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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

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Reconstructure of a Polish constitutional system during the years 1989–1992

The year 1989 was distinctive for a political transformation in Poland and other countries of Eastern and Central Europe. It was in this year that the first free elections were conducted in Poland and the Berlin wall collapsed in Germany. These events started a long way to the democratization of a political life in post-communist countries. The process of democratization manifested itself, among others, in the rejection of foundations of socialist constitutions.

Foundations of the Constitution of the Polish People's Republic of 22 July 1952

By breaking with a Polish governmental tradition the Constitution of the Polish People's Republic of 22 July 1952¹ created a system of a socialist state that could be transformed into a communist one. It was based on principles which today may sound strange e.g. the worker-peasant union, the sovereignty of the working people of towns and villages, the Sejm supremacy, the unity of state power, state ownership of production resources as well as on the principle of a leading role of the communist party. The communist constitution guaranteed citizens a wide range of freedoms, yet this regulation had a completely pretentious character. A legal status of a citizen was determined by an ordinary statute and exercising rights and freedoms was

¹ Journal of Laws no. 33, item 232.

totally licensed. Modelled on Western countries socialist constitutionalism in Poland was endowed with the Constitutional Tribunal. It should be stressed that this organ started its activity in 1986, that is three years before the change of a political system in Poland. It was the only such organ in countries of Eastern bloc. Its judgements on unconstitutionality of a statute were not final and had to be approved by the Sejm which was a representative of the communist party.

A characteristic feature of all countries of a people's democracy was a complete lack of freedom of speech and free elections. These two freedoms constitute a *sine qua non* of a democratic system; however, the term "people's democracy" did not comprise them. A *sine qua non* of a democratic system was, on the other hand, a pre-publication censorship of press, radio plays, TV programmes and books, even those addressed to children. Instead of multiplicity and equality of political parties a people's democracy offered candidates' competitiveness within one political option i.e. a socialist-communist option. Other political options were forbidden while a freedom of speech was severely punished. So formed a political and social system did not correspond with needs and aspirations of the majority of society that supported the independence movement.

The Polish Round Table of 1989 and April Amendment of the Constitution

The independence movement in the form of postulates of the first independent trade unions required something more than the rationalization of a socialist system. At the beginning of 1989 Poland was hit by a wave of strikes which arose from dissatisfaction with a social and economic situation². A more and more widespread economic crisis and low salaries brought about the discontentment of the working people. The communist government was aware that only radical economic reforms would prevent Poland from going bankrupt. This led to the decision about starting talks with the opposition. It was resolved that the opposition would be allowed to take part in governing and in this way it would be rendered responsible for the condition of the state. The result of the talks between the opposition and the communist government was so-called the Round Table Talks which lasted from 6 February 1989 to 5 April 1989. The communist government treated the Round Table as an introduction to building Solidarity into a political system of the Polish People's Republic (Polska Rzeczpospolita Ludowa

² See generally A. Dudek, *Reglamentowa rewolucja. Rozkład dyktatury komunistycznej w Polsce*, Kraków 2004.

– PRL) without disturbing a leading position of the Polish United Workers' Party (Polska Zjednoczona Partia Robotnicza – PZPR).

The main achievement of the Round Table negotiations was a decision about the legalization of Independent Self-governing Trade Union "Solidarity". Furthermore, the second chamber of the parliament and the office of the president of the Republic of Poland were to be reactivated. Contract elections to the Sejm were arranged – 65% of seats (299 seats) were reserved for the PZPR, ZSL and SD (60%) and for Catholic organizations: PAX, UChS and PZKS (5%) while independent candidates were to fight for 35% seats left (161 seats) in free elections. Elections to the Senate were assumed to be free. It was decided that the office of the President of the PRL would be formed. Solidarity was to be given access to the media in the form of their own 30-minute programme on TVP channel once a week and an hour of air time in the Polish Radio station. Other provisions included a postulate of registering a Solidarity weekly and the introduction of a principle of trade union pluralism in working places. It was also decided that the system of common courts of law would be reformed.

