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THE POLITICAL DEBATE ON THE CHANGE OF THE CONSTITUTION OF THE REPUBLIC OF POLAND AFTER THE PARLIAMETARY ELECTIONS OF 2015

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In 1997, the Constitution of the Republic of Poland was adopted. Since then, constitutional disputes have continued in Poland. After the 2015 elections, they sharpened. In addition, Polish President Andrzej Duda proposed a change to the Constitution of the Republic of Poland. This initiated a political debate on constitutional matters. They are the subject of the article. Moreover, the most important current constitutional dilemmas were analyzed. The current constitutional debate refers both to the need to amend the Constitution of the Republic of Poland of 1997 and the need to pass a completely new basic law.

Keywords: political debate, Poland, the Constitution of the Republic of Poland.

On the 2nd of April 1997 the National Assembly of the Republic of Poland adopted the text of the constitution by a qualified majority of votes. Then the society accepted the text of the act in a nationwide referendum [1]. The adoption of the constitution closed the process of Poland's transformation in the legal sphere. It was a momentous event.

However, over twenty years have passed since the adoption of the Constitution of the Republic of Poland. Such a perspective allows the assessment of the verification of this act in systemic practice.

After the enactment of the constitution, there were numerous proposals to change it. There were also projects of a completely new constitution. Their authors were political parties, teams of experts and representatives of state authorities.

The systemic proposals in these projects differed greatly. The motives for presenting constitutional projects were also different.

Sometimes it was an expression of genuine concern for improving the functioning of the state and its organs. However, more often, in the author's opinion, they were dictated by particular political interests.

After the 2015 elections, constitutional issues returned, once again, to the political and social discourse. The emergence of a significant advantage of one party in the parliament – Law and Justice (Prawo i Sprawiedliwość, [PiS]) and the determination of the state authorities to change the constitution, especially the President of the Republic of Poland (Andrzej Duda), made the possibility of departing from the Constitution of 1997 become real.



In June 2018, the questions were presented, which were supposed to be in the announced constitutional consultation referendum. It was the main motivation to undertake research on the state of current constitutional debate in Poland.

The current constitutional debate refers both to the need to amend the Constitution of the Republic of Poland of 1997 and the need to pass a completely new basic law.

This is the effect of a changing political reality, with the majority of right-wing parties over left-wing parties that have lost their importance after the adoption of the constitution. There are also new international circumstances. Especially the functioning of Poland in the European Union and the necessity of constitutional settlement of Community affairs.

In addition, demography and the shaping of a new social model are a particular factor conducive to the mood of changing the constitution. With a generation that did not participate in the process of establishing the constitution, and therefore it is less identified with it and expects to adapt legal solutions to the reality of the functioning of the state. Hence, there is significant public support for constitutional reform in Poland. Therefore, the constitutional problem should be looked at both in the context of the circumstances of the adoption of the Constitution of the Republic of Poland of 1997, and from the perspective of the years that have passed since its entry into the political system.

The process of establishing a new Polish constitution was long and complicated. First of all, it was caused by political conflicts inside the Parliaments. The constitution was not adopted by the parliaments of 1989–1991 and 1991–1993. Only the parliament elected in 1993 led to the end of the constitutional process.

However, the structure of this parliament was dominated by left-wing parties. In fact, the constitution was created thanks to a coalition of leftist parties: Sojusz Lewicy Demokratycznej (SLD), Unia Pracy (UP), Polskie Stronnictwo Ludowe (PSL) oraz Unia Demokratyczna (UD) [Democratic Left Alliance, Labor Union, Polish People's Party and Democratic Union].

It should also be remembered that the leftist leader Aleksander Kwaśniewski was involved in the constitutional work, first as the chairman of the Constitutional Committee of the National Assembly, and then as the president of the Republic of Poland.

The right-wing parties did not legitimize the legal act adopted by that parliament. They criticized that the constitution lacked natural law and *invocatio Dei*, there were bad relations between the state and the Catholic Church, and Christian values were not emphasised.

The Constitution is not devoid of inaccurate regulations, but they were not the cause of frequent and serious disputes between the main centers of power in the state. The emerging problems concerned, for example, the division of powers of the executive, especially in the aspect of the right to represent the state in the European Council (so-called competency dispute) [2]. The problem was the powers of the president as the supreme head of the



Armed Forces. However, they were mainly caused by political disputes, between the governmental and presidential authorities and only partly due to bad constitutional regulations [3].

