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## REFERENDUM—AN INSTRUMENT OR AN ILLUSION OF THE POLISH NATION’S POWER\*

### I. THE TRADITION OF THE REFERENDUM IN POLAND

Some forms of direct democracy, although not that of a classic referendum, were applied right at the start of the reborn, independent statehood of the Second Polish Republic. They were to be seen in plebiscites intended to determine the national affiliation of disputed territories to Poland or Germany, the necessity of which had been decided by the Treaty of Versailles, signed on 28 June 1919, which ended the First World War.<sup>1</sup> While the plebiscite conducted on 11 July 1920 in Warmia and Mazury ruled out the affiliation of these territories to Poland,<sup>2</sup> the plebiscite in Upper Silesia on 20 March 1921 demonstrated a higher degree of support for the Polish option.<sup>3</sup>

A remarkable phenomenon of this period was the functioning of the Polish State in the absence of established and safe borders (hence the above-mentioned plebiscites, the Silesian and Greater Poland uprisings, the Bolshevik-Polish war) as a parliamentary democracy and even led to, among other things, the adoption of the March Constitution of 1921.<sup>4</sup> It should be added that, neither the March Constitution nor the next one adopted in the Second Polish Republic<sup>5</sup> provided for the institution of the referendum.

After the Second World War, pursuant to the Yalta agreements of the four powers, Poland found itself in the direct sphere of influence of the Soviet Union, which determined the scope of the political and legal transformation of the Polish People’s Republic then deprived of the attributes of full national sovereignty. Although the first legislative acts,<sup>6</sup> following the official political

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<sup>1</sup> Ratified on behalf of Poland by the Head of State J. Piłsudski on 1 September 1919, pursuant to the Act of 31 July 1919, *Journal of Laws* 1920, no. 35, items 199 and 200.

<sup>2</sup> Only 3.4% of those entitled voted for belonging to Poland.

<sup>3</sup> 40.4% voted for affiliation with Poland, 59.5% for Germany, and finally after the end of the Third Silesian Uprising the decision of the Conference of Ambassadors in Paris on 20 October 1921 granted Poland most of the disputed territories.

<sup>4</sup> *Journal of Laws of the Republic of Poland [JL RP]* no. 44, item 267; cf.: D. Dudek, *Prawo konstytucyjne II Rzeczypospolitej Polskiej*, in: Guz et al. (eds.), *Synteza prawa polskiego 1918–1939*, Warsaw 2013: 99ff.

<sup>5</sup> The Constitutional Act of 23 April 1935, *JL RP* no. 30, item 227.

<sup>6</sup> Cf. among others, two constitutional acts of the Legislative Sejm: of 4 February 1947 on the election of the President of the Republic of Poland (*Journal of Laws* no. 9, item 43) and of 19

doctrine, referred directly to the provisions of the Constitution of 1921, adopting even in a modified version some of its solutions but disregarding the fact that the Constitution of 1935 was then in force and remaining silent on the adopted rights and freedoms of the individual, did not in actual fact meet recognised democratic standards.

The Legislative Sejm (Parliament) (1947–1952) had no electoral legitimacy; it was formed apparently on the basis of an ordinance passed by the National Council which had no legal basis for its existence, by way of fraudulent elections in January 1947, preceded by police terror against the political opposition and the popular vote of June 1946 which was equally unreliable.

The latter, which was supposed to be a survey of the scale of society's support for or resistance to the new government, is worth recalling. Pursuant to the Act of 27 April 1946 on popular voting<sup>7</sup> the following content of the referendum questions was set out: (1) Are you in favour of abolishing the Senate? (2) Do you want the economic system introduced by the agricultural reform and nationalisation of the basic branches of the national economy to be consolidated in the future Constitution while retaining the statutory powers of private initiative? (3) Do you want to consolidate the western borders of the Polish State on the Baltic Sea, the Oder and the Lusatian Neisse?

The operation carried out by the State Security Commission, and in practice by the Security Office with the participation of Soviet officers, was a gigantic falsification of the results of this referendum (including the protocols of all 11,057 committees)<sup>8</sup> and it was subsequently continued by the Polish Workers' Party and the security apparatus in falsifying the elections to the Legislative Sejm in January 1947 as well as later.

It is also known that during the whole period of the Polish People's Republic, even in moments of so-called 'thaw,' really free and fair elections never happened. Towards the end of the Polish People's Republic, within the framework of the so-called normalisation after martial law, the authorities frequently referred to the institution of the referendum, both at the level of legal regulations and practice. On 6 May 1987, one of the last amendments to the Constitution of the Polish People's Republic was made, which supplemented the principle of 'the leadership of the people' with the succinct formula that 'the exercise of state power by the working people is also achieved by expressing their will in a referendum. The principles and the manner of holding a referendum are regulated by the relevant Act.'<sup>9</sup> The Act that was simultaneously adopted<sup>10</sup> provided detailed rules starting from a completely illusory definition of its *ratio legis*: 'With a view to making socialist democracy more fully effective and extending forms of participation by citizens in the exercise of power; guided by the constitutional right of citizens to participate

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February 1947 on the system and scope of operation of the highest authorities of the Republic of Poland (Journal of Laws no. 18, item 71).

<sup>7</sup> JL RP no. 15, item 104.

<sup>8</sup> The ratio of votes for, according to official and confidential data was: ad (1) 68%—26.9%, ad (2) 77.1%—42%, ad (3) 91.4%—66.9%.

<sup>9</sup> Added para. 3 to Article 2 of the Constitution, JL RP 1987, no. 14, item 82.

