

## THE CONSTITUTIONAL AND STATUTORY BASIS FOR A LOCAL REFERENDUM IN POLAND

1. In the Polish legal system there are three forms of direct democracy, two of which have constitutional status: referendum and citizens' legislative initiative. (The third is provided by the act of community self-government and it is general assembly of electors, occurring at the level of a subsidiary unit of community – village administrator's office (parish), designed primarily to make a choice of the village administrator)<sup>2</sup>.

Referendum in Polish constitutional order is a relatively young institution – yet it was inserted into the Constitution of Polish People's Republic – May 6, 1987 (Journal of Laws No 14, item 82), enacting simultaneously the law on public consultation and referendum (Journal of Laws Number 14, item 82), which was to serve the ad hoc need of carrying a referendum by the old regime. Until then, the institution of the referendum was based solely on ordinary legislation, enacted in 1946 on popular vote and on carrying out popular vote.

The institution of a local referendum appears for the first time in the mentioned Constitution of 1987. Article 2 of this Constitution provides the possibility to carry out a referendum nationwide or local in scope, whereas a public consultation can be nationwide, local or environmental in scope. This regulation was replaced by the provisions of the act on municipal referendum of 11<sup>th</sup> October 1991<sup>3</sup>. This was an expression of a general trend present in Middle and East European countries, in which, as noted by E. Zieliński, the period of democratic changes “re-

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2 Theoretical aspects of direct democracy are synthetically presented by, among others, B.Goschik, *You're The Voice – Try and Understand it: Some Practical Problems of the Citizens Initiated Referenda Acts*, “Victoria University Wellington Law Review” 2003, vol. 34, pp. 695–703 and the literature quoted there. A. Vatter, *Consensus and Direct Democracy: Conceptual and Empirical Linkages*, “European Journal of Political Research” 2000, no. 38, pp. 171–192.

3 This is more extensively addressed by: J. Jaskiernia, *Prawnoustrojowe i społeczno-polityczne doświadczenia referendum z 29 listopada 1987 r.*, (in:) *Referendum w Polsce współczesnej*, eds. D. Waniek, M.T. Staszewski, Warszawa 1995, see also: P. Klimkiewicz, *Zakres przedmiotowy referendum lokalnego w Polsce w świetle prawa i praktyki*, (in:) *Studia i szkice z prawa publicznego. Księga dla uczczenia pamięci Profesora Eugeniusza Smoktunowicza*, ed. A. Nowakowski, Rzeszów 2008, pp. 106–107.

sulted in introducing this institution into the law system as well as into practice in almost every state in that area”<sup>4</sup>.

2. Searching in the Polish Constitution of 2<sup>nd</sup> April 1997 for the legal basis of the institution of a local referendum, the principle of national sovereignty expressed in Article 4 should be primarily noted. The article says, “Supreme power in the Republic of Poland shall be vested in the Nation.” So the nation was considered to be of supreme power in the country, and in the second paragraph of this article a legislator described the means by which this power may be exercised. Article 4 paragraph 2 says, “The Nation shall exercise such power directly or through their representatives”. It is both due to this provision and the overall constitutional regulation that out of the two mentioned methods: representative and direct democracy, it is the first one that serves a model – a principle, while direct democracy is complementary in relation to it<sup>5</sup>. However, the functioning of the institutions of direct democracy, alongside with the values authorizing particularly important settlements in the life of the community (whether in the scale of state or locally), also plays an important role in terms of political awareness of citizens by enabling them to (potential) participation in decisions affecting them<sup>6</sup>. Article 4 of the Constitution thus permits the use of institutions of direct democracy, without prejudice to their forms, about which the legislator spoke in other constitutional provisions.

In the context of the principle of national sovereignty, which as an entity of supreme power can also implement it directly, the structural nature of the institution of local referendum should be looked for in Article 16 of the Constitution. According to the first paragraph of this provision “the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law” and in the second paragraph it can be read that local government participates in the exercise of public power and that a substantial part of public duties empowered by statute is performed in its own name and under its own responsibility. Thus if in the scale of state the sovereign can make decisions immediately, so in accordance with the expressed in the preamble principle of subsidiary, and expressed in Article 15 of the Constitution the principle of decentralization, in the scale of the local self-governing unit, the same opportunity should be to created for a local community, especially that this activity, though of course in the respect of afforded to the sovereign under the laws a substantial part of public tasks has to be car-

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4 E. Zieliński, *Problemy teoretyczne i klasyfikacyjne referendum*, (in:) E. Zieliński, I. Bokszczanin, J. Zieliński, *Referendum w państwach Europy*, Warszawa 2003, p. 23.

