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Direct democracy for the 21st century in the Polish local government

Demokracja bezpośrednia w XXI wieku w polskim samorządzie terytorialnym

I. Speaking most generally, when undertaking an attempt to define referendum, one should assume that it is a legal institution which, in situations determined by law, allows for the articulation of opinion of all the citizens in matters significant for the state or its part. Such a general definition indicates that referendum is immediately linked with the form of direct democracy. And such an inference is intrinsically true. Yet, it is also true that in modern states the fundamental form of exercising power is the principle of political representation (indirect democracy). Therefore, there arises a fundamental question about the mutual relations between the principles of direct democracy and indirect democracy, their character, significance for exercising power, whether on the level of the state or on that of the local self-government. A solution of this problem should be sought in systemic principles, which, in this respect, determine the manner of exercising power commonly in force in modern states. The starting point is the acceptance and binding of the legal fiction of the sovereignty of the nation. It entails a transfer of the problems of sovereign authority to the level of legal and political legitimisation of power. It is also reflected in the commonly accepted definition of sovereign power, that is, the power of granting investiture to govern and the power of influencing the government. For that reason the transfer of the concepts of the subject and sovereign power to the level of legitimising power had to result in the acceptance of the principle of representative democracy as a basic form of exercising power. Direct democracy, on the other hand, may be regarded exclusively as a subsidiary

form of exercising power and can be evoked only under conditions clearly determined by the law in force[1].

The chain of reasoning presented above is confirmed by the Constitution of April 2, 1997, currently in force[2], in the provisions of Art. 4 pursuant to Art. 104 and pursuant to Art. 125 – in so far as the mode of realising the attributes of sovereignty by the subject of the sovereign power in the state (nation) is concerned – and Art. 169 pursuant to Art. 170 and pursuant Art. 62 – in so far as the form of exercising power on the level of local self-government by the community of the inhabitants is concerned. This is even more evident because Article 16 of the Constitution clearly articulates the corporate clause: "The totality of the inhabitants of the basic territorial division constitutes a self-governing community by force of law". In view of this, it seems justified to assume that the analysis of the problems of communal referendum should be performed in the context of the general concept of sovereignty presented above and in the context of the parallel functioning of two systemic principles determining the forms of exercising power.

In the provision of Article 170 the Constitution in force states that members of a self-government community may decide – by way of a referendum – about matters concerning this community, including a recalling of the organ of local self-government originating from direct elections. The employed linguistic convention confirms the thesis put forth above about the fundamental nature – also in the commune (*gmina*), district (*powiat*), region (*województwo*) – of the representative principle, and thus of the character of the local referendum which is facultative and subsidiary in relation to the principle. Such a conclusion is confirmed by the laws about communal self-government of March 8, 1990[3], about district self-government of June 5, 1998[4], and about regional self-government of June 5, 1998[5], as well as the law of September 15, 2000 about local referendum[6]. These documents state quite clearly that the inhabitants of a commune (district, region) make decisions by means of universal suffrage, that is, by elections and referendum, or through the mediation of the organs of the commune (district, region). Hence, there can be no doubt that in the light of such determination about the manner of exercising power by communities of inhabitants of particular self-government units, evident priority is consistently given by the legislator to the principle of representation, in keeping with the provision of the Constitution. For the legislator clearly points first of all to

[1] The bulk of the material in this article has been drawn from W. Kręcisz, W. Taras, *Ustawa o referendum lokalnym. Wprowadzenie*, Zakamycze, Kraków 2001.

[2] Dziennik Ustaw No. 78, item 483.

[3] Dziennik Ustaw 2001, No. 142, item 1591.

[4] Dziennik Ustaw 2001, No. 142, item 1592.

[5] Dziennik Ustaw 2001, No. 142, item 1590.