<sup>10</sup> Act of 6 May 1987 on Social Consultations and Referenda, JL RP 1987, no. 14, item 83.

in consultations and referenda, and having regard to the duty of public authorities and the state administration to base their activities on the *conscious* and active participation of citizens (introductory phrase).<sup>7</sup>

The subject of consultations and referenda, on the other hand, of either national, local, or even environmental scope (in the case of consultations), was to include: ‘matters of vital importance for the development of the country, a specific area, or the interests and living conditions of citizens’ (Articles 1 and 2), but not matters relating to the defence of the State, the Armed Forces of the Polish People’s Republic, State security and matters constituting State secrets (Article 4). Leaving aside the detailed regulations of consultations, which also provided that their subject matter could be, among others, the principles or guidelines for proposals or drafts of acts and other normative acts, and which by definition were of a non-binding nature,<sup>11</sup> other specific elements of the referendum are also worthy of note. In the light of the law on a national referendum, citizens residing in the country and having an active right to vote in parliamentary (Sejm) elections were to express their will as to the way of resolving the issue submitted to the referendum, by giving a positive or negative answer to the question posed or by making a choice between the proposed options. The issues submitted to a national referendum were to be determined by the Sejm (by a majority of at least two thirds of votes in the presence of at least half of the total number of Members of the Sejm) or solutions to draft laws or resolutions of the Sejm defining the basic directions of the State’s activities (Articles 12–14). The Sejm could call a referendum on its own initiative or at the request of the Council of State, the Council of Ministers or the National Council of the Patriotic Movement for National Rebirth, and rejection of the motion had to be notified to the applicant along with the grounds for the refusal (Article 15).

Apart from the technical issues that were of secondary importance, one should note the high turnout requirements; the result of a referendum (to be made public) was to be conclusive if more than half of those entitled to vote were in favour of one of the solutions to the issue put to the vote (Article 19). However, the Act did not specify at all the manner of ‘consuming’ the referendum decision, not even in the meagre form that it did with regard to consultations.

There was one referendum conducted on the basis of this regulation—on 29 November 1987—on political and economic reforms.<sup>12</sup> Two questions were asked: (1) Are you in favour of the full implementation of the programme of radical economic recovery presented to the Sejm, aimed at a significant improvement of living conditions, knowing that it requires passing through a difficult period of two to three years of rapid changes? (2) Are you in favour of the Polish model of the in-depth democratisation of political life, the aim of which is to strengthen self-government, extend the rights of citizens and

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<sup>11</sup> The body which submitted a particular issue to the public consultation was only obliged to ‘consider’ the opinions and conclusions expressed during the consultation and to make them public and to specify ‘the extent to which they were to be used’.

<sup>12</sup> According to the initial intentions of the authorities, a referendum was to address such political changes as the appointment to the office of president.

increase their participation in the governance of the country? Thus, the first issue boiled down to the concept of whether you want it to be better later, but with the proviso that it will even be worse at first, and the second—to a simple ‘eye soap’ that the repressive system will be loosened further. Since, according to official data, only 67.3% of those entitled to vote in the referendum took part in it, which was the lowest official ‘election’ turnout in the history of the Polish People’s Republic, and of those 66.04% answered yes to the first question and 69.03% to the second, constituting, respectively, 44.28% and 46.29% of all those eligible to vote, the outcome of the referendum was neither ‘conclusive’ nor binding. The spokesman for the government commented on this saying: ‘So the government will do what it intends to do anyway, maybe only a little more slowly.’

The first nationwide referendum in the Third Republic of Poland, based on the new regulation of the Act of 29 June 1995 on Referenda,<sup>13</sup> was held on 18 February 1996 following the decision of the President of 29 November 1995 and with the consent of the Senate. Its question read: ‘Are you in favour of carrying out the universal enfranchisement of citizens?’ On the same day, another referendum was held on universal privatisation, ordered by a resolution of the Sejm of 21 December 1995. It included four rather complex questions: (1) Are you in favour of ensuring that the liabilities to pensioners and employees in the budget arising from the rulings of the Constitutional Tribunal are met from privatised state property? (2) Are you in favour of part of the privatised state property contributing to public pension funds? (3) Are you in favour of increasing the value of the National Investment Fund’s share certificates by extending this scheme to other enterprises? (4) Are you in favour of including privatisation vouchers in the enfranchisement programme?

As the turnout did not exceed one third of the total number of those entitled to vote (32.40%), although 96.15% of votes cast were in favour of enfranchisement, and regarding the privatisation referendum the votes were: question 1: 92.89%, question 2: 93.70% and question 4: 88.30% in favour, respectively while there were 72.52% votes against for question 3, the above results were not binding. This was because it was necessary (as it is today) for the referendum turnout to be more than 50% of all eligible voters. The tendency to abstain from voting in a referendum was slightly less when it came to the constitutional referendum held on 25 May 1997 on the adoption of the Constitution of the Republic of Poland, adopted by the National Assembly on 2 April 1997. The turnout was 42.86%, of which 52.70% were in favour of the Constitution and 45.90% against. In absolute numbers, the result was as follows: the Constitution was adopted by 6,396,641 votes in favour, out of 12,137,136 voters taking part in the referendum, with a total of 28,319,650 citizens entitled to vote,<sup>14</sup> which means that it was adopted by about 22.5% of all those entitled.

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<sup>13</sup> JL RP no. 99, item 487.

<sup>14</sup> Cf. Announcement of the State Electoral Commission of 8 July 1997, JL RP no. 75, item 476.

## II. THE APPLICABLE REGULATIONS APPLYING TO THE REFERENDUM—JURIDICAL ANALYSIS AND EFFECTIVENESS OF THE INSTITUTION

Let us briefly recall that according to the constitutional formula of the sovereignty of the Nation, supreme power in the Republic of Poland belongs to the Nation (Article 4 para. 1), and the Nation exercises power through its representatives, or indirectly (para. 2).