5 See similarly, for instance: P. Klimkiewicz, *Zakres przedmiotowy...*, *op. cit.*, p. 109.

6 The issue of a referendum as a manner of functioning settlement, despite democratically authorised organs, is addressed by: B.P.C. Carter, *Citizen Participation In Local Government. A Study Encompassing Local Government In Europe, the United States and New Zealand*, “Auckland University Law Review” 1972–1975, no. 2, p. 75.

ried out in his own name and under his own responsibility<sup>7</sup>. This is confirmed by the ascertainment of the Constitutional Court, which being based on the consensus doctrine, acknowledged that the essence of local government is its independent performance of its statutory duties (K 1/96). Thus, by deciding about the establishment of self-governing communities, the constitutional legislator opened in Article 16 a gate to direct democracy also on those levels of the territorial system of the Republic of Poland<sup>8</sup>.

Article 62 of the Constitution defines together a group of people with both active and passive electoral rights and with the right to participate in a referendum. It was decided that this law (a provision does not make distinction here between a nationwide and a local referendum) refers to all Polish citizens who, no later than on the day of vote, have attained 18 years of age. However, the citizens may lose this right. This is the case of people who were incapacitated or deprived of civil rights by legally valid decision of the court. A similar situation occurs in the case of deprivation of electoral rights by the State Tribunal.

At the same time the circle of people entitled to participate in a local referendum should be extended to people without Polish citizenship because as the Constitutional Tribunal accepted “The Constitution [...] does not subordinate [...] an affiliation to a self-governing community to having Polish citizenship. A place of residence (the centre of life) decides about this affiliation because a place of living constitutes a basic type of relationship in this kind of communities (K19/04). According to the Constitutional Tribunal the Constitution does not limit hence the right to participate in a referendum to Polish citizens, allowing it to be granted to other nations – mainly to those belonging to the European Union. As the Constitutional Tribunal stated – “not every extension of a specified civil right to others is an infringement of constitutional guarantee granted to this right”<sup>9</sup>. Such an understanding of belonging to a self-governing community is reflected in the law

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7 Similarly: S.J. Clark, *The Character of Direct Democracy*, “Journal of Contemporary Legal Issues” 2003–2004, no. 13, p. 346.

8 Legitimacy of the institution of a referendum itself sometimes may arouse controversy and, as stated by B. Banaszak „despite the more universal application of a referendum, it still inspires serious discussions in the world of law”. See: B. Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*, Warszawa 2007, pp. 253–255. The author quotes a number of arguments supporting the idea of a referendum, referring to a catalogue of arguments given by supporters of this institution, accomplished by E. Olejniczak–Szałowska. See: E. Olejniczak–Szałowska, *Referendum lokalne w świetle ustawodawstwa polskiego*, Warszawa 2002, pp. 27–28. See also: B. Goschik, *You’re The Voice...*, *op. cit.*, pp. 699–700. Against the institution of a referendum in the context of its unrestricted violation of minorities’ rights, poor quality of law created in this manner and inconsistency with the republican form of a state – E. Chemerinsky, *Challenging Direct Democracy*, “Michigan State Law Review” 2007, vol. 293, pp. 293–306. Compare with: S.J. Clark, *The Character of Direct...*, pp. 352–353. The issue of pathology of direct democracy in the context of deliberative democracy is addressed by E.J. Leib, *Can Direct Democracy Be Made Deliberative*, “Buffalo Law Review” 2006–2007, vol. 54, pp. 903–925.

9 See also: P. Winczorek: *Komentarz do Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, Warszawa 2008, pp. 149–151.

defining the personal scope of the rights to participate in local referendum, as according to Article 3 of the statute on local referendum people residing permanently in the area of the local government unit who have the active right to vote for the decision-making body of the unit, are entitled to participate in it and this is in accordance with art. 6a of the local government electoral law<sup>10</sup>, which shall implement the provisions of Council Directive 94/80/EC of 19<sup>th</sup> December 1994 laying down detailed rules for the exercise of the right to vote and stand for municipal elections by citizens of the Union who reside in a Member State but are not its citizens it is also granted to citizens of the European Union, who are over 18 years, reside permanently in the activity area of the local government unit and not deprived of the right to vote in the European Union member state, of which they are the citizens<sup>11</sup>. Such an elector is entered to the permanent register of voters by his/her demand, not later than 30 days after ordering of elections in which he/she is going to participate (art. 11 par. 8 of the electoral law to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland).