[6] Dziennik Ustaw No. 88, item 985.

elections, as to one of popular suffrage – apart from the referendum – in which political representation is elected and the personal composition of the executive organs of the commune (district, region) is established. By the same token, such legislation gives expression to the principles generally operating in this respect. Apart from that, it should be noted that the Universal Declaration of Human Rights of December 10, 1948, the International Covenant of Civil and Political Rights of December 16, 1966, and the European Charter of Local Self-Government of October 15, 1986, ratified by Poland, constitute sources of laws, having regard to Article 87, par. 1 of the Constitution, including their understanding as sources of broadly understood sources of the law of referendum. They confirm that institutions of direct democracy, that is, referenda, have a subsidiary character in relation to the principle of representation[7].

When analysing referendum as an institution of direct democracy, attention should also be paid to one more principle that accompanies it. It is not without reason that, when granting to the community of inhabitants the right to express their will by way of common voting such as referendum, the constitutional law-maker as well as the ordinary legislator use a formulation which indicates that the community decides about the matters that concern it precisely by means of this procedure. Thus, the formulation assumes a decisive expression of their will in respect to the matter, which has been submitted to a referendum to be decided about.

This is further connected with the assumption about the rationality of the action of the subject making a decision in a specific matter – in the case that interests us here the subject is the community of the inhabitants of a commune, district, or region. The question of the rationality of the subject making a decision, especially when such decision is taken by way of employing the institution of direct democracy, is of great significance in view of the consequences of expressing one's will in this way. Therefore, in spite of appearances, it is by no means a trivial issue. The expression of one's will by universal suffrage – by means of a majority of votes – accomplishes a legal fiction, which assumes the existence of the identity of the will of the subject which in this way exercises the attributes of its power – that is, the community of the inhabitants – with the will of the majority of voting people, who declare themselves for one of the variants submitted to their decision. Accordingly, it may be assumed that under conditions of direct democracy – that is, referendum, as opposed to other popular votings whose aim is the formation of a personal representative organ (elections to communal council, district councils, regional assemblies) – the legal fiction mentioned above leads to a situation which may be described as "the

[7] Cf. A broader treatment of this point A. Jamróz: *Demokracja współczesna*, Białystok 1993, who also provides further instances of solving conflicts between the principle of political representation and the principle of direct democracy.

tyranny of the majority". It is a consequence of the fact that co-deciding by way of the institution of referendum assumes an expression of both a declaration of will and of a declaration of knowledge by the persons participating in the referendum. This is the basis of the thesis about the rationality of making decisions in this way. On the other hand, elections amount only to an expression of the act of will by the electors – in respect to the personal composition of the organ of representation – with a simultaneous transfer of the right of expressing – on their behalf – declarations of knowledge to a higher level, that is, to the representatives elected to communal councils, district councils and self-government assemblies[8].

The presumption of the rationality of the subject making a decision by way of a referendum, the criteria of the evaluation of the rationality of action, and consequences of this presumption – all clearly indicate that this mode of making decisions by a subject of the sovereign power on the level of self-government – the community of the inhabitants – is accompanied by qualifications of a specific kind. Their aim is to guarantee that the community of the inhabitants has the right to consciously make decisions about matters subjected to a solution by such a procedure. This right may be guaranteed by posing clear questions that would not be misleading. Perceiving the importance of this problem, the case verdicts of the High Administrative Court (NSA) have led to the formulation of a principle according to which "the referendum questions or their variants should be formulated in such a way that they do not mislead by unclear or incomplete formulations which would not make it possible for the inhabitants to make a rational choice of a solution"[9].

II. The institution of direct democracy, such as the institution of referendum, is accompanied by a relatively high conceptual differentiation. This is a consequence of the fact that both the legislature and legal practice are well aware of situations in which – depending on specific circumstances in which this particular mode of making decisions takes place – a referendum may have a different character. The circumstances may concern the scope of the referendum, its effect, the mode of prescribing the referendum in the sense of the requirement to carry it out or an absence of such an obligation, the subject of the referendum procedure. Hence, in jurisprudence such circumstances are perceived as specific criteria on the basis of which it is possible to characterise a concrete referendum carried out in a specific case.

Thus, on the basis of the criterion of scope, one may distinguish an all-national referendum, performed in the territory of the whole country, in which all the citizens take part in order to decide about a matter significant for

[8] G. Sartori: *Teoria demokracji*, Warszawa 1994, pp. 151–152.

