

The referendum in Poland on 6 September 2015

An assessment by Anna Rytel-Warzocha



Abstract

On 6 September 2015 a three-part referendum will be held in Poland on introducing single-member constituencies for Sejm elections, maintaining state financing of political parties and introducing a presumption in favor of the taxpayer in disputes over tax law. The referendum was called by the former President after obtaining consent of the Senate. However, the questions proposed as well as the time of calling the referendum (between the first and the second round of presidential elections) raised some controversies. Due to Polish law, the referendum will be binding if 50 percent of all eligible voters participate.

On 6 September 2015 a nationwide referendum will be held in Poland. Citizens are asked to answer these three questions:

1. Do you approve the introduction of single-seat constituencies in the elections to the Sejm of the Republic of Poland?
2. Do you want to maintain the current method of financing political parties from the State budget?
3. Do you approve the introduction of a general principle of resolving doubts about the interpretation of tax law in favor of the taxpayer?

The history of the referendum

The referendum was ordered by previous Polish president Bronislaw Komorowski, who last May had lost elections in the second round to Andrzej Duda of the opposition party Law and Justice. According to art. 125 of the Constitution, the president of Poland may call a referendum on matters of special importance to the State with prior approval of the Senate expressed by an absolute majority of votes cast with at least half of senators present¹. The Senate has 14 days from receiving the draft call for a referendum to undertake such decisions in the form of a resolution. In order to fulfil the formal requirements the President had addressed the request to grant consent for calling a nationwide referendum on the issues above specified to the Polish Senate. After a debate the Senate granted such consent, despite that experts' opinions on the admissibility of the referendum questions were

¹ According to the Polish constitution, a national referendum may relate to three issues: granting consent for ratification by the President of the Republic an international agreement, under which Poland delegates to an international organization or international institution the competence of the organs of State authority in relation to certain matters (Art. 90 par. 3), issues of particular importance for the State (Art. 125), and to a limited extent the approval of the Constitutional amendments (art. 235, para. 6). Art. 125 of the Constitution, which is applicable in case of the referendum of 6 September, as well as the referendum planned for 25 October, states that "1. A nationwide referendum may be held in respect of matters of particular importance to the State. 2. The right to order a nationwide referendum shall be vested in the Sejm, to be taken by an absolute majority of votes in the presence of at least half of the statutory number of deputies, or in the President of the Republic with the consent of The Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of senators. 3. A result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it. 4. The validity of a nationwide referendum (...) shall be determined by the Supreme Court. 5. The principles of and procedures for the holding of a referendum shall be specified by statute".

divided. On a side note it should be noted that the Senate's positive decision could be expected as in the current term of office, which ends in November this year, the vast majority of mandates is occupied by the members of the Civic Platform party, which is the political background of president B. Komorowski (in the last elections in 2011 the party won 64 of 100 seats in the Senate). The procedure of ordering the referendum was therefore in line with Polish law.

However, attention should be paid to the specific political circumstances in which the referendum was ordered. In May 2015 presidential elections were held in Poland. Since none of the candidates received an absolute majority of votes in the first round of voting (that took place on 10 May), it was necessary to conduct a second round of voting. It was held on 25 May and voters could choose between two candidates who had obtained most votes in the first round - president Bronislaw Komorowski (supported by the Civic Platform party) who had received 33.77% of votes and Andrzej Duda (the candidate of Law and Justice party) who had received 34.76% of votes. At the third place was an independent candidate Paweł Kukiz (a well-known rock man and the councilor of Lower Silesia) with a score of 20.80% of votes, whose main and virtually the only slogan concerned the introduction of single-mandate electoral districts in the elections to the Sejm.

A big surprise of the elections was both the strong social support received by P. Kukiz and the defeat of President Komorowski by the candidate of Law and Justice. The day after losing the first round of elections the President decided to decree a referendum. Ordering a referendum between the first and the second round of presidential elections, during the election campaign, was legally permissible, although there were no doubts that the institution of the referendum was used instrumentally as a part of election campaign.