Article 170 of the Constitution directly relates to the institution of a local referendum and provides that members of a self-governing community may decide, by means of a referendum, matters concerning their community, including the dismissal of an organ of local government established by direct election. It was also pointed out in this Article that the principles of and procedures for conducting a local referendum should be specified by statute. This statute, published to carry out the constitutional disposition, and being the primary after the Constitution of the Republic of Poland legislation regulating the issue of a local referendum is thus the Law of 15 September 2000 on local referendum (Journal of Laws of 20 October 2000, as amended). This statute has regulated and unified the existing regulations contained in the local government acts.

As pointed out by H. Izdebski, this Statute essentially extended to other levels of local government units, the solutions adopted so far for a municipal referendum<sup>12</sup>. The rules of the referendum have been coordinated with the new rules of local government electoral law, resulting in this, that in the law on the referendum there was a provision of Article 1, paragraph 2, according to which „In the scope which is not regulated in statute on a local referendum, there are accordingly used

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10 Law of 16 July 1998; electoral law for municipal councils, county councils and regional councils, the text is placed in Journal of Laws of 2003, No 159, item 1547, as amended.

11 It is worth noticing that the statute does not make this right conditional to the place of one's register, since, as already mentioned, the statute in art. 3 grants this right to people permanently residing on the territory of the given self-government community. Also, under the provisions of art. 25 of the civil code, the place of residence of a natural person is the place where this person resides with an intention of permanent residence. In such a situation, even not being registered, the person may apply for being entered into appropriate registry. This problem is addressed by M. Grażawski, *Referendum lokalne jako forma realizacji prawa jednostki do udziału w sprawowaniu władzy publicznej*, (in: *Jednostka wobec działań administracji publicznej*, ed. E. Ura, Rzeszów 2001, p. 139.

12 H. Izdebski, *Samorząd terytorialny: podstawy ustroju i działalności*, Warszawa 2009, p. 152.

the provisions of the Law of 16 July 1998 – Electoral law to municipal councils, county councils and regional councils”.

Taking into account the criterion of geographical coverage and sticking to the constitutional deadlines, in the Polish Republic we deal with two kinds of referendums – on national and local level. It has been noted immediately, that the legislator in Article 170 alongside a literally indicated local referendum, also „hid” the regional referendum, as Article 164, paragraph 2 differentiates the local government from the regional one<sup>13</sup>, and mentioned above Article 170 does not restrict this form of direct democracy to local government, using the general concept of a self-governing community<sup>14</sup>. The division into a specific type of a referendum is based on estimation whether the issue being the subject of a referendum is important for the whole country or only for a specific regional or local community. This division means that in Poland we deal with:

- municipal referendum (at the commune level),
- county/ district referendum (at the county level),
- provincial referendum (at the province level),
- nationwide referendum.

3. Since the Constitution itself does not define the institution of the referendum, we shall refer to the mentioned Law of 15 September 2000 on a local referendum. In this Act in Article 2, paragraph 1 the referendum was defined as an institution in which the inhabitants of the local government unit as members of the local self-governing community express through the vote their will as to how to settle the case concerning this community, located in the tasks and competence of the bodies of a given unit or on the appeal of decision-making body of this entity, and in the case of the commune also on the appeal of the chief officer of a group of villages (mayor, a city president)<sup>15</sup>. Article 2, paragraph 2 adds that the referendum is to put on an official card for voting a positive or negative answer to the question or questions in relation to matters referred to in paragraph 1 or to make choices between the proposed variants. In the light of this regulation, there is no possibility to enable any kind of creative answers – postulates, alternative solutions or any other free expression<sup>16</sup>.

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13 A. Jackiewicz, *Status prawny regionu w świetle Konstytucji RP z 2 kwietnia 1997 roku – wybrane aspekty konstytucyjnoprawne*, (in:) *Polska wschodnia – zarządzanie rozwojem*, ed. B. Pławgo, Białystok 2008, p. 137 and the following.

14 Doubts concerning terminology are directly expressed by H. Izdebski, *Samorząd terytorialny...*, *op. cit.*, p. 151.

15 On the subject of statutory definition of referendum see: P. Uziębło, *Ustawa o referendum lokalnym Komentarz*, Warszawa 2008, pp. 17–19.

16 See B. Goschik, *You're The Voice...*, *op. cit.*, pp. 705–706. The problem of faulty statement of referendum questions is addressed among others by E. Olejniczak–Szałowska, *Referendum lokalne...*, *op. cit.*, p. 193, P. Klimkiewicz, *Zakres przedmiotowy...*, p. 120.