[9] Cf. also W. Kręcisz, W. Taras: *Glosa do postanowienia NSA z 19 marca 1997 r. (II SA/Łd 428/97)*, „Samorząd Terytorialny" 1998, No 5, pp. 67 ff.

the state, and a local referendum, of particular interest for us, carried out in a part of the territory of the country, that is, on the territory of a specific self-government unit, in which a concrete community of inhabitants participates and decides about matters significant for that community. In respect to the effect of the citizens expressing their will by way of referendum, a given referendum may be regarded either as consultative (advisory) – when the result of the voting constitutes merely an indication and general directive for a concrete state organ or a self-government organ, yet not legally binding; or a legislative referendum – when by way of voting a legal norm is effected, and the result of the voting is legally binding and obliges concrete subjects to take up action in order to perform the decision taken up by way of popular voting (referendum). The obligation to carry out a referendum, in turn, makes it possible to distinguish an obligatory referendum, when the regulations of law stipulate the duty of specific organs of the state or of self-governments to order and carry out a referendum in specifically defined matters, the decision about which may be taken only and exclusively by this way; and a facultative referendum, when the regulations of law grant a concrete organ of the state or of self-government the right – not the duty – to submit a specific matter to a decision to be reached by way of referendum. Finally, in constitutional jurisprudence, depending on the matter subjected to be decided upon by way of popular voting, one may distinguish: a constitutional referendum, whose subject is a constitutional matter, and therefore it aims at expressing an opinion or taking a binding stand in the case of accepting a constitution or an act about amending a constitution; and a statutory referendum, whose subject is to decide upon a matter which is a subject of an act.

Employing the criteria mentioned above, in view of the scope of popular voting, the local referendum should constitute the proper subject of our analysis. Its character is determined by specific provisions of the Constitution, acts about communal self-government, district self-government, regional self-government, and the act about local referendum. There can be no doubt that, in the light of the legal regulations mentioned above, the local referendum, in principle, has the character of a facultative referendum. For members of a community may – as the constitution or the acts stipulate – take decisions in this way in matters concerning their community. Thus, it confirms the validity of the conclusion formulated above that the application of the institution of direct democracy is a subsidiary mode of exercising power by the community of the inhabitants.

At the same time, both the constitution and the acts postulate an exception to the facultative character of the referendum. In a commune, district and region, the referendum has an obligatory character when its subject concerns a decision about the recalling of the communal council, district council or regional assembly before the expiry of their terms. It is important to observe that propositions to introduce the direct election of the head of the board in small communes have submitted to Sejm (parliament) and according to the regulations

of the bill, the local population (inhabitants of the commune) will may remove the mayor from office by local recall referendum. At the same time, the act about local referendum and the act about communal self-government indicate that a referendum concerning the self-imposition of taxation on the inhabitants of the commune for public purposes also has an obligatory character.

III. When analysing problems of local referendum, special attention should be paid to the subject scope of matters that can be decided upon in this way. The scope is determined by the constitutional legislator and ordinary legislators or by reference to a general criterion in the form of "a matter important for the commune" (district, region), or still by enumerating the matters – selected on the basis of a strict subject criterion – which are to be decided upon in the course of an obligatory referendum procedure, e.g., the recalling of the authorities of the commune council (district council, regional assembly) before the expiry of their term, self-taxation of the inhabitants of a commune etc. If the latter criterion mentioned above raises no doubts in respect to the determination of a concrete subject of the referendum procedure, in the case of the former criterion one should refer to the achievements of the doctrine of the law as well as the case verdicts of the NSA.

