



POLAND POLICY ALERT

The upcoming 2023 referendum and parliamentary elections in Poland: key concerns about the “double celebration” democracy day

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On 8 August 2023, Polish President Andrzej Duda scheduled the next parliamentary elections for October 15th, 2023.²

Arguing its intention to minimize costs, the Polish government decided to hold a national referendum alongside parliamentary (both *Sejm* and *Senat*) elections. To this end, an amendment to the Referendum Act was adopted on July 7th.³ By harmonizing the voting times (i.e., from 7 a.m. to 9 p.m.), both votes will be held completely in a simultaneous manner for the first time.

The *Sejm* adopted the resolution to hold a nationwide referendum by an absolute majority of 226 votes (with 210 against and 7 abstentions) on August 17th. The referendum campaign began on the day the *Sejm* announced the adoption of the referendum resolution (i.e., August 18th) and it will end 24 hours before voting day. Coinciding with the election silence, the referendum blackout period will start on Friday (October 13th) at midnight, and will last until the end of the voting.

¹ A Polish version of this report was published by the Stefan Batory Foundation as a part of the “Analizy Wyborcze” series with the following title: Polskie wybory parlamentarne i referendum w 2023 roku. Jak zepsuć „święto demokracji”. Available at: <https://www.batory.org.pl/wp-content/uploads/2023/09/Polskie-wybory-parlamentarne-i-referendum.pdf> (28.09.2023).

² *Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 8 sierpnia 2023 r. w sprawie zarządzenia wyborów do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej* (JoL 2023 item 1564).

³ *Ustawa z dnia 7 lipca 2023 r. o zmianie ustawy o referendum ogólnokrajowym* (JoL 2023 item 1628).

15 October — a national day of (direct) democracy?

Poland's experience in using various forms of direct democracy is far from perfect. This applies in particular to the institution of nationwide referendums. It is worth noting that after 1990, there have been only two referendums: (1) the 2003 one on Poland's accession to the European Union,⁴ and (2) the 2015 one on electoral, party funding, and tax reform.⁵

The latter, with a turnout of just 7.8 percent, is a clear example of how a referendum can be used in an instrumental manner: it was initiated by President Bronisław Komorowski only after the first round of the 2015 presidential elections took place with the intention to attract an important part of the voter that had voted to Paweł Kukiz, the main promoter of single-member constituencies and defender of eliminating public funding of political parties.

We currently face a very similar situation. The Law and Justice (PiS) party aims to use the referendum to mobilize their electorate. Unfortunately, such politically driven actions undermine direct democracy and discourage voters.

The idea of holding both the referendum and parliamentary elections on the same day is a controversial initiative (of PiS) and counts with the unequivocal rejection of all the opposition parties. According to them, this constitutes an instrumental use of direct democracy with the aim of increasing the ruling coalition's chances of winning elections and remaining in power. The same can be said of both the content and wording of referendum questions.

But opposition parties have not been the only ones to criticize PiS' idea. Others like Wojciech Hermeliński, former chairman of the National Electoral Commission (NEC), multiple experts on political parties and elections as well as many of those involved in political financing and electoral campaigning have screamed blue murder for what

⁴ M. Musiał-Karg, *Referendum w państwach europejskich. Teoria, praktyka, perspektywy*, Wydawnictwo Adam Marszałek, Toruń 2008, p. 246.

⁵ Postanowienie Prezydenta Rzeczypospolitej Polskiej z dnia 17 czerwca 2015 r. o zarządzeniu ogólnokrajowego referendum (JoL 2015 item 852).

they consider a clear partisan use of one of the most important consultative mechanisms democracy possesses.

It should be noted that on August 11th, PiS published a spot on its official Facebook profile where Jarosław Kaczyński, the party leader, presented the first question to be posed in the referendum.⁶ For the following three days, Mateusz Morawiecki (Prime Minister), Beata Szydło (former Prime Minister), and Mariusz Błaszczak (Minister of National Defence) presented the rest of the referendum questions,⁷ while being revised – due to heavy criticism – in parliament.