The scope of the subject of referendum, that is the answer to the question of what categories of cases it may concern<sup>17</sup>, requires a brief explanation. The subject of the referendum may be three categories of cases. Firstly, a referendum can be used for resolving any issues concerning self-governing community, within the scope of tasks and responsibilities (properties) of the bodies of the given unit (Article 2, paragraph 1)<sup>18</sup>. Such a referendum may be held at all three levels. The residents of a given local government unit who decide about the matter by referendum should therefore be considered, as stated by H. Izdebski – “as one of the authorities of that body – and in fact as the highest authority”<sup>19</sup>, as in a particular issue they acquire a competency of a council, a regional council or the board (which, moreover, is confirmed in Supreme Administrative Court jurisdiction)<sup>20</sup>. In this context, the essence of referendums is correctly provided by M. Jabłoński, who claims that this is “the most democratic form of exercising government, which as its assumption is not supposed to settle conflicts between the members of representative authorities, but to give the complete image of the sovereign”<sup>21</sup>. However, a possible matter of referendum does not include cases in which the decision shall be reached as provided for the Tax Ordinance and the Code of Administrative Procedure or these that were explicitly given to the exclusive jurisdiction of the body as is the case, for example, of budget matters<sup>22</sup>.

Secondly, the aim of the referendum may be recall of a decision making body of the local government unit at all three levels, and in reference to the commune also of a chief officer of a group of villages, a mayor and a city president (Article

17 More extensively on the subject of the scope of the subject of referendum see: A. Modrzejewski, *Zakres przedmiotowy referendum lokalnego w świetle wyroku Trybunału Konstytucyjnego z 26 lutego 2003 r.*, “Samorząd Terytorialny” 2010, no. 1–2, pp. 84–93.

18 The principle of subsidiary while using this institution seems to be of importance. Compare with: R. Paczuski, M. Nicińska, *Patologie w relacjach z obywatelami w zakresie udziału społeczeństwa w ochronie środowiska przy organizowaniu referendów lokalnych jako formy prawnej rozwiązywania konfliktów społecznych*, (in:) *Patologie w administracji publicznej*, eds. J.P. Suwaj, D.R. Kijowski, Warszawa 2009, p. 323. As the authors point out, referendum is prestigious in character and should be conducted with great deliberation, as a final measure when all the other measures have already been exploited. They also emphasize that due to the costs and severe formal requirements it should only be carried out in cases of a special rank.

19 H. Izdebski, *Samorząd terytorialny...*, *op. cit.*, p. 153.

20 M. Grażawski, *Referendum lokalne jako forma...*, *op. cit.*, p. 140. The author addresses with criticism the view present in the doctrine according to which the inhabitants are an organ of the given self-government local authority unit. See, for instance, A. Agopszowicz, *Ustawa o samorządzie terytorialnym. Komentarz*, Warszawa 1997, p. 104. This is a convincing criticism, especially considering the literal wording of regulations exhaustively defining the system of organs of self-governing local authority units as well as the fact that it would be a contradiction to the idea of direct democracy, which relies upon decisions made “not by its organs”. In this light, inhabitants shall be considered not an organ of authority, but the authority itself.

21 M. Jabłoński, *Referendum de lege lata i de lege ferenda*, *Przegląd Prawa i Administracji*, Wrocław 1997, t. XXXIX, p. 78. On referendum as the best manner of settling conflicts inside the given community – B. MacGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, “Berkeley Journal of International Law” 2009, vol. 27, p. 574.

22 Controversy concerning the issue whether the subject of referendum can be also the cases given to exclusive competence of the given organ is shown by M. Grażawski, *Referendum lokalne jako forma...*, *op. cit.*, pp. 141–142, taking judicature of the Supreme Administrative Court into consideration.

2, paragraph 1). It should be noted that the appeal of a decision-making body in the district or region would also entail an appeal of the executive body there<sup>23</sup>.

The third type is a referendum on self-taxation of residents for public purposes within the scope of tasks and competence of the municipal authorities (Article 7). The institution of self-taxation, and thus an appropriate referendum, is the only mechanism occurring in the municipality, does not appear in either the district or in the region. Still current seems to be the thesis that a referendum on the appeal cannot be combined with a referendum on another case. The Act visibly permits to carry out the municipality referendum on the appeal of both the counsel and executive body (see the provision of the Supreme Administrative Court of 17 March 1995, SA / Bk 393/95, ONSA 1995, item 18)<sup>24</sup>.

The world of law differentiates the division of referenda on obligatory and non-compulsory. The criterion in this case is the possibility to settle the given question only by means of referendum – in such a situation it is the obligatory referendum. In the case when the given decision can be made by means of referendum or by other means – then this is the non-compulsory referendum. Referring to the three types of matters listed above, which can be the subjects of local referendums, referendum settling issues of the residents' self-taxation for public purposes and referendum on the appeal of a municipal council, county council or regional councils, as well as on the appeal of a village-mayor (mayor or the mayor of a city) before the end of term of office shall be treated as obligatory. The referendum settling issues concerning the community, falling within the responsibilities and competence of the given unit is the non-compulsory referendum<sup>25</sup>.