According to these criteria, the communal referendum (or district and regional referendums) may be carried out in the case of each matter important for the commune (district, region), if the matter has a public nature, is of local importance and has not been restricted by laws for subjects other than the commune (district, region). The implication of such a description leads to a conclusion that the subject scope of matters submitted to the referendum is determined by the regulations of the law in force. In this context, it is worthwhile to recall the NSA case verdicts, which evidently concern the permissible limits of subjects to be decided about by way of referendum by communities of the inhabitants. Thus, for instance, the NSA validly judged that "an advisory opinion of a council or its organ, expressed in respect to a matter that is not included in the scope of operation of the commune, cannot be the subject of a referendum. The issues of the territorial division of the country (apart from the establishing sub-units such as village or town district) are undoubtedly beyond the competences of the commune"[10]. In this context it has justly been emphasized that the issue of referendum questions covering – even if only indirectly – the voting of the stand of the communal council expressing an opinion in the matter of the administrative unit in which a planned district should be included cannot be a subject of a referendum. In this case the proper way of finding out the genuine preferences of the inhabitants of a commune should be appropriate opinion polls, carried out by sociological and statistical methods, or by the councillors; for it would not be either valid or rational or still legally

[10] NSA verdict of April 29, 1993 (SA/Wr 935/93), Orzecznictwo NSA 1994, No. 3, par. 105.

justified to perform such polls by way of a costly communal referendum financed wholly from public resources. Apart from that in one of the verdicts it has been justly emphasized that in no case can the subject of the referendum be a decision about prohibiting the incumbent members of the city council to run again for the office, because any restriction of civil rights may be stipulated only in an appropriate act. The NSA decisively stated that "it is against good customs and it is an appalling sign of the times, when a substantive conflict about a change or modification of certain solutions is replaced by a campaign against persons deciding about these solutions." In this context the NSA reiterated its view that the limits of the freedom of referendum are determined by the legal order in force and therefore a resolution of the communal council about carrying out a referendum which would lead to results contrary to the law, is invalid[11]. One should also recall a case verdict in which the NSA expressed a view that a referendum solution cannot concern the matter of a popular enfranchisement of the inhabitants of the commune with communal property by issuing privatization bonds because the principles and procedures of privatization had been previously regulated in the act of August 30, 1996 about commercialization and privatization of state enterprises[12].

To continue our considerations concerning the influence of court practice, especially of NSA case verdicts, on the subject scope of referendum procedures determined by the criteria mentioned above as regarding a given matter as possible and permissible to be decided upon by way of referendum – that is, important for the commune (district, region), of public character, of local significance, not restricted by law for other subjects, not based on the principle of exclusiveness for particular determined units of territorial self-government with simultaneous exclusion of others – we should raise the question concerning the matter of self-imposing taxation by the inhabitants of the commune for a public purpose to be determined by means of a referendum. In a resolution of five judges of October 13, 1997, the NSA expressed an opinion that "On the basis of Art. 18 par. 2, subpar. 8, of the act of March 8, 1990 about local self-government, and of the results of a communal referendum, the council of the commune is not empowered to pass a resolution introducing a tax on financing the costs of removal and utilization of communal wastes"[13]. It seems that the judgment is by no means unquestionable. It certainly must provoke doubts, from the point of view of the case verdict practice observed by the NSA so far, and particularly from the point of view of the Constitution, especially the corporate clause (Art. 16), principles of exercising power on the self-government level (Art. 169 pursuant to Art. 170 pursuant to Art. 62) as well as the binding conception of the

[11] NSA verdict of March 17, 1995 (SA/Bk 393/95), unpublished.

[12] NSA verdict of March 24, 1998 (II SA/Wr 288/98), Orzecznictwo NSA 1999, No. 1, par. 20.

[13] Verdict of five judges of the NSA of October 13, 1997 (FPK 15/97), Orzecznictwo NSA 1998, No. 1, par. 8.

sources of the law, on the basis of which it may be assumed that the effect of a local statutory referendum is an introduction of a legal norm. At the same time, it is also a fact that, in Art. 217 of the Constitution, the system legislator clearly recognized the issue of imposing taxes as a statutory matter, which may indeed influence the manner of constructing a legal interpretation of both the constitution and the acts about communal self-government and about communal referendum, yet not to the extent which would incapacitate the community of the inhabitants in this respect[14].