Among the most controversial constitutional solutions of the 1997 constitution is the bicameral parliament. Since the establishment of the Senate in 1989, there have been disputes over the legitimacy of its functioning. The proposals for the abolition of the Senate were rather part of electoral programs. However, constitutional provisions defining the scope and forms of participation of the Sejm and the Senate in the implementation of the legislative authority are not subject to criticism.

One of the biggest constitutional controversies concerned the regulation of the status of deputies and senators. The scope of formal immunity has been the subject of one of the two previous amendments to the Constitution of the Republic of Poland of 1997. In the Act of May 7, 2009 in art. 99 point 3, it was noted that the person elected to the Sejm or the Senate may not be a person convicted with a valid sentence for imprisonment for an intentional crime prosecuted by public prosecution [4].

The system of government in the Constitution of the Republic of Poland of 1997 differs from the contemporary, classic political solutions of democratic states [5]. It has been described so far as a semi-presidential or presidential-parliamentary one [6, s. 125]. It is widely recognized that it is a parliamentary-cabinet model which contains solutions strengthening the constitutional position of the president [7, s. 160]. This is called rationalization of the parliamentary-cabinet system, "Polish model of governance".

Relations between the President and the Prime Minister in systemic practice were not stable. The Constitution of the Republic of Poland provides, however, the autonomy of both entities of the executive branch.

The solution that has been particularly confirmed in political practice is the constructive motion of non-confidence in the government [8]. It has been shown that this ensures considerable stability of the executive and enforces the search for a compromise in the parliament.

The Constitution of the Republic of Poland in 1997 included courts and tribunals in the judiciary. So far, the constitutional provisions regarding the judiciary have not been changed.

However, in the systemic practice, judicial reforms were made with ordinary laws. It was the subject of a political and constitutional conflict that emerged after the 2015 elections. PiS claimed that changes in the judiciary system were caused by lack of balance in division of power [9]. These issues, as before, have not been finally resolved. The conflict has even spread to the sphere of action of the bodies of the European Union.

The constitutional provisions stating competences of the Constitutional Tribunal (CT) did not raise any serious controversies in practice. Only the necessity to specify the entity responsible for the execution of the Constitutional Tribunal's judgments was indicated. However, the situation has changed after the parliamentary elections of 2015. Issues related to the CT have become most serious constitutional dilemmas.



The correlation of CT activities with EU law is the subject of the greatest constitutional doubts [10]. There is also a controversy between the Supreme Court and the CT and the EU Court of Justice regarding the obligation to submit a preliminary ruling.

Not all aspects of the functioning of the state under the terms of the *acquis communautaire* are included in the constitution. There is a need to amend certain constitutional provisions.

In 2006, a change was made to art. 55 of the Constitution of the Republic of Poland of 1997, regulating the issue of extradition of a Polish citizen on the basis of the European arrest warrant [11].

In addition, Poland's membership in the EU caused a number of constitutional dilemmas. For example: coherence of EU law with the Constitution of the Republic of Poland; the question of the primacy of the law; the scope of the transfer of the EU and its institutions to the competences of the authorities and the sovereignty of the Polish state.

The assessment of the functioning of the Constitution of the Republic of Poland in the systemic practice carried out by teams of experts of constitutional law is often different from the assessment of the constitutions of political groups. After more than twenty years since the adoption of the 1997 constitution, there is still no dependence between political demands and the actual practice of its application.

After the elections of 2015 and the acquisition of a significant political advantage of one grouping (PiS), the postulate to pass a new constitution became very categorical.

The substantive justification for this project is the insufficient constitutional efficiency of the state in the constitutional conditions set by the "leftist" coalition of 1997. A constitutional axiological system is criticized, which in practice makes it impossible to accept it in its entirety. The basic controversies and constitutional dilemmas have once again returned to the political scene. As a consequence, President Andrzej Duda, during the state ceremonies on May 3, 2017, announced a constitutional referendum in 2018. The referendum was to show what a new constitution the Poles want.

The issue of the announced constitutional referendum (consultative) triggered a political and legal discussion in terms of its compliance with the Constitution of the Republic of Poland of 1997.

The leaders of opposition groups against the PiS spoke against this referendum.

