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## CONSTITUTION-MAKING IN POLAND: SOME REFLECTIONS ON POPULAR INVOLVEMENT

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In Poland which rebuilt its political system in 1989, after 44 years of communist rule, the forms and efficiency of the people's influence on constitution-making have varied depending on the historical and systemic conditions. In the light of Polish experiences, broad pre-constitutional social consultations cannot be regarded as an important causative factor, actually influencing the contents of the fundamental law. Paradoxically, it is a rule, both in the communist system (which comes as no surprise) and also in a "young democracy", that the leading political forces do not intend to involve masses of interested citizens in the discussion on the shape of the system and individual institutional solutions. Currently, this may be attributed to the manifest trend of parties' dominating the political life. One cannot neglect the scarce familiarity of Poles with the mechanisms of state functioning and their citizen's activity. The above, slightly pessimistic remarks were formulated on the basis of Polish experiences, which I believe to be shared by other states undergoing systemic transformation.

**Key words:** *Poland, constitution-making, citizen's political participation*

1. The forms and efficiency of the people's influence on constitution-making in Poland have varied depending on the historical and systemic conditions. The state which rebuilt its political system in 1989, after 44 years of communist rule, is still different from "experienced" democracies in terms of citizens' activity, social participation in government, the degree to which members of the public identify themselves with political parties and the citizens' trust in the state. The above-mentioned closely interrelated factors make up a picture of deep alienation of citizens from public authorities, which should be attributed to the communist past, but not only so. Among Poles, the sense of influence on the course of public affairs is weak, one of the reasons being also the symptomatic experiences with the enactment of fundamental laws.

In brief the various forms in which the public influenced constitution-making in Poland were the following:

1. fictitious broad public consultation (before adoption of the Polish People's Republic of 1952),

2. the so-called Round Table as a mechanism for agreement upon basic systemic assumptions between the communist government and representatives of the opposition (1989),

3. open consultations, though dominated by experts (work on the Polish Constitution in the years 1991-1997 and on the Treaty establishing a Constitution for Europe),

4. nationwide referendum on the basic lines of systemic reform (falsified systemic referendum of 1946, referendum on enigmatic democratization of government system and introduction of market economy in 1987 and practically unused institution of preliminary referendum on the principles on which to base the Constitution, as provided for in the Act on the Procedure of Preparing and Adopting the Polish Constitution of 1992, as amended in 1994).

It is necessary to stress that this analysis omits the legal regulation and practice of approving constitutional referendum, provided for in the aforementioned Act of 1992, by which the nation ratified the Constitution of 1997, currently in force, as well as the facultative referendum to approve a bill to amend the constitution, provided for in Art. 235 of this Constitution. In both cases, citizens decide whether the fundamental law is to enter into force, without shaping its contents. This is also true of the referendum on consent for ratification of the EU Accession Treaty, which was not directly concern a constitutional amendment but had a fundamentally systemic nature – citizens took the final decision to join the EU with no influence on the terms of accession.

2. Apart from the pan-European debate on the Constitution Treaty, the only case when the text of a Polish constitution was the subject of nationwide debate was the fundamental law of 1952, but the reality of communist regime made it purely fictitious. Formally, work on the Constitution was conducted by the Constitutional Commission of the Parliament, established by the constitutional statute of 26 May 1951, whose members, apart from Deputies, included e.g. “leading representatives of science, culture and art”. Tasks of the Commission included preparing a draft of the Constitution and holding a nationwide discussion about it, collecting and processing any motions, corrections and remarks suggested by citizens and then preparing a final draft of the Constitution on the basis of the nationwide debate and submitting it to the Parliament.<sup>1</sup> In reality, the Constitutional Commission held only 4 meetings, the “debate” was a huge propaganda campaign and the Constitution was drafted by party bodies in the years 1949-1951.<sup>2</sup> The has remained a copy of the fundamental law on which Joseph Stalin himself wrote final amendments, paradoxically accentuating e.g. national features. Of course, the Constitutional Commission accepted them.<sup>3</sup> Poland’s first post-war “constitutional debate” was characterized by façade character of democratic institutions, typical for communist systems, and distortion of their essence by domination of the communist party.