4. A referendum may be conducted from the initiative of the decisive organ in the given territorial self-government unit, or from the initiative of its residents.

In the former case, the decisive organ of a territorial self-government unit proclaims a statute on the issue of conducting a referendum with absolute majority of votes of its statutory number of members (with the exclusion of referendum on dismissing an executive organ in a commune). The statute includes referendum questions or alternatives proposed to be chosen by the unit's residents, the date of the referendum, the example of a ballot paper and the calendar of activities related to conducting the referendum. In the case when the subject of referendum is self-taxation of residents for public purposes, the statute of municipal council shall also in-

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23 The subject of practice, pursuant to statistics is addressed by: A.K. Piasecki, *Referendum w sprawie odwołania rady. Praktyka kadencji 1990–2002*, "Samorząd Terytorialny" 2004, no. 7–8, p. 79 and the following.

24 The subjective scope of referendum In the light of a statute is considered by P. Uziębło, *Ustawa o referendum...*, *op. cit.*, pp. 20–25 and the literature referred to there.

25 This is also presented in this manner by P.Uziębło, *Ustawa o referendum...*, *op. cit.*, p. 20.

dicating the purpose or purposes and principles of self-taxation. The statute of the decisive organ of territorial self-government unit on carrying out a referendum is subject to submitting in an official journal, in addition to which, the statute of a municipal council is also subject to immediate placarding or announcing in any other manner customary in the given commune.

In the case of referendum, which is supposed to be conducted on application from residents of the given territorial self-government unit, the initiative may be brought by:

- 1) a group of at least 15 citizens, who are entitled to be elected to the decisive organ of the given territorial self-government unit, and in the case of municipal referendum – also five citizens entitled to be elected to municipal council,
- 2) statutory local composition of a political party operating in the given territorial self-government unit,
- 3) social organization possessing legal identity, whose statutory territory of operation is the territory of at least the given territorial self-government unit.

One of the referendum initiators listed above notifies in writing the board chairman of the given territorial self-government unit and in a commune – the village mayor (mayor, the mayor of a city), about an intention to express an initiative to conduct a referendum. Moreover, he notifies the residents about the subject of intended referendum at his own expense. Within 60 days from the notification, the initiator of conducting a referendum gathers signatures from residents who are entitled to elect the decisive organ of the given territorial self-government unit and who are willing to support this initiative. The application must obtain the support of at least:

- 1) 10% of the commune or county residents entitled to vote,
- 2) 5% of the province residents entitled to vote.

The residents' application may be submitted after 10 months from the date of the organ's election or after 10 months from the date of last referendum on the organ's dismissal and no later than 8 months before the end of its term of office.

In the case of referendum on application from the residents on matters different than the appeal of a territorial self-government organ, the decisive organ shall adopt a resolution on conducting the referendum within 30 days from the day of submitting the application, if the residents' application fulfils the requirements of a statute and does not lead to decisions contradicting the law, with the decisive organ being bound by the content of the application. P. Uziębło explains that this means, referring to the Supreme Court's decision of 1<sup>st</sup> June 2000 (III RN 184/99, OSNP 2001, no. 9, item 295), that "there is not a possibility to broaden or narrow the mat-



ter subject to referendum” as well as to modify the wording of referendum questions<sup>26</sup>. It should be remembered that the contradiction to law would take place if the application concerned matters not included in the properties of the given unit.

On the other hand, the initiator of a referendum on the subject of territorial self-government organ’s appeal shall submit the application to the electoral commissioner, who orders a referendum from the initiative of residents within 30 days if the residents’ application fulfils the statutory requirements.

In each situation, resolution of the decisive organ of territorial self-government unit as well as the decision of electoral commissioner about conducting a referendum are subject to announcement in a provincial official journal. Moreover, the municipal council’s resolution is subject to immediate placarding or announcement by other means customary in the given commune.