The European clause provides only that the Republic of Poland may, pursuant to an international agreement, delegate the powers of the state authorities in certain matters to an international organisation or an international body (Article 90 clause 1), while consent to the ratification of such an agreement may be given in a national referendum in accordance with Article 125 (para. 3), to be decided by the Sejm in a resolution adopted by an absolute majority, with a quorum of 50% (para. 4). The basic regulation of a referendum is contained in Article 125, according to which in matters of particular importance for the State a nationwide referendum may be held (para. 1); it may be called by the Sejm by an absolute majority of votes in the presence of at least half of the statutory number of deputies or by the President of the Republic with the consent of the Senate, expressed according to analogical formal requirements (para. 2) by an absolute majority of votes in the presence of at least half the statutory number of senators. The result of a referendum is binding if more than half of those entitled to vote take part in it (para. 3), and its validity (as with the constitutional referendum under Article 235[6]) is determined by the Supreme Court (para. 4). The Constitution refers to the ordinary act (para. 5) in order to define the principles and the procedure for holding a referendum.

It is worth noting that although the matter of referenda is not particularly protected in the Constitution against changes in the event of a state of emergency,<sup>15</sup> when neither the Constitution nor any of the electoral ordinances or laws on the state of emergency may be changed, although this exclusion does not apply to the referendum regulation, during a state of emergency and within 90 days of its termination, the term of office of the Sejm may not be shortened, a national referendum may not be held, elections of public authorities (to the Sejm, Senate, for the President of the Republic of Poland or to local government bodies) may not be held, and the terms of those bodies are prolonged as appropriate (para. 7).

The regulation of the procedure for amending the Constitution, made by means of an act adopted with the same wording by the Sejm and then, within no more than 60 days by the Senate (Article 235 para. 2), provides, to a limited extent, an optional application of the ratification referendum. Namely, if the Act amending the Constitution concerns the provisions of Chapter I ('the Republic'), Chapter II ('Freedoms, rights and duties of the person and citizen') or Chapter XII ('Amendment to the Constitution'), each of the subjects of a

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<sup>15</sup> That is the martial law, a state of emergency or a state of natural disaster—Article 228 para. 1.

constitutional initiative<sup>16</sup> may, within 45 days following the adoption of the act by the Senate, 'demand' a referendum approving the matter by way of a motion to the Speaker of the Sejm, who then calls an immediate referendum to be held within 60 days from the date of submission of the motion, and an amendment to the Constitution is to be adopted if a majority of voters has voted for it (para. 6).

It should be noted that the Constitution also provides for a local, following an interesting formula, and not a simple duplication of the structure of a national referendum. Specifically, members of a local government community may decide by referendum on matters concerning that community, including the dismissal of a local self-government body elected in direct elections; the rules and procedure for holding a local referendum are laid down in a statute (Article 170).<sup>17</sup>

Commenting on the above regulation, it should be stated that it is a kind of paradox that although the Constitution of the Republic of Poland of 1997 after its adoption by the National Assembly was approved on 25 May 1997 in a nationwide ratification referendum (with relatively low support), its provisions (Articles 4, 90, 125 and 235) significantly depreciate this form of the exercise of power by the sovereign nation of Poland. A referendum, which is a direct expression of the will of the citizens of the Republic of Poland, or in other words, the most democratic form of the exercise of power, is always only optional (permissible), and never obligatory in any matter, as is sometimes the case in other States which provide for *a posteriori* or even *a priori* constitutional referendum.<sup>18</sup> The Constitution also limits the admissibility of applying a constitutional referendum to certain amendments to the Basic Law, namely those relating to the regulation of the political system of the Republic, freedoms, rights and duties of individuals, and the procedure for amending the Constitution (to the provisions contained in Chapters I, II and XII of the then binding Constitution). On the other hand, a simple national referendum on matters of 'particular importance for the State' actually depends on the Parliament, and in two respects. It can only be administered by the Sejm or by the President with the consent of the Senate, expressed by a qualified majority of votes. This is not the right solution, since when it comes to managing a constitutional referendum, the Head of State enjoys an independent position.<sup>19</sup> Of equal importance is the fact that the Constitution adopted in a referendum without the requirement of a minimum turnout does not at all allow for a referendum initiative on the part of the stakeholders themselves, that is citizens, as is the case in many European countries,<sup>20</sup> but requires, for the result of a national referendum to be binding, more than half of all eligible

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<sup>16</sup> A group of at least one fifth of the statutory number of the deputies, the Senate or President of the Republic of Poland—Article 235 para. 1.

<sup>17</sup> Cf. Act of 15 September 2000 on Local Referenda, JL RP 2016, item 400 as amended.

<sup>18</sup> Cf. R. Grabowski, *Partycypacja obywateli w procesie zmiany konstytucji w państwach europejskich*, *Przegląd Prawa Konstytucyjnego* 2010, no. 1: 61–66.

<sup>19</sup> Although doubts may arise as to whether such an official document requires to be countersigned by the President—cf. Article 144 para. 3 point 5.

<sup>20</sup> Cf. R. Grabowski, *op. cit.*: 53ff.

citizens to take part in such a vote. At the same time, it does not distinguish between constitutive and consultative referenda, nor does it determine who is to be bound by the outcome of the referendum and how it is to be linked.<sup>21</sup>

In view of the abovementioned constitutional announcement referring to the regulation of the ordinary Act, another Act (of 14 March 2003) that has been amended<sup>22</sup> several times requires deserves attention. It is the Act on a National Referendum.<sup>23</sup>

This Act regulates the rules and procedure for holding a national referendum of any kind that has been provided for in Articles 125, 90(3) and 235(6) of the Constitution of the Republic of Poland (Article 1). Pursuant to these provisions only Polish citizens are entitled to participate in a referendum (as set out in Article 62 of the Constitution). It further states that those participating express, through the votes they cast, their will as to how the matter submitted to the referendum is to be resolved while the essence of a referendum is to provide an official vote answering in a positive or negative manner a question or questions or to choose between proposed options of solutions (Article 2).