<sup>1</sup> Feliks Siemiński, *Prawo konstytucyjne*, PWN, Warsaw-Poznań 1976, pp. 60-61.

<sup>2</sup> Marian Kallas, entry *Polish constitutions* in: *Encyklopedia Britannica* 2003, vol. 33, pp. 438-439.

<sup>3</sup> Andrzej Garlicki, *O mój Rozmarynie*, “Polityka” 2002, nr 29, pp. 66-67.

While the above “constitutional discussion” was an initiative of state authorities, which manoeuvred its course and effect, manifestations of the citizens’ real attempts to influence the shape of the Constitution may be found in widespread public resistance to introducing into the Constitution in 1976 *inter alia* provisions on the socialist system, leading role of the communist party and alliance with the Soviet Union. From the point of view of the proposed effects of social pressure the discussion was unsuccessful – its aim was to stop the questioned amendments to the fundamental law. These attempts were in vain, but resistance to constitutional amendments was the seeds of consolidation of Poland’s opposition movement, which – through the establishment of “Solidarity” and resistance to the martial law – led to the fall of communism in Poland. It seems the 3<sup>rd</sup> basket of the Conference on Security and Cooperation in Europe did have some influence here. Without neglecting the elite nature of that opposition movement, we recognize its precursory character and growing awareness of the importance of undamental law as such, despite its defects at that time.

3. What can be recognized as a special, historically exceptional form of systemic consultations is the so-called Round Table: a social agreement between the communist authorities and the opposition, which preceded reforms of the political and socio-economic system in Poland in 1989. Origins of the Round Table can be traced back to 1980, when the precedent of agreement between the authorities and shipworkers on strike concerning e.g. legalization of free trade unions and holding other reforms to treat individuals more personally confirmed that those in power had lost their legitimacy and inspired hopes for deeper systemic reforms. The Independent and Self-governing Trade Union “Solidarity” adopted a programme of state reforms which was to be implemented through subsequent amendments to the Constitution of the People’s Republic, a project which failed after introduction of the martial law on 13 December 1981. Deepening political and economic crisis and the increasing importance of delegalized “Solidarity” forced the authorities to start talks with trade unionists supported by opposition intellectuals. Round table talks held in spring of 1989 led to the adoption of *modus vivendi* between those holding power and the opposition, in particular re-legalizing “Solidarity”, holding an earlier parliamentary election of a partly democratic character (communists were to retain a majority in the parliament, which was still the supreme power) and reform of central authorities (e.g. reinstatement of the President and second chamber of the Parliament by the constitutional amendments of 7 April 1989). The price for reforms was to be guaranteeing decisive political influence for those still in power by adequate formulation of laws on elections and the opposition’s commitment to vote for the head of state in a certain way. The communists were crushed in the parliamentary election and their party allies left, which sealed the fate of the falling regime.

The marvel of the Round Table, where a political contract was made to conduct “soft” state reforms, is judged in various ways today. On the one hand, advantages of conciliatory and not painfully confrontational takeover of the state power are stressed, on the other, representative character of opposition members of the Round

Table (only the co-called constructive opposition recognized by the authorities) is neglected and their excessive amicability is emphasised, as it still is the root of conflicts concerning failure to bring criminals of the system to accountability and unlawful takeover of state property by the communist elite. However, the reforms of state institutions and foundations of systemic principles agreed at the Round Table were decisive for the systemic transformation and continue to be constant elements of the Constitution in force. The Round Table as a form of pre-constitutional civic consultation remains unique and is appropriate in a situation when those holding power lawfully but with weak legitimacy voluntarily give up their monopoly. The rules of democratic system provide for other mechanisms of succession of governing groups, so the Round Table should be seen as a historical institution or, more generally, one appearing in not-fully-democratic states.