In the end, the referendum will include four different questions:

1. *Do you support the selling-off of state companies to foreign-owned businesses, leading to a loss of control by Polish women and men over strategic sectors of the economy?*
2. *Do you support an increase in the retirement age and the reinstatement of the increased retirement age to 67 for men and women?*
3. *Do you support the removal of border barriers between the Republic of Poland and the Republic of Belarus?*
4. *Do you support the admission of thousands of illegal immigrants from the Middle East and Africa, in accordance with the relocation mechanism imposed by the European bureaucracy?*

Major issues in relation to the October referendum:

1. The omission of vacatio legis for the amendment of the Referendum Act

Because the law, adopted in the Polish parliament (*Sejm*) on July 7th, was scheduled to enter into force already the day after its publication in the Polish Journal of Laws, the vacatio legis (i.e. the obligation to leave 14 days between the publication of a legal act and its entry into force) was clearly violated.

⁶ Available at: <https://www.facebook.com/pisorgpl/videos> (4.09.2023).

⁷ *Ibidem*.

Moreover, because the amendment of the Nationwide Referendum Act was undertaken less than three months before the referendums, the Council of Europe (2022) “good practice” (p. 18) aimed to prevent an instrumental use of the electoral law while creating a framework that guarantees a fair electoral competition⁸ was also violated.⁹ This also clearly contravenes the jurisprudence of the Constitutional Court who, on several occasions (e.g., K31/06, Kp3/09, and K9/11¹⁰), has maintained that any significant changes to the electoral law should be made no less than at least six months prior to elections.¹¹

2. The wording of the questions

The questions asked in the referendum should be phrased in a way that does not arouse emotions, avoid unambiguous wording - such as 'selling-off of national assets', 'thousands of illegal immigrants from the Middle East and Africa', or the mechanism 'imposed by European bureaucracy'. Conversely, they have been formulated in an ambiguous manner in order to influence the perception of voters and manipulate their voting decisions. PiS' intention is clearly destined to mobilize the electorate by arousing fear of immigrants, selling off state companies, the European Union, Belarus, etc.

3. The binding effect of the referendum

Another important aspect of the referendum is that while it has a binding effect, we can hardly predict the actions the government will take to implement the decisions ensuing from its results. As in the case of the Brexit referendum where many citizens that voted yes were not for a “hard Brexit”,¹² Poles will not be able to predict the consequences of voting “no”. As a result, the government should prepare, or at least

⁸ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (JoL 1997, no 78, item 483), art. 2.

⁹ Code of Good Practice on Referendums, Venice Commission, 20 June 2022, CDL-AD(2022)015. Available at: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2022\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)015-e) (5.09.2023).

¹⁰ Wyrok Trybunału Konstytucyjnego z dnia 3 listopada 2006 r. sygn. akt K 31/06 (JoL 2006 no 202 item 1493); Wyrok Trybunału Konstytucyjnego z dnia 28 października 2009 r. sygn. akt Kp 3/09 (Official Gazette 2009 no 72 item 917); Wyrok Trybunału Konstytucyjnego z dnia 20 lipca 2011 r. sygn. akt K 9/11 (JoL 2011 no 149 item 889).

¹¹ K. Urbaniak, Opinia prawna dotycząca organizacji referendum ogólnopolskiego razem z wyborami parlamentarnymi 2023 roku, 07.07.2023, Fundacja im. Stefana Batorego, pp. 5-6. Available at: <https://www.batory.org.pl/publikacja/opinia-prawna-w-sprawie-mozliwosci-przeprowadzenia-referendum-ogolnopolskiego-wspolnie-z-wyborami-do-sejmu-rp-i-senatu-rp-w-2023-roku/> (5.09.2023).

¹² M. Musiał-Karg, “Referenda and their impact on the future of a united Europe. Brexit and the shape of the European Union”, *Rocznik Integracji Europejskiej*, 11/2017, pp. 225-241.

announce, appropriate legislation to implement decisions made in the referendum. As yet, we only know that the government expects a 'no' answer to all four questions, but at the same time, we do not know what such a result will entail.