The Act repeats, following (in accordance with) the Constitution, the regulation of the management of a referendum in matters of particular importance for the State (Article 60), however, it adds that the Sejm may decide to submit a particular matter to a referendum on its own initiative, as well as at the request of the Senate, the Council of Ministers or citizens, specifying proposals for questions or options for a solution in a matter to be submitted to a referendum. If this chamber (by way of a resolution) does not accept the motion to hold a referendum, the Speaker of the Sejm will inform the petitioner about it (Article 61).

Of particular interest is the regulation of the ‘civic’ referendum. In this case, the Sejm may (only optionally) decide to submit a specific matter to a referendum on the initiative of citizens who have the support for their motion of at least 500,000 persons entitled to participate in a referendum (that is, having an active right to vote in a parliamentary election), although it may not concern every matter. By law, three are excluded: (1) expenditure and income, in particular taxes and other public levies, (2) the defence of the State and (3) amnesty (Article 63).

It is also worth noting that the act clarifies the regulation of the ‘presidential’ referendum. Namely, the President of the Republic of Poland submits to the Senate a draft decision to call a referendum, containing the content of questions or variants of a solution to the matter submitted to a

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<sup>21</sup> Which has been considered in the literature as a drawback of the Constitution of 1997 and at the same time ‘the functional weakness of the institution of the referendum itself.’ Cf. B. Naleziński, Komentarz do art. 125, in: M. Safjan, L. Bosek (eds.), *Konstytucja RP. Komentarz*, vol. 2, Warsaw 2016: 561.

<sup>22</sup> It should be noted that the very adoption of this Act in 2003, providing for an innovation in the form of the possibility of voting in a referendum within one or two days, was a certain sociotechnical and profrequency measure, undoubtedly dictated by the Parliament’s desire to ensure the effectiveness of the accession.

<sup>23</sup> JL RP of 2015, item 318, and of 2017, item 850.

referendum, as well as the date on which it is to be held, and the Senate is to adopt a resolution on the consent to the referendum decision within 14 days (Article 64). The Senate may, of course, refuse such consent, and the Head of State has no means of appeal against it anymore.

The Act on holding a referendum (announced in Journal of Laws of the Republic of Poland), which is in fact a resolution of the Sejm or a decision of the President of the Republic of Poland, contains several elements: (1) an indication of the legal grounds for calling a referendum; (2) the wording of the questions or options for a solution to the matter submitted to a referendum; (3) the deadline (with an option of two days) for holding a referendum; and (4) a calendar of activities connected with the holding of a referendum, with the referendum taking place no later than on the ninetieth day after the day on which the order to hold a referendum is announced (Article 65).

The Act repeats the constitutional condition for the binding nature of the outcome of a referendum stipulating that more than half of those entitled to vote shall participate, with the result being decided in accordance with the form of a referendum question, that is whether in response to the question put a majority of the valid positive or negative votes was cast, or if most valid votes were cast for one of the options proposed to resolve the matter put to the referendum (Article 66).

Unlike its predecessor, the current Act regulates in some way the implementation of the result of the referendum, stating that: 'the competent State authorities shall take immediate action in order to implement the binding outcome of the referendum in accordance with its determination by issuing normative acts or taking other decisions, but not later than within sixty days from the date of the announcement in the Journal of Laws of the Republic of Poland of a Supreme Court resolution on the validity of the referendum (Article 67).'

Although this regulation seems to be rationally conceived, it gives rise to considerable interpretative difficulties, which can in fact affect almost everything. The problem may already concern the obligated entity itself, because although it would be difficult to nominally or even generically identify all 'competent public authorities' in relation to certain categories of cases, it is easy to imagine the inaction of an authority, or even a negative conflict of competencies between several authorities that could, or rather would have an obligation to, take action. As an example: if the reliable implementation of the nation's statement in a referendum would require the adoption of a law, who should exercise the right of a legislative initiative, which of the four constitutionally entitled entities (Article 118 para. 1), since, it should not really be... citizens by way of their initiative (Article 118 para. 2) who, after all, have just expressed their will in a referendum vote?!

The essence of these obligations is 'to take immediate action to implement the outcome of the referendum.' The mere undertaking of a measure is, of course, necessary, but it may also be quite removed in time from its completion (implementation), or, in other words from its execution and completion. Also the 'goal' and its 'implementation,' rather than the more categorical 'execution,' may be very vague in practice. On the other hand, the means of



implementation seem unclear, because if in a given case the ‘issue’ of normative acts would be at stake, what stage of the proceedings is it all about here, is it enough to initiate or is it necessary to follow the legislative path to its end? Also, ‘making other decisions’ is a vague formulation. These are, however, the results of the faulty, incomplete constitutional regulation of the legal consequences of a referendum, ‘which remains largely *leges imperfectae*.’<sup>24</sup>

Leaving aside the regulation of a referendum regarding the expression of a consent to ratify an international treaty (Chapter 9 of the Act), which nevertheless has rather creatively complemented the constitutional regulation,<sup>25</sup> a closer look should be given to the provisions of Chapter 10 regulating the referendum approving an amendment to the Constitution of the Republic of Poland (Articles 76–79).

The Act does not limit itself to the repetition of the provision of Article 235 para. 6 of the Constitution regarding a motion for calling a referendum addressed to the Speaker of the Sejm, and adds the requirement that the Speaker must take a decision immediately and set the referendum date as a public holiday, falling within 60 days from the date of the filing of the motion. The Act states quite strictly—which does not mean: unquestionably—the formula of this referendum, stating that the question in a referendum is to begin with words: ‘Are you in favour of the adoption of an amendment to the Constitution of the Republic of Poland of 2 April 1997, by way of the Act of ... (title of the Act)?’ (Article 78 para. 1).