4. The work on a fully democratic Polish Constitution started almost immediately after the Parliament was formed in 1989. Eventually, the Constitution was adopted in April 1997, and before that the old fundamental law underwent fragmentary amendments or incomplete, purposefully temporary regulations were adopted. Without analysing the complex procedure of work on the fundamental law, it is worthwhile to point out the phenomenon of relative closure of political forces to the constitutional debate. A manifestation of admission of the public factor to discussion on the shape of the Constitution was, in the years 1990-1991, inclusion in legislative work of several private drafts of the fundamental law. In fact, their authors were usually outstanding experts in the field of studies on the state and the law, sometimes with clear political affiliation. Public or "civic" drafts were admitted to the work in the National Assembly in 1994 when the strict condition of support by at least 500,000 of those entitled to vote in general election was met. This condition was fulfilled by the draft by "Solidarity", which formally was a trade union, but in fact a political movement in opposition to the then parliamentary majority.

However, what was missing was the dialogue between those working on the Constitution and the public, the systemic debate being monopolized by newly established political parties. As Prof. Wiktor Osiatyński stresses, whereas the context of fresh democratization required difference and conflict (for identification of young political groups), the preparation and adoption of a constitution, quite the contrary, required them to reach consensus.<sup>4</sup> The external, public factor was limited to experts of constitutional commissions, selected upon suggestions by the political forces and also, to a minimum extent, to opinions and papers about certain systemic solutions prepared mainly by think tanks (see e.g. studies by the Centre for Constitutionalism and Legal Culture of the Institute of Public Affairs or the Bathory Foundation), academic centres (such as the Institute of Legal Studies of the Polish Academy of Sciences) and catholic activists. It is worth mentioning that it was those organizations that took the initiative to submit their opinions and

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<sup>4</sup> Wiktor Osiatyński, *Kilka uwag na temat trybu uchwalania Konstytucji III Rzeczypospolitej* in: Mirosław Wyrzykowski (ed.), *Tryby uchwalania polskich konstytucji*, Instytut Spraw Publicznych, Warsaw 1998, pp. 93-96.

that their results were usually moderate, while the National Assembly made no efforts to gather opinions from the public.

It seems not only the sin of a young democracy, but a certain general truth that constitutional amendment is mainly intended to give effect to a systemic vision of the majority which initiates it and in fact holds the *pouvoir constituant*.

Recent future brought an example that even broad constitutional consultation with the public can fail to produce measurable effects. When the Laeken Declaration launched the Convention's work on the Treaty establishing a Constitution for Europe, broad public participation in the discussion on its shape was assumed. Although technical and organizational conditions were created (web forums, Youth Convention) and there was favourable media climate, if we read carefully the documents of Convention working groups, they prove very limited usefulness of the pan-European debate. In fact only drafts and suggestions of well-established expert groups and politicians were recognized. We may suppose that the campaign encouraging debate on EU institutional future aimed to strengthen the European identity and identification with the EU, which had long been perceived as weaknesses of the integration project.

As I mentioned before, the debate on the Constitution Treaty was the first time (apart from the 1952 fiction) when Poles were invited by the *pouvoir constituant* to express opinions, although the state only aspired to EU membership. In reality, neither the familiarity with EU law nor the degree of active participation in domestic public affairs fostered Poles' active involvement in the discussion. Like in the previous case, almost solely academics grouped around NGOs were engaged in the debate, which took the form of expert activities for the benefit of public authorities determining the standpoint of Polish representatives in the Convention.

5. The Polish history of preliminary constitutional referenda shows that theoretical assumptions are not always given effect in practice. It happened twice in our country – in 1946 and 1987 – that this institution was used instrumentally to achieve the aims set by centres of political power. In 1946 – deriving inspiration from the French constitutional referendum – the first referendum on basic systemic changes to be included in the new fundamental law was held. In fact, the referendum was to be a political surrogate of election, a form of decisive political confrontation of pre-war democratic political forces and the pro-Soviet party. In order to hold the referendum in April 1946 the Countrywide National Council (parliament) adopted the relevant acts on popular voting and on holding the same, posing the questions in such a way as to make probable positive answers to all of them, which was to symbolize the nation's approval for the policy of new authorities. Participants answered questions about consent for liquidation of the Senate, nationalization of basic branches of the national economy and parcelling out of land, as well as about approval of the government's policy against the German aggression, in the defence of the western border. Contrary to intentions of the authorities, the majority of those casting vote on 30 June 1946 answered the

second and third questions in the affirmative, but were in favour of retaining the Senate. However, as contemporary historians demonstrate, the referendum results were falsified and, disregarding the facts, the majority of affirmative answers to all three questions was announced, and consequently the referendum result was claimed to mean full support for the policy of the new authorities and the planned systemic reform.<sup>5</sup> What is symptomatic, the 1946 referendum was held on the basis of the two aforementioned episodic acts and the institution was not included in the 1952 Constitution.