4. The importance of issues to be voted on “matters of particular importance to the state”

According to Article 125.1 of the Polish Constitution, a nationwide referendum may be held on “matters of particular importance for the state”.¹³ The Constitution, however, does not specify what those matters are. For some experts it is the importance for the 'state', and not for citizens, that matters. As an example, they refer to changes in the provisions of the Constitution, issues pertaining to the political system, and the freedom of moral behavior.

The Polish Constitution also stipulates that a referendum may express the consent to ratify an agreement delegating competencies from the state to an international organization or body (article 90.3), as Poland had in 2003 when citizens were asked about the accession of the Republic of Poland to the European Union. Moreover, the Constitution also refers to the possibility of holding a referendum to approve amendments to Chapters I, II, or XII (article 235.6). But none of them is the case here.

The criterion of “particular importance to the state” is so vague that it often allows those in power to decide what is important (i.e., what affects the functioning of the state). However, one could think that an indication of importance may refer to the existence of an ongoing public debate at any given time.

This is what happened with the 2003 accession referendum, which not only concerned the ratification of an international agreement but also was the subject of long debates for several months.¹⁴ As regards the planned referendum, we may conclude that we are about to vote on issues that have not been seriously debated until recently.

¹³ Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Jol1997, no 78, item 483), art. 125.1.

¹⁴ M. Musiał-Karg, „Instytucje demokracji bezpośredniej w procesie integracji europejskiej – od referendum ogólnonarodowego do europejskiej inicjatywy obywatelskiej”, *Rocznik Integracji Europejskiej*, no 6/2012, p. 212.

5. Organizational issues: collection of ballot papers

According to information from the National Election Commission and the National Election Office, when a nationwide referendum is to be held together with elections to the *Sejm* and *Senat*, voting will not only take place at the same polling stations but it will also be conducted by the same district election commission using the same ballot box.¹⁵

Magdalena Pietrzak, the head of the National Election Office, points out that there is no legal possibility to set up separate election commissions, and the legislation clearly indicates that this role needs to be played by election committees responsible for the elections and established based on the specific registers of voters.

Voters are to get three ballot papers: one for the *Sejm*, one for the *Senat*, and one for the referendum. Voters are not obliged to take all three ballots from the commission as they may decide, for example, to participate only in the election to the *Sejm* and the *Senat* but not in the referendum. They may also participate in the election to the *Sejm*, but not to the *Senat* or the referendum. Alternatively, they may participate in the referendum only. Needless to say, if a voter refuses to accept any of the ballots, then the electoral committee needs to note the fact in the register of voters.

Looking at the voting patterns in the *Sejm* (PiS in favor, the opposition against), the parties' political positions on the issues asked in the referendum are pretty clear. As a result, it seems highly probable that a person who refuses to participate in the referendum will not vote for PiS in the parliamentary elections. In this context, a refusal to accept a referendum ballot might provide information to members of the election commission and other people at the polling station about the voting preferences of particular citizens, raising doubts – to say the least - as to whether the principle of secrecy of the ballot is respected.¹⁶

Sylwester Marciniak, the Chairman of the State Election Commission, explained that the refusal to collect a ballot "must be recorded, as it is important to count the

¹⁵ Wyjaśnienia związane z przeprowadzeniem referendum ogólnokrajowego w tym samym dniu, w którym odbywają się wybory do Sejmu Rzeczypospolitej Polskiej i do Senatu Rzeczypospolitej Polskiej, Państwowa Komisja Wyborcza. Available at: <https://pkw.gov.pl/aktualnosci/wyjasnienia-stanowiska-komunikaty/wyjasnienia-zwiazane-z-przeprowadzeniem-referendum-ogolnokrajowego-w-tym-samym-dniu-w-ktorym-odbywaj> (30.08.2023).