In the opinion of Ryszard Petru (Nowoczesna) [Modern Party, and next the Liberal and Social Circle] the referendum should not take place because the referendum questions presented "are stupid, absurd and frivolous". Eugeniusz Kłopotek from the PSL estimated that it was "a complete misunderstanding, because the constitutional referendum is proposed by the president who broke the constitution several times".

Adam Szejnfeld, Platforma Obywatelska (PO) [Civic Platform], assessed that "this will be the most unwanted referendum in the world". Włodzimirz Czarzasty (SLD) said that the president "is doing it to emphasize his presence on the political scene in Poland" [12].



The position regarding the referendum was not clearly assessed by PiS. The PiS spokeswoman said that “the referendum will be extremely difficult to carry out” and the party's opinion will be worked out during the meeting of the PiS Political Committee [13]. The head of the Standing Committee of the Council of Ministers Jacek Sasin stated that there are differences in the matter of the referendum in PiS [14]. However, the head of the Strategic Analysis Center at the Chancellery of the Prime Minister, Waldemar Paruch, believed that “the consultation referendum proposed by President Andrzej Duda makes no sense”. Because “a new constitution should be written by a specific group of lawyers, taken over by the constituent and then subjected to a referendum” [15].

However, the initiative of the referendum and the change of the constitution was definitely supported by the leader of the Kukiz'15 parliamentary club (Paweł Kukiz) who called the Constitution of the Republic of Poland of 1997 “Bolshevik” and threatening the independence of the state [16].

It should also be mentioned that the Law and Justice (PiS) conducted parallel consultations on constitutional matters, parallel to the president's actions, and even competitive. A so-called “constitutional survey 2017”. Its results were presented by the PiS in April 2018 [17].

PiS treated this project as more important than the presidential program “Together about the Constitution”¹. Because the questions were addressed directly to experts in constitutional law [18].

The questionnaire concerned four main issues: the principles of the constitution, the status of the individual, the system of government and the courts. While discussing the results of the survey, Anna Łabno stated that there is a need to amend the constitution. Especially in the field of the functioning of the state in the EU and that “the system of government in Poland should be changed”. The aim is to create a “strong prime minister's power”. As a result, “strengthening the role of the prime minister would mean marginalization of the presidency”. This was understood as a dispute between the President of the Republic of Poland and the PiS [19].

The competitiveness of the actions of the PiS and the President of the Republic of Poland was a signal that there is no consensus on these issues in the matter of constitutional matters. The president can not count on strong support for his own project of a constitutional referendum in the parliament, and especially in the Senate, without which the consent of the referendum could not take place.

In addition, the Senate's powers to decide on the announced referendum were also questioned. In the opinion of some constitutionalists, what the president called a constitutional consultative referendum was simply social consultations. And the Senate has no power to give consent in this matter [20].

¹ The development of the questionnaire, the selection of respondents and the preparation of the results for publication were commissioned to Anna Łabno, Bogumił Szmulik and Bogusław Banaszak. Only 14 lawyers (out of over 100 people) replied to the questionnaire.



This meant that Senate's approval of the President's project would mean breaking of the constitution. In the opinion of experts, it was an attempt to circumvent the provisions on the change of the constitution [21].

After the announcement of the referendum, a period of intense social consultations in the area of constitutional issues began. The first stage of the social and information campaign were open meetings held in the regions of Poland. They took place at the initiative of the Chancellery of the President of the Republic of Poland. Constitutional law experts participated in them. In addition, there were invitations to cooperate with social organizations, the media, educational institutions, trade unions, business organizations, religious associations, as well as people who on their own initiative wanted to take action in the field of constitutional debate. The consultations took the form of expert conferences and regional meetings.

It should be noted that the conducted social campaign was intense, and the issues raised during it related to many important systemic issues.

The result of these actions was the presentation by President Andrzej Duda on June 12, 2018 of a catalog of 15 questions to which he wanted the citizens to respond in the pre-constitutional referendum. The scope of these questions was controversial. The number of questions has also caused serious discussions.

Therefore, the President submitted another project to the Senat. That project of a referendum consisted of 10 questions and suggested specific dates between on November 10–11, 2018.

The justification for the selection of questions that were to be put to the referendum was made by the president of the Republic of Poland many times.

The need for a consultative referendum was argued by the Secretary of State, Deputy Chief of the Chancellery of the President of the Republic of Poland, Paweł Mucha. He was responsible for coordinating activities related to constitutional social consultations.