The fundamental question is whether the restricted form of the referendum issue allows or excludes such a formula as ‘an amendment to the Constitution’ which would consist in a complete change: the replacement or exchange of the Constitution in force for a new one. If the supporters of the restrictive interpretation were are right,<sup>26</sup> this would mean not only that the authors of the 1997 Constitution intended to stiffen the procedure for amending the Constitution, but even to set in stone this regulation altogether. Metaphorically speaking, this constitution would then appear to be a political Trojan horse left by a group justly associated with the era of the Polish People’s Republic (the legal and moral heir to the then communist party), nowadays not even present in the parliament.

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<sup>24</sup> Cf. L. Garlicki, Komentarz do art. 125, in: idem (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. 2, Warsaw 2001: 12–14, Article 15.

<sup>25</sup> In the event of a failure to adopt an Act giving consent to the ratification of an international treaty pursuant to Article 90(2) of the Constitution, as well as in the event that the outcome of a referendum on the consent to such ratification is non-binding, the Sejm may adopt a resolution on the choice of the procedure for giving consent to the ratification of such an agreement—Article 70a and Article 75.

<sup>26</sup> According to which the legislator ‘has unequivocally indicated that the subject of such an act [act amending the Constitution—D.D.] can only be a modification of the provisions of the Basic Law’—cf. P. Tuleja, B. Szczurowski, Komentarz do art. 235, in: M. Safjan, L. Bosek (ed.), op. cit.: 645. Eventually, however, the authors agree with W. Sokolewicz’s opinion that in the procedure referred to in Article 235 ‘it is permissible to make a “comprehensive” change, i.e. to adopt a new constitution treated as “maximum fragmentary changes”’, *ibidem*: 1647.

At the same time, however, there are no objections to the provisions of the Act, which in a way dictate the manner in which the result of such a referendum is to be implemented, such a result always being always, regardless of the turnout—the referendum adopts an amendment to the Constitution when the majority of voters have voted in favour of it. In such a case, immediately after the announcement of a resolution of the Supreme Court on the validity of a referendum in the Journal of Laws, the Speaker of the Sejm shall present to the President the Act amending the Constitution, and the President has 21 days to sign it, and also calls for its immediate announcement in the Journal of Laws.

It is understandable and obvious that this specific legislative procedure is, after all, about a constitutional act, because the Head of State cannot contest it by means of a legislative veto (Article 122 para. 5). However, it is no longer so obvious whether the head of state could not question the formal defects that occurred in the course of the legislative process, or in the proceedings of the Sejm or Senate concerning the amendment to the Constitution. Hence a question: could or should such failures be subject to control by the Constitutional Tribunal?<sup>27</sup>

To conclude, it is worth stressing that the literal wording of the Act on a referendum allows a referendum to be held on the same day as the elections to the Sejm and Senate, the election of the President of the Republic of Poland or elections to the European Parliament (Article 90), which seems to exclude *a fortiori* the possibility of holding a referendum on the day of local elections. The appropriate application of the provisions of the Electoral Code of 5 January 2011 (in non-regulatory matters) does not resolve this doubt.

### III. MODERN REFERENDUM PRACTICE

The first national referendum conducted pursuant to the 1997 Constitution was held on the seventh–eighth June 2003 and concerned Poland's accession to the European Union. It should be stressed right away that the legality and democratic manner in which the accession referendum was conducted raises no doubts, and that it resulted in a solution (decision) legitimately attributed to the Polish Nation. According to the announcement of the State Electoral Commission of 9 June 2003, 58.85% of citizens entitled to vote took part in the referendum, of whom 77.45% cast valid votes in favour of the ratification of the Treaty. The number of votes cast in the referendum<sup>28</sup> was 17,578,818, which accounted for the turnout of 58.85%. The question posed in the referendum: Do you consent to the accession of the Republic of Poland to the European Union?—was answered positively by 13,516,612 voters, that is 77.45% (valid votes), and negatively by 3,936,012, that is 22.55% (valid votes). In other words, 45.25% of the total number of entitled persons voted in favour of accession, which was an impressive figure,

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<sup>27</sup> Cf. the interesting deliberations of W. Sokolewicz, Komentarz do art. 235, in: L. Garlicki (ed.), *op. cit.*: 70–74, remark 39.

<sup>28</sup> The number of voting ballots taken out of urns.

at least in comparison with the result of the constitutional referendum of 1997, in which about 22.5% of all entitled voters decided to adopt the Constitution, and this political decision was anyway legitimately attributed to the whole Nation. Travestyng the (quite unfortunate) remark of a politician: ‘Sorry, this is the charm of democracy.’

However, the significant difference between the two referenda was the level of information provided to the electorate, and therefore the possibility of making an informed decision. The constitutional referendum was preceded by a reasonably reliable information campaign under the patronage of the then President of the Republic of Poland, who was the signatory (with a presidential ‘mission’) of the text of the Constitution, sent and delivered to some one million Polish households. Before the accession referendum, Polish homes received different material, signed by the same Head of State, but this time in the form of a colourful brochure on the European Union, in an edition unknown to me, but certainly lacking the value of at least a minimal shortened version of the Accession Treaty and the entire *acquis communautaire*, which—apart from the ECJ case law—totalled over a thousand pages (exactly 1,145 pages)<sup>29</sup> and was not free of inaccuracies and factual errors.

A fundamental question can be asked here: is it beyond discussion that, in 2003, the Polish Nation agreed not only to the accession itself, but also to all the consequences of the accession and European integration, even those that lead in a direct line to the abolition of the classic formula of the sovereignty of the Nation, and its replacement by a new, ‘post-classic’ approach, reducing essentially the prerogatives and attributes of that sovereign? The fact that the nation agreed to the content of the Constitution determined by its representatives is to fully justify the view of the Constitutional Tribunal that ‘the nation has determined the possibility of transferring (by way of a separate decision) to an international organisation the competences of State authorities in certain matters and has indicated further (most important) consequences of accession, including above all the obligation of the direct applicability in the Republic of Poland of the law enacted by this international organisation.’<sup>30</sup> But the question returns: what really, and to what extent did the Nation consciously and consequently approve of in these acts of its will?