The subject scope of the local referendum within which the freedom of referendum voting is realised, although defined and determined by the regulations of the law in force, is also – as the NSA verdicts quoted above indicate – significantly determined by the practice of applying the law. In principle, the juridical activity of the administrative court must be evaluated very highly. Executing concrete supervising competences in a referendum procedure, determined by appropriate laws, the NSA guarantees the preservation of democratic procedures, meeting commonly accepted world standards in this respect, of making decisions on the self-government level by the community of the inhabitants.

IV. According to the regulations of the binding laws about communal self-government, district self-government or regional self-government, the local referendum is effected either on the initiative of the council (of the commune, district) or of the assembly, on the basis of a resolution passed about it, or on the basis of a motion by at least 1/10 of the inhabitants of the commune and district or at least 1/20 of the inhabitants of the region who have the voting rights. The provisions of the acts indicate that the legislator has introduced a threshold of the binding character of the referendum on which its validity depends, as well as, it seems, the peremptoriness of the decisions taken in this way. The threshold has been set on the level of 30% of persons with voting rights and taking part in the referendum. As has already been indicated, the binding acts also stipulate that the referendum has a facultative character and may be carried out in every matter of importance for the commune, district, region – in the understanding presented above and with the above restrictions, naturally, with the exception of the referendum concerning the recalling of the statutory organ of the commune, district or region before the expiry of the term, because the latter has an obligatory character. Apart from that, the act about commune self-government stipulates that the referendum concerning taxation self-imposition of the inhabitants of the community for a public purpose must also have an obligatory character. The acts about district self-government and regional self-government do not provide for such referendums.

[14] Cf. a broader treatment of this issue [in:] W. Kręcisz, W. Taras: *Glosa do uchwały 5 sędziów NSA z 13 października 1997 (FPK 15/97)*, „Humanistyczne Zeszyty Naukowe", No. 3, Katowice 1998, pp. 251 ff.

In the resolution of the five judges of January 22, 1996 (VI SA 25/95), the NSA determined that only the inhabitants of a commune may be the subject of self-taxation because only they may take part in the communal referendum as a consequence of which they assume an obligation of transferring determined payments for public purposes; as a result, this duty does not concern the persons who are not inhabitants of the commune in which the referendum has been carried out[15]. The very idea of the citizens' self-taxation implies that its subjects cannot be legal entities, corporate bodies having no legal entity or private companies. The view that self-taxation for public purposes concerns only the inhabitants of the commune, rather than economic subjects, has also been endorsed by the Anti-monopoly Court[16].

V. The Preamble of the European Charter of Local Self-Government contains a clause stipulating that the right of the citizens to participate in the conduct of public affairs constitutes one of the democratic principles that are shared by all the member States of the Council of Europe. At the same time, the aforementioned rules shared by all the civilized states generally include the right to the due course of law (Art. 1, par. 1, Convention about the protection of human rights and fundamental freedoms of November 4, 1950). The jurisprudence connects the construction of the rights and freedoms of the citizens not only with the postulate of adequate regulation of the contents of these rights in the regulations of commonly binding laws but also the requirement of a statutory regulation of the procedures which are to protect these rights[17]. The instrument, which guarantees that each member of the self-government community has effectively the right to decide about affairs important for the commune is generally created by establishing an elected organ in universal suffrage and by equipping it with a relatively broad scope of power competences. Apart from that, the legal system allows a direct expression of the will by members of the community by way of another sequence of formalized activities, i.e., the referendum. Both procedures (through elections and through referendum) are under control of special organs, namely, the elections commissions. They cannot replace an external control of the correctness of the realization of the procedure exercised by the independent court of law. The NSA passes judgments in conflict cases, which occur because of factual circumstances which are often unforeseeable, and that is why it would be hard to overestimate the importance of its operative explication of the realization of the civic right to self-determination.

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[15] Orzecznictwo NSA 1996, No 2, par. 57.

[16] Verdict in case XVII Amr 24/96, "Rzeczpospolita" of August 2, 1996.