However, the Senate committee, which on 25 July 2018 considered the draft submitted by the president, did not agree to the President of the Republic of Poland ordering a nationwide consultative referendum on changes or adopting a new constitution.

The absolute majority required to pass the Senate's resolution in this case was 47 votes. Ten senators voted for it, 30 were against and 52 abstained.

The Senate's position ended the presidential initiative of holding a referendum on changes in the constitution.

The Speaker of the Senate, Stanisław Karczewski (PiS), explained that the decision of the Senate was due to badly chosen deadline for the referendum and the high costs of its implementation. The Senate's decision also took into account the negative opinion on the referendum expressed by the National Electoral Commission.

However, the Senate's decision, apart from substantive arguments, also had a political aspect. 9 senators of the PiS voted for the project of the President of the Republic of Poland and the remaining members of the party (50) abstained from voting. In the political sense, this result showed a weakening



of the political position of the President of the Republic of Poland. Numerous comments and analyses confirmed this. The result of the vote in the Senate also meant the president's poor recognition of his political base.

One should also remember the various opinions of the President of the Republic of Poland Andrzej Duda and the President of the PiS, Jarosław Kaczyński, regarding the potential new system of government. The president wanted to strengthen his political position. President J. Kaczyński wanted to strengthen the cabinet [22]. From this political dispute, the leader of the PiS won the victory.

The only group that strongly negatively commented on the Senate's decision regarding the consultative referendum was Kukiz'15.

Conducted during the constitutional consultations of a public opinion poll showed that 47 % of Poles do not want to change the current constitution. However, 31 % thought that the constitution should be changed. Participation in the announced referendum was declared by 50 % [23]. Research has shown that in constitutional matters, society is clearly divided. Like the one in 1997, when the constitution of the Republic of Poland was passed.

After the 2015 elections and PiS victory and the assumption of the office of the President of the Republic of Poland by Andrzej Duda, once again constitutional issues were dominated politically.

The substantive arguments presented repeatedly for the need for constitutional amendments and projects and proposals prepared by experts have not yet found political support. Therefore, the scope of postulates in the field of *de lege fundamentalis ferenda* has been practically unchanged for many years [24, s. 305].

The most important is the regulation of European affairs, which is a consequence of Poland's membership in the European Union. For example, the prospect of joining a monetary union or withdrawing from the EU. There is a need for a precise division of competences between executive organs. The status of the Constitutional Tribunal and its powers to control legal acts created by international organizations should be considered. The Polish Constitution also does not contain provisions directly regulating the role of the Sejm and the Senate in the process of establishing European Union law. One of the postulates is the strict definition of the mode of ratification of EU treaties. For example, in terms of the date of signing them by the President of the Republic of Poland. There are no precise constitutional regulations regarding the authorization of the president to refuse or postpone the ratification of an international agreement.

It must be said that despite the need to make changes to the Constitution of the Republic of Poland of 1997, there are currently no compelling reasons to justify the rapid, comprehensive change of the constitutional system in Poland. Practice confirmed that constitutional changes should be carried out after extensive social consultations, especially expert ones. The real political situation should also be taken into account.

Although politics is primarily about the struggle for power, various views and political demands must be accepted in a pluralistic society. The duty of the political elite is to seek the most effective solutions, that is, to

reconcile the distant interests of the political scene actors. This requires reciprocal concessions, coalitions and agreements. The ability to work out compromises is therefore the foundation of modern politics and one of the basic democratic standards.

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ПОЛИТИЧЕСКИЕ ДЕБАТЫ ОБ ИЗМЕНЕНИИ КОНСТИТУЦИИ РЕСПУБЛИКИ ПОЛЬША ПОСЛЕ ПАРЛАМЕНТСКИХ ВЫБОРОВ 2015 ГОДА

Конституция Республики Польша была принята в 1997 г. С момента принятия Основного Закона в стране не утихает обсуждение конституционных вопросов. После выборов 2015 г. конституционные споры обострились еще больше. Позднее президент Польши Анджей Дуда предложил внести изменения в Конституцию страны. Это положило начало широким политическим дебатам по конституционным вопросам. В статье анализируются основные конституционные дилеммы и предметы конституционных споров. Нынешние конституционные дебаты касаются как необходимости внесения поправок в Конституцию Республики Польша 1997 г., так и необходимости принятия Основного Закона страны в абсолютно новой редакции.

Ключевые слова: политические дебаты, Польша, Конституция Республики Польша.

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