Leaving aside the unsuccessful referenda initiatives, in particular the referendum on the adoption of the European Union Constitution,<sup>31</sup> proposed in 2003 when, as a result of the rejection of the draft Treaty in the referenda in

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<sup>29</sup> See JL RP 2004, no. 90, item 864.

<sup>30</sup> Cf. M. Dobrowolski, *Zasada suwerenności narodu w warunkach integracji Polski z Unią Europejską*, Lublin 2014: 199ff.

<sup>31</sup> Treaty establishing a Constitution for Europe, signed on 29 October 2004 in Rome by the Member States of the European Union, published in the Official Journal of the European Union of 16 December 2004, series C, no. 310; available *inter alia* at: <<http://eur-lex.europa.eu/legal-content/PL/ALL/?uri=OJ:C:2004:310:TOC>> and <[https://europa.eu/european.../treaty\\_establishin\\_g\\_a\\_constitution\\_for\\_europe\\_pl.pdf](https://europa.eu/european.../treaty_establishin_g_a_constitution_for_europe_pl.pdf)>.

France and the Netherlands, its pointless holding in Poland was abandoned, let us recall the last Polish referenda held so far.

Shortly after the first round of the presidential elections and the official announcement of their results according to which the two main contenders obtained, respectively: 33.77% the then President Bronisław Komorowski, running for re-election, and 34.76% of the votes validly cast for Andrzej Duda running for the presidency,<sup>32</sup> on 13 May 2015 the President still in office submitted a decision about holding a referendum<sup>33</sup> to the Senate which, following a heated debate, the Senate approved by a resolution of 20 May 2015.<sup>34</sup> Fifty seven senators voted for giving consent, in the absence of the opposition.<sup>35</sup>

Pursuant to the decree of the President of the Republic of Poland of 17 June 2015 to call a nationwide referendum on 6 September 2015,<sup>36</sup> issued immediately after the second round of the election in which the existing Head of State had lost,<sup>37</sup> three questions were to be asked: (1) Are you in favour of the introduction of single-mandate constituencies in parliamentary elections to the Polish Sejm? (2) Are you in favour of maintaining the current method of financing political parties from the state budget? (3) Are you in favour of the introduction of the general rule of resolving doubts as to the interpretation of tax law to the benefit of the tax payer?

Held on 6 September 2015 (exactly one month after the formal appointment of newly elected President Andrzej Duda), the referendum on this matter had a record low turnout of only 7.80%. More specifically, out of the 30,565,826 voters entitled to participate in the referendum, question 1 was answered positively by 1,829,995 (or 78.75%) voters, question 3 by 2,194,689 (or 94.51%) and question 2 was answered in the negative by 1,923,994 (or 82.63%) voters eligible to take part in the referendum.<sup>38</sup>

It should not be forgotten either that on 21 August 2015 the newly-elected President Andrzej Duda submitted to the Senate a draft decree<sup>39</sup> calling for a nationwide referendum on 25 October 2015, the day of the parliamentary election (decreed by the previous President). The proposed referendum was to contain three questions: (1) Are you in favour of lowering the retirement age

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<sup>32</sup> Cf. Announcement of the State Electoral Commission of 11 May 2015 on the results of the voting for the President of the Republic of Poland called for 10 May 2015, JL RP 2015, item 650.

<sup>33</sup> Print 899.

<sup>34</sup> Resolution of the Senate of 21 May 2015 on giving consent to the calling by the President of the Republic of Poland of a nationwide referendum, not published in *Monitor Polski*, available at: <<http://www.senat.gov.pl/prace/senat/posiedzenia/tematy,418,1.html>>.

<sup>35</sup> See Stenographic report of the 75th Session of the 8th Senate: 99, <<http://www.senat.gov.pl/prace/senat/posiedzenia/przebieg,418,1,wersja-pdf.html/>>.

<sup>36</sup> JL RP 2015, item 852, constituting an attachment to the 'Calendar of the action plan for holding a referendum' was amended by a President's decree of 3 August 2015, JL RP 2015, item 1134.

<sup>37</sup> B. Komorowski received 48.45% of valid votes, A. Duda—51.55%. See Announcement of the State Electoral Commission of 25 May 2015 on the results of the repeated voting and the result of the election for the President of the Republic of Poland, JL RP 2015, item 725.

<sup>38</sup> Cf. Announcement of the State Electoral Commission of 7 September 2015 on the results of voting and the result of the referendum conducted on 6 September 2015, JL RP 2015, item 1375.

<sup>39</sup> Print 1054.

and linking pension rights to seniority? (2) Are you in favour of maintaining the existing system of functioning of the State Forests Enterprise? (3) Are you in favour of abolishing the general statutory schooling obligation for six-year-olds and restoring the general statutory schooling obligation from the age of seven?

After as equally heated a debate in the Senate as on the former President's proposal, on 4 September 2015 (with 35 votes in favour, 53 against and 2 abstentions) the Senate, which was about to end its term of office, did not approve the holding of this referendum.<sup>40</sup> Without commenting on the above through the lens of the requirements of the political (or rather parliamentary) culture, nor trying to assess the costs of the referendum of 2015 which had a sub-minimal turnout, one thing needs to be emphasised. Although the non-participation of citizens, or their choice not to participate in a referendum, does not have direct legal effects, it is not of no significance. It is a manifestation of the division into those who govern and those who are governed, showing the citizens' indifference or even distrust towards the initiators of a referendum as well as its subject matter. It may also indicate that most citizens regarded the calling of a referendum to have been of an tactical or cyclical nature, dictated by reasons other than a genuine desire to ask the Nation to propose a solution, and consequently showed their disapproval of the treatment politics as anything else but reasonable concern for the common good.