The referendum held in 1987 was preceded by a relevant amendment to the same Constitution. Article 2 was supplemented with a paragraph reading “exercise of state authority by the working people also through expression of their will in a referendum”. On the same day, that is on 6 May 1987, a statute regulating this institution and social consultation was adopted. The referendum result was to be decisive if more than half of those entitled to participate supported one of the solutions (Art. 19). On 29 November 1987, a referendum was held to answer two questions contained in a Sejm’s resolution. Both questions, rather complex and in essence unclear, concerned the directions in the authorities’ policy in the field of economic reforms and democratization, yet they did not identify any specific proposals of solutions but concerned approval – in a way “in blank” – for activities of the authorities aimed at e.g. “strengthening self-government” or “increased civic participation in governing the country”. So the subject-matter of the referendum was connected with state system, in the broad sense, though formally it was not a constitutional one. In view of attendance by approx. 2/3 of those entitled to vote and diversification of answers (approx. 2/3 affirmative ones) authorities were not bound by the referendum result. An attempt to legitimize the falling regime failed.<sup>6</sup>

The Polish post-war experiences with referenda show that the minimum condition for achieving the immanent aim of this institution is a democratic character of the state system, including legal and political guarantees that it will be held honestly, enabling untamed expression of preferences by participants, as well as sticking to the “political contract” between the authorities and participants on adoption of a constitution consistent with their preferences.

The institution of partial pre-constitutional referendum – conceived in the period of work on the Polish Constitution currently in force and never used in practice – would enable the Constitutional Commission of the National Assembly (a body made up of all Deputies and Senators, established to adopt the Constitution) to ask the public at each stage of work questions concerning the nature of the future

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<sup>5</sup> Andrzej Paczkowski, *Referendum z 30 czerwca 1946 r. Próba wstępnego bilansu* in: Michał Staszewski (ed.), *Referendum w Polsce współczesnej*, ISP PAN, Warsaw 1995, pp. 74-75.

<sup>6</sup> Jerzy Kuciński, *Polskie referendum 12 listopada 1987 r. – problemy teorii i praktyki (z punktu widzenia przyszłej konstytucyjnej regulacji ustroju politycznego)* in: Wojciech Sokolewicz (ed.), *Założenia systemu politycznego PRL*, “Studia Konstytucyjne”, vol. 2, Warsaw 1989, p. 174.

constitution, regulation of relationships between the highest authorities, etc.<sup>7</sup> Incidentally, in the work on provisions concerning preliminary referendum an amendment was rejected which provided for mandatory preliminary referendum on basic constitutional principles of the state system. The Referendum Act of 29 June 1995 gave more substance to laconic constitutional provisions stating that the decision to hold a preliminary referendum was to be taken by the National Assembly by an absolute majority of votes upon motion of the President, 10% of members of the National Assembly and its Constitutional Commission. A partial referendum might concern only specific problems or solutions in the draft Constitution (Art. 14 para. 2). In a resolution to hold a referendum the National Assembly would also define the questions or alternative solutions in the matter submitted for referendum. Only once did the initiative (promoted by a marginal party of the majority coalition) to hold a partial referendum appear in the Constitutional Commission. It was to concern the Parliament's structure, the majority necessary to overthrow President's veto, neutrality of public authorities on religious matters, method of financing the health care and structure of local self-government. Protracted work on necessary adjustments to the Rules of Procedure of the National Assembly to take up new tasks connected with partial referendum made holding it redundant, as the Constitutional Commission had earlier completed work on a uniform draft. Limited experiences from that episode show how difficult it was for the special sub-commission of the Constitutional Commission to formulate adequate referendum questions.<sup>8</sup> It seems that the phenomenon is universal in nature and affects – apart from other factors – the way usefulness of the preliminary referendum is judged.