¹⁶ R. Horbaczewski, Czy wybory na pewno będą tajne i bez presji, 17.08.2023. Available at: <https://www.prawo.pl/samorzad/referendum-ogolnokrajowe-kiedy-glos-jest-niewazny,522671.html> (23.08.2023).

number of ballots". This will certainly have also a bearing on the referendum turnout.¹⁷

While, at least according to the National Election Commission and the National Election Office, it is not possible to have two separate - one for the elections and one for the referendum - registers of voters (article 90.1.1. of the National Referendum Act), the truth is that this would allow those voting in the parliamentary elections and those participating in the referendum to register separately, consequently helping to avoid the need to record refusals to participate in the referendum.¹⁸

Moreover, according to Prof. Krzysztof Urbaniak – an expert in electoral law - the implementation of two electoral rolls would not only eliminate allegations of a breach of the ballot secrecy but also making it almost impossible to automatically determine the preference of voters.¹⁹

Alternatively, and taking into consideration a more transparent but also voter-friendly solution, it would be possible to constitute two different commissions in two separate polling places with two separate rolls. This might create other difficulties (e.g. commission staffing, voting organization, etc.), but would certainly help to guarantee the secrecy of voting (with the exception, perhaps, of very small villages).²⁰

6. Two parallel campaigns, different financing rules

Since parliamentary elections and the referendum are to be held on the same day, many doubts have been raised about the distinction between two campaigns that are financed according to separate rules.

¹⁷ D. Gajos-Kaniewska, PKW o referendum: jest kara za podarcie karty do głosowania, 16.08.2023, Rzeczpospolita.pl. Available at: <https://www.rp.pl/prawo-dla-ciebie/art38955991-pkw-o-referendum-jest-kara-za-podarcie-karty-do-glosowania> (30.08.2023).

¹⁸ It should be noted that secret balloting is guaranteed in the Polish Constitution, meaning that not only voting choices should be secret, but also the identity of those voting beyond the ballot box. For that reason, it is important that the principle of secrecy is extended to voters' choice to participate or not.

¹⁹ R. Horbaczewski, Jeden spis wyborców na wybory, drugi na referendum, 1.09.2023, Prawo.pl. Available at: <https://www.prawo.pl/samorzad/tajnosc-glosowania-w-referendum-ogolnokrajowym.522895.html> (18.09.2023).

²⁰ A. Frydrych-Depka, *Monitoring the abuse of state resources (ASR) – challenges for domestic observers*, A paper presented at the ECPR General Conference, Charles University, Prague, 4-8 September 2023.

A. *Financing of the election campaign*²¹

In Poland, the election campaign is run by electoral committees representing a political party, a coalition of parties, or a conglomerate of voters. The campaign financing rules and donation limits are set out in the Electoral Code, but the limit of expenditure per voter is announced by the Minister of Finance.

In this year's election to the *Sejm*, the spending limit per voter is PLN 1.10, and to the *Senat* PLN 0.24. When calculated per all eligible voters, the spending limit is approximately PLN 32 million and almost PLN 7 million, respectively. Parties and coalitions can accumulate funds at their election accounts provided they originate from contributions and donations, and bequests from individuals. An individual citizen may contribute to a maximum 15 times the minimum salary (i.e. no more than PLN 54k). It is also prohibited to finance campaigns from the state budget (e.g. from the budget for running an MP office).

According to article 132.2 of the Electoral Code, committees are also forbidden to accept in-kind contributions other than unpaid hanging of election posters, assistance in office works, use of items and equipment (including motor vehicles), and free-of-charge places for exhibiting election materials. All funds should be collected on a separate bank account. Finally, election committees are requested to provide a financial report on their election campaigns.

B. *Financing of the referendum campaign*²²

Article 37 of the 2003 Referendum Act provides for a broad range of entities that can run referendum campaigns. These include citizens, political parties, associations, foundations, and other bodies. Expenses related to the referendum campaign are covered by individual budgets according to regulations on the financial activity of campaigning organizations. However, provisions of the Electoral Code do not apply (article 47 of the Referendum Act).