#### **IV. THE LIMITS OF THE SOVEREIGN POWER OF THE PEOPLE, OR WHAT MAY (OR MAY NOT) BE THE SUBJECT OF DECISIONS BY THE PEOPLE IN A REFERENDUM**

The question posed above could merit a separate, comprehensive and certainly controversial study. The first, and indeed overriding, consideration concerns the moral issues: can difficult moral issues, such as the temporal limits of the legal protection of human life, be resolved by means of a referendum vote? Or is it possible to vote on the truth at all? According to a well-known, but rather poorly documented saying, the English Parliament could have done almost everything by way of legislation, with the exception of... the conversion of a man into a woman and vice versa. However, if we really believe that the representatives of the Nation, such as MPs and senators, diverse politically and in terms of their professional background or life experience, who are not always infallible, have unlimited legislative powers, as long as these are in conformity with the Constitution—why should we limit the rights of the sovereign itself, which those (MPs) represent?

We cannot view a referendum naively as an ultra-democratic tool and an excellent institution in the axiological, political and normative dimensions. The regulations and institutional practice in contemporary countries vary and are

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<sup>40</sup> See Stenographic report of the 81st Session of the 8th Senate: 208, <<http://www.senat.gov.pl/prace/senat/posiedzenia/przebieg,424,3,wersja-pdf.html/>>.

not always positive.<sup>41</sup> With regard to the admissibility of a nation deciding on a constitution by means of a referendum, however, I share the view that 'if the constitution is to express (and symbolise) the aspirations of its constituent social entity (nation, people) to an independent existence in a sovereign State, this entity cannot, or at least should not limit its sovereign power *ex definitione*, including also in the field of legislation.'<sup>42</sup>

Without raising many more questions and doubts, I express a rather radical view: the subject matter of a referendum may be about almost anything but certainly may be about the Constitution, amendments to it or its revision. On the other hand, any statutory restrictions on the substance of matters to be decided in a referendum (as provided for in Article 63 of the Polish Act on Referenda of 2003) have no axiological or juridical justification. I consider them to be directly incompatible with the Constitution and the principle of the sovereignty of the Nation expressed in it.

It is exactly this last point that I want to address, as the literature takes the view that in the conditions of European integration, this principle has been transformed into a 'postclassical' form and is no longer an absolute value, and that 'the only legally permissible way for a sovereign nation to lose sovereignty is a conscious and explicit intention on the part of that sovereign power to transfer power to another sovereign power, which would also require a corresponding constitutional change, preferably of course in the form of an acceptance expressed in a referendum.'<sup>43</sup> And what is important: 'There is no doubt that the integration clause itself [in the Constitution of the Republic of Poland of 1997— D.D.] was established with the consent of the sovereign (nation).'<sup>44</sup> The following remark should be made here: I do not share this view, I do not fully understand what the second 'axiom' or even dogma in the area of the requirements of so-called political correctness is really about. The principle of the Nation's sovereignty was not 'enacted' in the Constitution of the Republic of Poland (adopted shortly before Poland's accession to the EU). Yes, it is proclaimed in this act, or rather merely affirmed, ascertained rather than constitutionalised. After all, this principle, present since the first Constitution of 3 May 1791, was restored in our system of law right on the threshold of the transformation, within the framework of the revision of the Constitution of 29 December 1989 and since then it has been grounded in concrete manifestations of regulation and political practice, starting with the first free election of the President of the Republic of Poland in 1990, through the abolition of the 'contract' parliament and the election of the chambers in 1991 and 1993 and the presidential elections of 1995, up to the nationwide (sic!) ratification referendum of 25 May 1997, in which the Nation adopted a new Constitution. So it was not the Constitution that created the sovereignty of the Nation, but it was (not without some doubts, about which further), so to say: a child of this sovereignty! If, therefore, we understand the Nation's sovereignty not only as

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<sup>41</sup> Cf. an extensive monograph by M. Musiał-Karg, *Referenda w państwach europejskich. Teoria, praktyka, perspektywy*, Toruń 2008: 416.

<sup>42</sup> Cf. W. Sokolewicz, *Komentarz do art. 235*, in: L. Garlicki (ed.), *op. cit.*: 15, remark 8.

<sup>43</sup> Cf. M. Dobrowolski, *op. cit.*: 287.

one of many legal constructs, but as a fundamental principle and constitutional value that is binding, and not just instrumental but also autotelic, then it is not at the discretion of the 'beneficiary', and if that is the case, the possibility of self-destruction consisting in renouncing it, albeit with the entire staffage of democratic procedures, for any purpose, even the most noble and pragmatic, such as the need for European integration, should be excluded. I therefore believe that the Nation's sovereignty is just as inalienable as is the inherent and inalienable dignity of man—the latter may be subjected to interference, restrictions and even repression, but it cannot be taken away from man, nor can man forfeit this dignity, not even by the most unworthy conduct, which is not worthy of the man himself. Even then man will not stop being human. Likewise, a Nation cannot divest itself of sovereignty, or its subjectivity, because then it would cease to be a Nation both in the legal and political as well as cultural sense, it would lose not just some attributes or a certain scope of rights, but its identity and existence. And this is not allowed not only by the binding Constitution of the Republic of Poland, albeit one that is flawed or subject to any future amendments in regulation, but above all by the history of Poland and our responsibility for its future fate.

Therefore, it is not only about the interpretational extrusion, as far as possible, of the normative and practical formulation of the imperfect integration clause from Article 90 of the Constitution; it must be borne in mind that the preamble to the Constitution calls for its application 'for the good of the Third Republic', which—according to the first article of this act—is the 'common good of all citizens,' while the first constitutional duty of a Polish citizen (Article 82) is none other than loyalty to the Republic of Poland and concern for the common good. Finally, it is worth recalling that the Constitution (in Article 6 para. 1) somewhat inadvertently, but nevertheless accurately, captures the meaning and value of culture, which is 'the source of the identity of the Polish nation, its persistence and development.' It is only to be hoped that the wealth of the national culture includes the legal culture and, at least to a modest extent, the study of constitutional law.