[17] Cf. W. Taras, A. Wróbel: *Zarys koncepcji państwa prawnego w praktyce Rzecznika Praw Obywatelskich*, Warszawa 1991, pp. 40–45, and Z. Kmieciak: *Postępowanie administracyjne w świetle standardów europejskich*, Warszawa 1997, pp. 234–247 as well as the bibliography quoted therein.

The acts of great international organizations do not valuate forms of democracy; they only stress the rights of the local community to decide about its affairs by way of direct democracy within the range determined by domestic law. While until recently Baden Württemberg was the only Land to provide, since the mid-1950s, for direct democracy procedures, local (binding) referendums have been instituted in the early 1990s in almost all Länder in Germany. The local population now may, via local referendum, address all matters of the local community, local budgetary and internal organizational matters of local administration, as an important exception, are not eligible for local referendum. With regard to local direct procedures Germany has turned into a frontrunner among European countries, except for Switzerland as the classical European homeland of local direct democracy[18]. Question of democracy, public trust and government-citizens relations are added to internal efficiency and user satisfaction when we define the goals of reform efforts in the contemporary world. An increasing challenge is how to manage expectations. User councils and other forms of direct democracy are spreading in many countries today. Surveys of citizen's trust in government, invitations to debate on the internet, public hearings, focus groups, town meetings and, last but not least, referendums are all signaling an increased interest in listening to people. The citizen is no longer reduced to being a user or a customer[19].

The literature on the subject mentioned, however, a considerable number of contraindications concerning a change of the prevailing proportion between forms of direct democracy and representative democracy. The overuse of the institution of referendum results in diminishing the interest of the citizens in this mode of exercising power. Where general elections take place every few years, because of the stabilized political system, and regional voting is rare, electoral attendance is high. The situation is different in countries with traditional preference of direct democracy, e.g., in Switzerland, where in some communes the percentage of voters oscillates around 1%. Another factor, which restricts the expansion of the scope of local voting is connected with the living conditions of the population. The inhabitants of large cities are not interested in local affairs to the same extent as members of small village communities. Refusal to believe in the possibility of effectively influencing the conduct of their own affairs is also common. Still another reason concerns the complexity of matters submitted to referendum; not everybody has sufficient knowledge about the subject of voting, and there are few persons sufficiently persevering to read through the presented justification of particular variants of solutions and search for additional

[18] H. Wollmann: *Local government modernization in Germany: Between incrementalism and reform waves*, "Public Administration" 2000, No. 4, pp. 928–929.

[19] A. Wolf: *Trends in public administration – a practitioner's view*, "International Review of Administrative Sciences" 2000, No. 4, p. 695.

information in other sources. On the whole, one may state that this form has certain, almost natural, limits to its expansion and when these limits are exceeded its very essence may be nullified[20]. Under Polish conditions, the scope of facultative referendum seems to have already reached its maximum, since its subject may concern every matter important for the commune (district, region), and for this reason subsequent legislative changes should not lead to further broadening of the institution of obligatory referendum.

STRESZCZENIE

Doktryna prawa i akty organizacji międzynarodowych nie wartościują form demokracji, niemniej jednak we współczesnych państwach podstawową formą sprawowania władzy jest zasada reprezentacji politycznej (zasada przedstawicielstwa). Pojawiają się więc fundamentalne pytania o wzajemne relacje zasad demokracji pośredniej i bezpośredniej, o ich charakter i znaczenie dla wykonywania władzy suwerennej. Demokracja bezpośrednia może uchodzić dzisiaj wyłącznie za subsydiarną formę sprawowania władzy.

Autorzy zwrócili uwagę na referendum lokalne jako instytucję demokracji bezpośredniej relatywnie często stosowaną w praktyce, a zwłaszcza na zagadnienia racjonalności działania podmiotu podejmującego rozstrzygnięcie, zróżnicowania pojęciowego form demokracji bezpośredniej oraz zakresu przedmiotowego referendum lokalnego w ustawie z 15 września 2000 r.

[20] Cf. e.g., Z. Niewiadomski: *Podstawowe instytucje demokracji bezpośredniej w Szwajcarii*, Warszawa 1985.