowaniec M., *The views of the Polish Political Class on the Institution of a Nationwide Referendum*, „Kultura i Edukacja” 2016, n. 4.

Zieliński E., *Referendum w państwie demokratycznym*, [in:] *Referendum w Polsce współczesnej*, eds. D. Waniek, M. T. Staszewski, Warszawa 1995.

Zoll A., *Zgodność z Konstytucją RP materii pytań zawartych w projekcie postanowienia Prezydenta RP o zarządzeniu ogólnokrajowego referendum (druk senacki nr 1054)*, „Opinie i Ekspertyzy” 2015, n. 239.