Referendum campaign is the following stage in the procedure of referendum. In accordance with article 28 paragraph 1 of the act on local referendum, the campaign serves the purpose of explaining the essence of problems settled by means of the referendum by decisive organ, which ordered the referendum, the content of posed questions and alternatives, as well as presenting standpoint of the referendum initiator, political parties, unions and residents concerning the subject of referendum. The campaign commences on the day of adopting the resolution of the decisive organ or the resolution of electoral commissioner on conducting the referendum, and terminates 24 hours before the date of voting. Course of the campaign is regulated with a statute, which also regulates, among others:

- the prohibition of conducting referendum campaigns within the territory of government administration and self-government offices, courts and work places in a manner interrupting their usual functioning; as well as the territory of military units, and other units subordinate to the minister concerned with the defence issues and the departments of civil defence or barracked police force units,
- the period of “referendum silence” meaning that since the end of the referendum campaign, until the end of voting it is prohibited to summon gatherings, organize marches and manifestations, give speeches, distribute leaflets, as well as any other manner of agitation referring to the referendum; it is also prohibited to publicize public opinion polls (surveys) concerning predictions of the residents’ behaviour during the referendum or polls conducted on the day of the voting,
- the prohibition of organizing raffles, other kinds of games of chance as well as competitions, where the prize is monetary or takes the form of ob-

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26 P. Uziębło, *Ustawa o referendum...*, *op. cit.*, p. 90.

- jects whose value is higher than the value of small objects used customarily for purposes of advertisement or promotion,
- the obligation of subjects participating in referendum campaign to remove their agitation materials within 30 days from the day of the referendum,
  - special, referendum mode of court proceeding, in which each of the interested parties has the right to submit to the district court an application for settling whether the forms of propaganda and agitation contain true data and information, and in case they are not true – to demand for instance a ruling on confiscation of these materials, issuing a prohibition to publish the materials, ordering to correct the information, to apologize the accused, ordering the participant of the proceeding to make a payment of 10.000 zloty for a charity or even adjudge payment of no more than 10.000 zloty for the applicant as means of compensation. This mode is characterised by speed, as the district court recognizes the application within 24 hours in the course of non-trial proceeding.

The act on local referendum also regulates questions related to financing a referendum. As a rule, financing a referendum is open. The costs of a referendum are covered from the budget of territorial self-government unit, which the referendum concerns, whereas the expenses of referendum initiator connected with the referendum, are covered from his own sources. Plenipotentiary of the referendum initiator is obliged to compile a financial report including the income as well as the expenses related to the referendum. The financial report shall be submitted by the plenipotentiary to the executive organ of the territorial self-government unit within three months from the day of referendum. The act does not allow subjects participating in referendum campaign to accept financial means (as well as non-monetary valuables) for the purpose of referendum coming from a number of sources, as, for instance, the state budget, territorial self-government units' budgets, unions and other self-government legal persons, from state enterprise units as well as foreign subjects (as, e.g. foreign citizens or subjects whose seat does not fall within the territory of the Republic of Poland).

Referendum is conducted and its results are settled by appropriate, summoned especially for this purpose, territorial (provincial, county and municipal) referendum committees and district referendum committees.

Electoral commissioner appoints a territorial committee no later than 25 days before the referendum in the case of a referendum on the appeal of territorial self-government unit's organ before the end of its term of office. In all other cases – it is the decisive organ of a territorial self-government unit. Electoral commissioner also appoints district committees no later than 21 days before the day of the referendum in the case of a referendum on the appeal of territorial self-government

unit's organ before the end of its term of office. In all other cases – it is the decisive organ of a territorial self-government unit.

Referendum shall be carried out on a holiday, no later than 50 days from the day of publishing a resolution on the referendum in provincial official journal, within fixed voting districts created to serve the purpose of conducting elections for the decisive organs of territorial self-government units. People who permanently reside on the territory of the given territorial self-government unit and who possess the active voting right for the decisive organ of this unit are entitled to participate in the referendum. These are citizens of Poland who possess active voting rights in accordance with binding regulations, but also citizens of European Union who attained the age of 18 no later than on the day of voting, who permanently reside within the territory of the commune and who were included in the permanent register of voters of this commune no later than 12 months before the day of voting.

Ballot card shall contain the signature of referendum, the name of organ, which ordered conducting the referendum, question, questions or alternative solutions concerning the subject of referendum. As was already mentioned, referendum consists in giving a negative or positive answer to the question or questions posed on the ballot card, or making a choice between proposed alternatives. If the referendum consists in giving answer to the posed questions, words “yes” and “no” are also printed on the ballot card, with squares on the left, which are used to put a sign next to the answer chosen by a voter. If the referendum consists in making a choice between proposed alternatives, numbers of each alternative are printed on the left, together with squares used to put a sign next to the alternative chosen by a voter.