²¹ Ustawa z dnia 27 czerwca 1997 r. o partiach politycznych (JoL 2023, item 1215) – Rozdział 4; Ustawa z dnia 5 stycznia 2011 r. - Kodeks wyborczy (JoL 2022, item 1277) – Rozdział. 15; o finansowaniu partii politycznych, w tym kampanii wyborczych szerzej: F. Casal Bértoa, M. Walecki, *Party regulation and the reshaping of party politics in Poland*, [in:] *The Regulation of Post-Communist Party Politics*, red. F. Casal Bértoa, I. van Biezen, Abingdon/New York: Routledge 2017; F. Casal Bértoa, *Party Funding Regulation in Poland (1990-2015): An Appraisal*, "Politologia," vol. 1, no 1/2016, pp. 47-89.

²² Ustawa z dnia 14 marca 2003 r. o referendum ogólnokrajowym (JoL 2023, item 497, 1628).

Thus, expenditures on the referendum campaign are, in fact, unlimited and no one can practically control them.

As the election and referendum campaigns are run in parallel by different actors and according to different financing rules, it is difficult to separate the two processes, which means that de facto we have a merging of two different campaigns. This may significantly affect parties' electoral campaigns, creating opportunities for them to violate the principle of equality during the electoral process.

Thus, it is possible that a candidate running his/her election campaign pays for banners or TV spots to inform about the referendum. Such funding is in line with the law and cannot be counted as election campaign expenditures, provided banners and spots are marked only with the logo of a political party and are not signed in the name of an election committee.

Although the National Electoral Commission tried to pay attention to this controversy with an explanatory note on August 28th,²³ it is still very difficult to predict how the campaign expenditures will work in practice. Similarly, referendum spots and banners can be paid, for example, by the Prime Minister Chancellery and involve ministers who are candidates in the election.

All this will be in line with article 58 of the 2003 Act, which states that "State bodies, including the body running the referendum, are free to present and explain the content of referendum questions or proposed answers, as well as respond to individual questions about the referendum. This cannot be considered part of the referendum campaign".

All in all, and as already stated by experts from the Analysis Bureau in the *Sejm* during the preparation of amendments to the Referendum Act, it will be almost impossible to distinguish between referendum and parliamentary elections expenses, allowing for unlimited spending by the different stakeholders, including those who initiated the idea of a referendum: namely, the ruling coalition.

²³ Wyjaśnienia Państwowej Komisji Wyborczej w sprawie kampanii wyborczej i kampanii referendalnej, ZKF.621.37.2023, 28.08.2023, Państwowa Komisja Wyborcza. Available at: https://pkw.gov.pl/uploaded_files/1693387466_zkf621372023-wyjasnienia-kampania-wyborcza-a-referendalna.pdf

7. The role of state-owned enterprises (SOEs) in the referendum campaign/ financing of political parties by people employed in state-owned enterprises

Before the referendum, political parties, foundations, associations, and social organizations may campaign in the public media in their free airtime. They are just required to notify the National Electoral Commission (NEC) of their intention to exercise this right by September 5th.

Because almost one-fifth of the 67 entities that have sent their notification to the NEC are foundations of state treasure companies, their participation has aroused much controversy, as the money from state-owned companies can be used by the ruling coalition to promote its electoral message under the pretext of running a referendum campaign.²⁴ This will allow the ruling party to use as many opportunities and resources (including state-owned companies' money) as possible during the campaign, clearly contravening the principle of fair electoral competition. Thus, experts agree that both state-owned companies and their foundations should not take an active part in political activities in general, not to mention referendum campaigns.²⁵

Unfortunately, the misuse of state resources in elections is a widespread and difficult-to-eliminate feature of the electoral landscape.²⁶ In 2021, journalists from "Wyborcza", Radio ZET, and Onet prepared a list of management boards and state boards of companies, analyzing data on 5,000 people appearing in the authorities of over a thousand state-owned companies and related companies. The data showed that more than 900 of them have links to ruling party politicians.²⁷

²⁴ S. Klauziński, *13 fundacji spółek Skarbu Państwa hurtem zgłosiło się do PKW. Chcą prowadzić kampanię referendalną*, 6.09.2023, OKO.press. Available at: <https://oko.press/kampania-referendum-spolki-skarbu-panstwa-pkw> (6.09.2023).