The question of the single-member district was a nod to the voters of Paweł Kukiz. The President and his party hoped that ordering the referendum and public declaration of support for the introduction of single-member constituencies would convince Kukiz's electorate to support him in the second round of elections. However, it did not happen. As it was later pointed out, the President's actions were perceived by the voters as untrustworthy, aiming to get their votes.

The three referendum questions

Question 1: introducing single-member constituencies

On the question concerning the introduction of single-member constituencies there were serious legal doubts concerning its admissibility in the light of the Polish Constitution of 1997. Art. 96 p. 2 of the Constitution states that “Elections to the Sejm shall be universal, equal, direct and proportional and shall be conducted by secret ballot”. Therefore, the change of the electoral system to the Parliament from a proportional to majority system including single-mandate constituencies requires the amendment of the Constitution and it cannot be done only by statutory law.

Therefore, there was a problem whether that issue could be subject to a referendum, as the positive answer to the question on the introduction of single-seat constituencies in the elections to the Sejm would require the amend of the Constitution while the procedure of amending the Constitution has been specified in Chapter XII of the Constitution. Art. 235 para. 6 provides the opportunity to call a constitutional referendum in Poland but only in very restricted cases. In such type of a referendum voters can approve the constitutional amendment that has been already adopted by the Parliament and relates to the provisions of Chapter I (Republic), Chapter II (Rights, freedoms and duties of a man and a citizen) or Chapter XII (Amending the Constitution). In case of the presidential referendum, none of these requirements was met.

Although the majority of experts in the opinions prepared at the request of the Senate indicated that the referendum question concerning the introduction of single-member constituencies was inconsistent with the Constitution, the Senate expressed its consent to call the referendum. This situation proved that one of the weaknesses of the Polish legal regulations concerning the referendum is the inability to examine the admissibility and constitutionality of referendum questions by the Constitutional Tribunal, as it takes place in some other countries.

Other doubts concern the excessive vagueness and imprecision of the proposed referendum questions, which cause that voters’ positive or negative response will be ambiguous and will not point out specific legal solutions to be implemented.

Question 2: The financing of political parties

This primarily relates to the question on maintaining the current method of financing political parties from the state budget. A negative answer to this question in no way indicates the direction of possible changes. The opponents of “maintaining the current method of financing political parties” can be in favor of increasing subsidies from the State budget, as well as in favor of their reduction. So it is not sure if political parties will not receive even larger amounts from the State budget than now. The experts have also noted that the second referendum question has been purposefully designed in a way that excludes the possibility to express categorical "no" for financing parties with taxpayers' money.

Question 3: Issues of tax law

As far as the third question is concerned, the main complaint is that the principle “*in dubio pro tributario*” has already been applied in legal transactions been constitution a part of Polish law. What's more, the principle has many times been expressed by courts, including the Supreme Court and the Constitutional Tribunal. It is a rule that when it comes to litigation between a taxpayer and tax authorities and doubts cannot be resolved, the principle “*in dubio pro tributario*” is applicable. Moreover, there is a problem how exactly should this principle be understood. Polish citizens will therefore speak on an issue that *de facto* brings nothing new to the Polish legal system.

The referendum campaign

The mode of conducting a nationwide referendum in Poland, has been determined by the Act of 14 March 2003 on nationwide Referendum. The law also regulates such issues as: general principles concerning voting and electoral rights, organs responsible for conducting a referendum, ballot paper, manner of voting and conditions of the validity of a vote, establishment of the results of voting and of a referendum, validity of a referendum, referendum campaign and its financing, financing of a referendum by a State budget and specific regulations concerning three types of a referendum.