After the termination of voting, district committee shall compile a protocol containing results of the voting in the district. After compiling the protocol, district committee shall immediately publicize voting results by displaying one copy of the district voting results protocol in its seat, in a place easily accessible for citizens. The chairman of the committee shall immediately send one copy of the district voting results protocol to the territorial committee in a sealed envelope. The territorial committee shall compile a protocol of referendum results immediately after obtaining protocols from all district committees. The protocol of referendum results shall include total numerical data from the area of the entire territorial self-government unit and the results of the referendum. After compiling this protocol, territorial committee shall publicize the results of voting and referendum by means of displaying one copy of this protocol in its seat, and the provincial governor shall immediately announce the referendum results protocol he obtained from territorial committee in the provincial official journal.

Within 7 days from making the referendum results public, each resident of the territorial self-government unit entitled to participate in the referendum has the right to submit a protest, if statutory regulations have been violated and the violation may have had a significant impact on referendum results. District court shall examine the protest within 14 days from the day the protest was submitted, with the presence of the person submitting the protest and the representative of appropriate territorial self-government unit, and, if the protest concerns the dismissal of a territorial self-government unit's organ – also with the presence of electoral commissioner. This regulation has its conceptual consequences, which will be discussed in the following paragraphs.

Statutory regulation of the results of a conducted referendum may arouse doubt. First of all, its incompatibility with solutions concerning nationwide referendum – also those provided by the Constitution shall be taken into consideration. Article 55 of the act on local referendum states that a referendum is valid if at least 30% of people entitled to vote participate. Moreover, a referendum on the dismissal of organ of territorial self-government unit, elected by means of direct vote is valid when not less than 3/5 of the number of voters who participated in electing this organ, participates in the referendum. Hence, validity of territorial referendums is assessed with the consideration of the criterion of turnout. This leads to a question of this solution's compatibility with regulation of nationwide referendum in the context of constitutional provision found in article 125 paragraph 4 of the Constitution, which states that “the validity of a nationwide referendum and the referendum referred to in Article 235, paragraph 6, shall be determined by the Supreme Court”. The Constitution requires assessing validity of a nationwide referendum by means of the Supreme Court judgment. What is important here, it does not determine the criteria, which should be considered, referring to a statute also in this respect<sup>27</sup>. However, it seems that other criteria than appropriate turnout are of importance here, since the Constitution explicitly defines in article 125 paragraph 3, that whether results of a referendum are binding or not depends on the participation of more than half of those entitled to vote<sup>28</sup>. The act on nationwide referendum of 14<sup>th</sup> march 2003 (Journal of Laws [Dz. U] 2003, no. 57 item 507) addressed this issue in chapter V. Article 33 paragraph 1 opening this chapter leaves no doubt what are the criteria for considering a referendum as valid or not, stating that “against the validity of a referendum a protest may be submitted on the grounds of committing an offence against the referendum or violating regulations

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27 The Constitution does not suggest particular understanding of nationwide referendum's validity, therefore it would be possible to regulate this matter by statute in a manner conditioning statement of validity on the Supreme Court both on the turnout and on legality. In my opinion, this would be pointless.

28 On understanding the notion of referendum's binding character In European countries see B. Banaszak, *Porównawcze prawo...*, *op. cit.*, pp. 263–264.

of this act considering voting, settling the voting results or the referendum results”. This may be confirmed by understanding validity of a referendum determined by its legality. Thanks to this understanding, it is possible to differentiate referenda, which are:

- invalid, the turnout does not matter in this case since the decision was made in a manner violating the law,
- valid and non-binding due to insufficient turnout,
- valid and binding.

On the other hand, the regulation of territorial referendum limits the issue of referendum validity to the question of turnout in article 55. However, it does not exploit this matter on the basis of this act since, as already mentioned in article 66 paragraph 1, there is a right for every person entitled to participate in a referendum in the given territorial self-government unit to submit a protest within 7 days from making the referendum results public. The basis for this protest must be an accusation of violating statutory regulations, with the violation having significant impact on referendum results. In the following two paragraphs of this article, the act refers to self-government electoral law and grants settlement of these protests to appropriate district courts. In article 67 paragraph 5 legislator explicitly refers to these protests as – “protests against validity of a referendum”. On the basis of this act, we are dealing with a completely unnecessary fusion of conditioning the referendum validity both on turnout and on the legality of its conduct. In relation to this, in the case of territorial referendums one may only talk about two kinds of referenda:

- a referendum is valid, which means that proper turnout was accomplished and there were no cases of violating statutory regulations, which may have had a significant impact on referendum results,
- a referendum is invalid, which means that either on or both of these premises were not fulfilled.

Moreover, an argument against such regulations included in the act on local referendum may be the fact that although we are dealing with nationwide referendum in one case and territorial referendum in the other case, it is still the same institution of direct democracy and a unified notion system defining both kinds of referendums would be advisable.