²⁵ G. Osiecki, T. Żółciak, *Spółki Skarbu Państwa uruchamiają tryb wyborczy*, 6.09.2023, „Dziennik. Gazeta Prawna”, Available at: <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/9291949.spolki-skarbu-panstwa-uruchamiaja-tryb-wyborczy.html> (6.09.2023); P. Balinowski, *Fundacje spółek Skarbu Państwa chcą prowadzić kampanię przed referendum* 6.09.2023, RMF24, Available at: https://www.rmf24.pl/raporty/raport-wybory-parlamentarne-2023/news-fundacje-spolek-skarbu-panstwa-chca-prowadzic-kampanie-przed_nld.7009011#crp_state=1 (6.09.2023).

²⁶ F. Casal Bértoa, M. Walecki, M., Musiał-Karg, *Party Funding Regulation in Poland: From Vacuum to De-liberalization*, [in:] *Oxford Handbook of Polish Politics*, eds. K. Grzybowska-Walecka, S. Guerra & F. Casal Bértoa, Oxford University Press, Oxford (forthcoming).

²⁷ D. Uhlig, J. Kopeć, K. Korzeniowska, S. Górka, *Partia i Spółki. Sieci powiązań polityków prawicy w państwowych spółkach*, 27.09.2021, Wyborcza.pl. Available at: <https://biqdata.wyborcza.pl/biqdata/7.159116.27618985.partia-i-spolki-sieci-powiazan-politykow-prawicy-w-panstwowych.html> (5.09.2023).

Recommendations

Taking into consideration all the issues related to the organization of parliamentary elections and a national referendum on exactly the same day, leads us, for the sake of improving the quality and transparency of both processes, to make the following recommendations with the intention of easing some of the concerns mentioned above:

- ▶ Enactment of electoral law and its amendment respecting the principle of *vacatio legis* and keeping at least a six-month period before the popular vote. This will avoid an instrumental use of referendums.
- ▶ The institution of the referendum should not be used instrumentally. It is evident that the vote scheduled for October is to benefit the ruling camp and strengthen their position. The referendum should not be a plebiscite in support of its initiator. It should allow the electorate to express their opinion on issues that are important for them and the state. This will respect the idea of direct democracy that complements representative democracy.
- ▶ Questions in the referendum should be formulated in a non-suggestive and non-emotional manner.
- ▶ Substantive and lengthy public debate should be held on issues included in the referendum so citizens can make informed (i.e., with a clear understanding of the consequences) decisions at the time of voting.
- ▶ Separate voter lists for parliamentary elections and the referendum could be a less controversial and more transparent solution, not only for the commission but also for voters. As a matter of fact, it could not only make it easier for voters to collect their ballots at polling stations (e.g., they would not have to refuse to collect their ballot in case they do want to abstain) but might also prevent election committees from making annotations in the same electoral roll.²⁸
- ▶ Issues related to the financing of both campaigns are particularly important. Since the referendum campaign does not have identical restrictions as the

²⁸ Such regulatory change can only be introduced via an amendment to the National Referendum Act.

electoral one, it would be appropriate to consider measures that increase the transparency of referendum campaign spending;

- ▶ For the sake of avoiding inequalities, the electoral campaign should be separated from the referendum campaign, and candidates running in the parliamentary elections should be prevented from campaigning in the referendum; and
- ▶ Fundraising restrictions and limited spending on the referendum campaign should also be introduced.
- ▶ It is highly desirable to restrict the participation of state-owned companies and their foundations in any political activity, in particular the referendum campaign. This will limit the widespread practice of using state resources to gain political advantage.

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