Ahead of the referendum we should observe the peak of a referendum campaign that is going to finish at midnight on Friday the 4th of September. According to law, the referendum campaign started on the day of the proclamation of a decision of the President and shall end 24 hours before the polling day. From the end of the referendum campaign until the conclusion of voting it is forbidden to organize assemblies, marches and demonstrations, to make speeches, distribute leaflets or to carry out any other forms of referendum campaign.

The law on referendum defines the referendum campaign as presenting opinions by citizens, political parties, associations, foundations as well as other subjects about the problem put to referendum. Therefore, by law everybody can take part in it. However, the subjects engaged in referendum campaign shall cover all expenses out of their own sources and in accordance with provisions on their financial activities. There is only one case when the State provides some support for the campaign participants. The law on referendum enumerates in art. 48 the subjects entitled to participate in referendum campaigning in radio and television programs by distributing referendum announcements free of charge pursuant to the provisions of the Referendum Act. These are political parties, which in the last elections to the Sejm held before referendum formed its own election committee and gained at least 3% of valid votes or at least 6% of votes if they formed a coalition, deputies, senators and a parliamentary clubs (under some restrictions specified by law).

The referendum law also provides that transmitting by organs of the State authority, including a body that administers referendum, of information, explanation and communications connected with the content of questions put or variants proposed, as well as answering to the questions of citizens shall not constitute referendum campaign.

The ongoing referendum campaign takes place at the same time as the election campaign before parliamentary elections that will be held in October. This causes that some smaller and bigger political parties use it as an additional opportunity to promote themselves before the parliamentary elections.

The main substantive discussion within the referendum campaign revolves around the first two questions proposed by the President – the issues of single-seat constituencies and the financing of political parties. In the last week before the referendum day they are the subject of numerous debates organized in public institutions (eg. in the Sejm), on television and by non-governmental organizations. Generally, the debates are organized in a fair way giving floor for presenting both for and against opinions. However, referendum campaign did not arouse widespread public concern and was not so visible before. It was even assessed by experts as “sham” and “invisible” to the public. Out of 133 entities entitled to present free referendum spots in the public media, only a small number used that opportunity.

While the substantive campaign is rather weak and does not arouse big emotions, the informative campaign about the referendum must be assessed positively. In a form of TV spots citizens are informed about the date of the referendum and the time of voting (from 6 am to 9 pm), the procedure of voting, including alternative ways of voting such as postal voting or voting by a proxy.

The turnout quorum

On 6 September it needs to be seen whether the referendum will surpass the turnout quorum. According to the Constitution, 50 per cent of all eligible voters need to participate in the referendum to recognize the referendum as effective. It should be mentioned that in the public debate in recent years there were some proposals to reduce that requirement or even completely abolish it, however, legal changes in this area have not been made. The analysis of a turnout in the elections and referendums that have taken place in Poland since 1989 leads to the conclusion that this requirement is very high and difficult to obtain. In the 27 nationwide ballots only in eight cases, turnout exceeded 50% (three times in parliamentary elections in 1989, 1993 and 2007, four times in presidential elections in 1990, 1995 and 2000, 2010 and in the referendum on the accession to the European Union).

Finally, it should be also mentioned that on 20th August 2015 the current Polish president Andrzej Duda asked the Senate to grant consent for the referendum on three other issues concerning the retirement age, mandatory schooling for six-year-olds and the State Forests. This referendum is planned to be held together with parliamentary elections on 25th October 2015. Similar to the referendum of 6 September it has provoked extreme emotions among the society, politicians and experts. The new president wants Polish citizens to express their views on the prohibition of the privatization of state forests, abolishing the duty to start school by six-year olds and lowering the retirement age.

It should be noted that all these issues were addressed to the Sejm as popular referendum initiatives in recent years. Although the proposals submitted to the Parliament in total were signed by nearly 6 million citizens eligible to vote, the Sejm did not call the referendums. The time and political circumstances of the President's actions once again indicate that for the second time this year the institution of referendum has been made an element of political struggle, this time within electoral campaign. However, in order to call the referendum the Senate must agree.

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