The required turnout threshold may also arouse certain doubt. This seems to be quite a strict criterion in contemporary reality since local issues usually do not arouse such emotions as issues of special significance for the state mainly due to the media. Nationwide issues are subject to referendum in extraordinary cases – central authorities quite seldom refer to the sovereign’s will for financial, political or pragmatic reasons. If we are dealing with a nationwide referendum, it is assisted with nationwide media campaign, which activates the sovereign disproportionately much more, then

on the regional or local level. Although the turnout requirement was differentiated – over half entitled to vote in the scope of the country and over 30% in territorial scope, this is a difference which, in my opinion, does not convey the essence of the entitled people's interest in matters subject to referendum and causes certain blockage of this institution. Seldom use of territorial referendums is often a result of either a pessimistic approach to the turnout issue and fear of wasting financial means<sup>29</sup>, or, as pointed out by J.P. Suwaj and M. Wenclik, treating referenda and consultations as “not pleasantly welcome, which have to be struggled through by local authorities”<sup>30</sup>. Lowering the required turnout threshold would, in my opinion, cause the effect of certain feedback. With the current turnout requirement the person entitled will not go to vote if he is against the changes (lowering the turnout, the person makes the decision process more difficult) or because a person does not believe that a high turnout result will be accomplished and therefore stays at home<sup>31</sup>. If the requirement was lowered, both these groups would have a significant encouragement to vote realizing that their vote is either needed to preserve the current state of affairs since there is a real fear of winning of those with the opposite standpoint, or he starts to believe in the possibility of making a decision by means of referendum. Paradoxically, lowering the required turnout may lead to the turnout increase<sup>32</sup>.

There is no such national and material doubt concerning the definition of referendum result, which is conclusive if for one of the solutions in the matter subject to referendum was granted more than half of valid votes. Yet, if this was a municipal referendum on the issue of self-taxation of the residents for public purposes, then the result is conclusive if over 2/3 of valid votes were for self-taxation<sup>33</sup>.

The effects of a referendum depend on the matter subject to it. If a referendum ends in result conclusive for the matter in question, concerning that community, falling within the scope of assignments and competence of the given unit's organs,

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- 29 Statistic data concerning referenda up to 2005, on the level of commune and county, with the division considering the matters of referenda are quoted after the Central Statistical Office and analysed by: P. Klimkiewicz, *Zakres przedmiotowy...*, *op. cit.*, p. 110 and the following.
- 30 J.P. Suwaj, M. Wenclik, *Patologiczne konsekwencje nieuwzględniania czynnika obywatelskiego w procesie decyzyjnym*, (in: *Patologie...*, *op. cit.*, pp. 373, 380–383. The authors critically assess the practice, stating that local referendum is in 95% not used for the purpose of making decisions important for local community, but is rather an expression of frustration and a manner of dismissing organs before the end of their term of office, which, in their opinion results from the attitude of not only the governing, but often also the citizens themselves.
- 31 On the subject of citizens' participation in local community's public life in comparative terms see P.C. Carter, *Citizen Participation...*, *op. cit.*, pp. 62–82.
- 32 The demand to lower the required Turnout to 25% is presented by E. Olejniczak–Szałowska, *Referendum lokalne...*, *op. cit.*, p. 220, showing i.a. that this would allow to double the number of valid referenda on dismissing municipal councils. Contrary to this, M. Grażawski takes the standpoint of rather increasing the required turnout to 50% noticing that in practice more referenda would be invalid considering the usually low voting Turnout. M. Grażawski, *Referendum lokalne...*, *op. cit.*, p. 140. An analysis of required quora in European countries between 1970 and 2007 is presented by L. Aguiar–Conraria, P.C. Magalhaes, *Referendum design, quorum rules and turnout*, “Public Choice” 2010, no. 144, pp. 63–81.
- 33 On the subject of “concluding a case” see H. Izdebski, *Samorząd terytorialny...*, *op. cit.*, pp. 154–156.

the proper organ of territorial self-government unit shall immediately take up actions aiming at realising it.

In the case of referendum concerning the dismissal of a territorial self-government unit organ, announcing referendum results concluding the appeal of organs before the end of their term of office is equal to the termination of their operations. However, if in the course of a valid referendum on the appeal of a village mayor (mayor or mayor of a city), conducted on application from municipal council, on grounds different than not granting vote of approval, over half of valid votes were against appealing the village mayor, then the activity of this municipal council shall terminate from the force of law. In the cases pointed out above, The President of the Council of Ministers shall immediately appoint a person, who will assume the functions of territorial self-government unit's organs until new organs are elected and also orders earlier elections.