Therefore, while maintaining the highest possible degree of scientific impartiality, but at the same time breaking away from the purely legal-dogmatic layer, it is worth recalling words that so aptly fit the subject discussed here, spoken by Pope John Paul II, who as far back as 1983 indicated 'the way that will let the nation enjoy full civil rights and social structures fit for its legitimate requirements; that will liberate the support that the State needs in order to fulfil its tasks and through which the Nation will truly express its sovereignty.' This has been achieved in the process of political transformations since 1989, but the papal call remains valid: '[...] I feel responsible for this great common heritage, the name of which is Poland. It is the name of all of us. It is the name that obliges us all.'

Hence the conclusion: it is legally and factually impossible for the People of Poland, through a referendum or with the votes of its representatives, to relinquish the sovereignty of its own country and that of its own country, and thus renounce... itself.

## V. PROSPECTS FOR A CONSULTATIVE REFERENDUM ON THE CHANGES TO THE CONSTITUTION OF THE REPUBLIC OF POLAND

Even on the basis of the binding, restrictive constitutional provisions<sup>44</sup> it will still be possible to give the institution of the referendum the right dimension and real importance for the shaping of the constitutional system of the Republic of Poland. The initial initiative of the President of the Republic of Poland, submitted on 3 May 2017, to prepare a consultative referendum on the need to amend (change) the current Constitution<sup>45</sup> is unprecedented. On the one hand, it deals with constitutional issues, which are and should be of vital interest to civil society as a whole, since they directly affect it, and, on the other hand, it does not imply limiting the role of citizens' statements to a future yes or no decision. On the contrary, this initiative is based on the assumption that citizens' participation in the process of exercising power cannot be merely symbolic. The nation should have genuine influence firstly on defining the subject matter of the referendum, setting the direction and even the content of specific provisions of the new or amended Constitution, and only then—after a legislative procedure in parliament, that would take into account the results of consultations—on their approval in a constitutional referendum.

While the very thought of the need to amend the Constitution is in line with the political and academic debate in Poland on this fundamental subject,<sup>46</sup> such a model of conduct, involving the nation in the process of political reflection and co-creation of the constitution from the very beginning, is innovative. Regardless of possible reservations on the part of some politicians or doubts (which is always possible) on the part of lawyers (for example, as to the relation and admissibility of the sequential application of Articles 125 and 235 of the binding Constitution), this model, as well as preparation and implementation of the constitutional consultative referendum, is fully in line with the principles of the constitutional system in force today. It is a confirmation of the essence of the statehood of the Republic of Poland as a common good of all citizens and is consistent with the fundamental civic duty of concern for the common good; it is the implementation of the principle of sovereignty of the Nation, entitled to directly exercise power also in the sphere of lawmaking; and finally, in the perspective of the initiator and promoter of this undertaking—it fully corresponds to the systemic role of the Head of State, President of the

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<sup>44</sup> *Ibidem*: 199 and *passim*.

<sup>45</sup> The doctrine indicates, among other things, that 'a matter subject to the Nation's decision in a universal suffrage cannot be an act of lawmaking, regardless of its form or stage of the procedure of its enacting,' while emphasising the significant difficulties of 'separating the matter' of the referendum under Articles 125 and 235 of the Constitution of 1997—this way: B. Naleziński, *op. cit.*: 556–557.

<sup>46</sup> See <<http://www.prezydent.pl/aktualnosci/wideo/video,181,prezydent-czas-rozpoczac-wazna-debate-o-konstytucji.html>>.

<sup>47</sup> For example, the 58th All-Poland Congress of Departments and Units of Constitutional Law was held in Zamość on 2–4 June 2016 under the motto: To change or not to change the Constitution?



Republic of Poland, as the representative of the Nation and spokesman for the *raison d'état* of the Polish State.

Therefore, the proposed referendum is not aimed at or against the Constitution; on the contrary: it serves the authority of the Constitution, understood more than just in terms of a positive legal document, pushed through by a certain political majority (today even absent from the political scene) and supported by a small group of citizens. This referendum is intended to concern the Basic Law as being a genuine act of the sovereign nation and the legal expression of its conscious will and respect for the values and principles that deserve the status of a constitution.

To sum up and to answer directly the question in the title: is the referendum only a virtual or is it a real power exercised by the nation?

Until now, on the basis of the Constitution of 1997, a national referendum has been held only twice, in 2003 and 2015—and served as a rather illusory instrument, institutionally devalued and often treated instrumentally or tactically. It is an instrument that is available and implemented with the permission of the Nation's representatives and not at the Nation's request. However, a real (genuine) good change in this area, is possible, as the Constitution of 1997 itself provides for the possibility of the sovereign and democratic determination of the fate or destiny of the Home country regained by the Nation in 1989. I believe that this will continue to be the case in 2018, the centenary of *Poloniae Restitutae*.

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#### THE REFERENDUM—AN INSTRUMENT OR AN ILLUSION OF THE POWER OF THE POLISH NATION

##### S u m m a r y

The author has analysed the following issues: Polish referenda traditions in the twentieth century, the currently applicable law contained in the Constitution of the Republic of Poland of 1997 and the Act of 2003, modern referendum practice in Poland (subject and results of the referendum carried out in 1997, 2003 and 2015) and the legal limits of sovereign power (the subject of the Nation's admissible decision in a referendum). The paper also points to the prospects for a consultative referendum on the amendment to the Constitution, related to the initiative of the President of the Republic of Poland submitted on 3 May 2017. It concerns the involvement of citizens in the process of drafting the constitution from scratch, before work on its draft in the Parliament commences, a practice that has no precedent in our history. The author takes the view that, notwithstanding the flaws or shortcomings of the existing legal regulations and negative past experience, a referendum may become the joint result of the work of a sovereign nation and may strengthen the authority of the new constitution.