## CONCLUSION

There is no doubt that, in the light of Polish experiences, broad pre-constitutional social consultations cannot be regarded as an important causative factor, actually influencing the contents of the fundamental law. Paradoxically, it is a rule, both in the communist system (which comes as no surprise) and also in a “young democracy”, that the leading political forces do not intend to involve masses of interested citizens in the discussion on the shape of the system and individual institutional solutions. Currently, this may be attributed to the manifest trend of parties' dominating the political life, which can also be seen in the solutions adopted in the law on elections to resolution-taking bodies of local authorities or proposed amendments to the law on elections to the European Parliament. One cannot neglect the scarce familiarity of Poles with the mechanisms of state

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<sup>7</sup> Michał T. Staszewski, Jacek B. Falski, *Referendum w praktyce parlamentarnej X, I i II kadencji Sejmu RP* in: Michał T. Staszewski, Danuta Waniek (ed.), *Referendum w Polsce i w Europie Wschodniej*, ISP PAN, Warsaw 1996, pp. 67-69.

<sup>8</sup> Ryszard Chruściak, Wiktor Osiatyński, *Tworzenie konstytucji w Polsce w latach 1989-1997*, Instytut Spraw Publicznych, Warsaw 2001, pp. 285-287.

functioning and their low political culture, due to which such a nation-wide debate is doomed to be ineffective or even fictitious.

Preliminary referendum is obviously hardly useful as an instrument ensuring citizens' influence on the shape of the constitution. The range and contents of questions are, by definition, simplified and the role of participants is not "writing the constitution", but choosing, at an early stage, between the legislative bills promoted by the political majority and the opposition. Such a referendum – just like other types of referenda – is in practice clearly plebiscitary, and its meaning can be reduced to minimizing the risk that a constitutional amendment will be rejected in the approving referendum, if one is provided for. "Pre-constitutional" referenda held in communist times were not to give the nation a chance to resolve basic systemic dilemmas, but to provide nationwide legitimization of reforms designed by the forces holding power. And neither of them gave the intended result.

A similar reflection springs to mind when one thinks of the consultations concerning EU Constitution Treaty, which clearly displayed the motive of social legitimacy for Union reforms and strengthening identification of individuals and communities with the EU.

Summarizing, pre-constitutional consultations inspired by the authorities seems to involve a considerable risk of instrumentalization, while "grass-root" movements are often channelled through the system of competing parties or – in non-democratic states – barely have a chance to give effect to the systemic proposals. The above, slightly pessimistic remarks were formulated on the basis of Polish experiences, which I believe to be shared by other states undergoing systemic transformation, bearing in mind such variables as the level of political culture or citizens' identification with the state.

## USTAVOTVORSTVO U POLJSKOJ: NEKE OCJENE O UKLJUČENOSTI NARODA

U Poljskoj koja je nakon 44 godine komunističke vladavine ponovno sagradila svoj politički sustav oblici i učinkovitost utjecaja naroda na ustavotvorstvo zavisili su o okolnostima povijesnog i sistemskog karaktera. U svijetlu poljskog iskustva široke socijalne predustavne konzultacije se ne smatraju važnim razložnim čimbenikom koji bi utjecao na sadržaj temeljnog zakona. Paradoksalno je, a to se pokazuje kao pravilo, da u komunističkom sustavu (što nije za čuditi se) kao i u "mladoj demokraciji" vodeće političke snage ne pokazuju namjeru uključivanja mase zainteresiranih građana na u rasprave o tome kako oblikovati sustav i pojedinačna institucionalna rješenja. To se danas svakako ima pripisati očiglednom trendu dominacije političkih stranaka u političkom životu. Ne može se zaobići bliskost Poljaka s mehanizmima funkcioniranja države i aktivnošću njenih građana. U radu autorica sumira ocjene koje se temelje na poljskom iskustvu, za koje ona vjeruje da vrijede i za druge države koje prolaze kroz sistemsku transformaciju

**Ključne riječi:** *Poljska, ustavotvorstvo, oblici građanske participacije*