Provisions of the Round Table required the amendment of the Constitution of the Polish People's Republic. On 7 April 1989 the communist Sejm passed the amendment of the basic law³. In this case the Sejm acted as a voting machine because its role was limited to ratifying political settlements during the Round Table talks⁴. April amendment did not bring major changes in a political system, they were rather of a symbolic nature. First and foremost, Poland was still a people's democracy with a leading position of the communist party and based on the principle of the unity of state authority. The principle of the sovereignty of the working people of towns and villages as well as the worker-peasant union were also preserved. Nevertheless, organs typical of Polish constitutional tradition suppressed after appropriating the state by the people's government were reinstated. April amendment reintroduced the Senate that is the other chamber of the parliament and the office of the president which had been replaced by the Council of State in 1952.

The Senate consisting of 100 members was not equal to the Sejm because the principle of the Sejm supremacy still existed. Senators were elected in universal, direct, secret and majority voting. Each voivodeship elected two senators except for the Małopolskie and a metropolitan voivodeship in which three senators were chosen. The Senate and Sejm formed the National Assembly which elected the President of the Polish People's Republic.

³ Act amending the PRL Constitution dated 7 April 1989 (Journal of Laws no. 19, item 101).

⁴ See W. Sokolewicz, *Kwietniowa zmiana Konstytucji*, „Państwo i Prawo” 1989, no. 6, pp. 5–6.

The President of the PRL was an executive authority which acted as a head of the state and had wide prerogatives. First of all, he could initiate legislation, sign statutes, ask the Constitutional Tribunal to rule a statute unconstitutional, veto, dissolve the Sejm and Senate, take part in forming the government, summon the government meeting to discuss important matters and chair such meetings, execute political responsibility of the Council of Ministers, supervise national assemblies and the public prosecutor's office, issue regulations and orders. What can prove numerous rights of the president is the provision which enabled him to dissolve the Sejm in case of passing a statute or a resolution which would made the president unable to exercise his constitutional rights. Official acts were countersigned; however, in practice this institution was not used. The PRL President was a guard of a socialist character of the country. His constitutional and statutory rights made him an active centre of deciding and executing the state's policy. Taking into account the fact that the first president of the Polish People's Republic was General Wojciech Jaruzelski, it should be concluded that full democratization under his supervision was impossible.

Moreover, April amendment of the PRL constitution guaranteed independent judges and courts. It was an important provision for an awakening Polish democracy. The communist regime used judges to fight the opposition. A strengthened status of a judge was inherent in the principles of a democratic state. Independent courts and judges were safeguarded by the National Justice Council.

On the one hand, provisions of April amendment did not break with a communist nature of the state. Its limited scope fitted in the spirit of the 1952 Constitution. The amendment was a legal expression of a "political contract" concluded between part of a democratic opposition and the communists. On the other hand, it triggered off a process of constitutional transformation. It was a first step towards the democratization of a constitutional order in Poland⁵.

Free elections of 4 June and December Amendment of the Constitution of the Polish People's Republic

The first free elections in the post-war history took place on 4 June 1989 and brought a landslide victory to the opposition. In the first round out of 161 seats eligible in the Sejm the Solidarity camp won 160, while in the Senate it took 92 seats out of 100 available. The government coalition had

⁵ See A. Szmyt, *Dokonywanie zmian przepisów konstytucyjnych*, [in:] M. Zubik (ed.), *Dwadzieścia lat transformacji ustrojowej w Polsce*, Warszawa 2010, pp. 124 et seq.

only 3 out of 299 seats. The attendance amounted to 62%. Due to the fact that not all the seats in the Sejm were filled, it was necessary to hold the second round, in which the opposition took yet another missing seat in the Sejm and 7 seats in the Senate. This time the attendance was only 25%. On 23 June deputies and senators elected from Solidarity lists formed Citizens' Parliamentary Club. Tadeusz Mazowiecki, an opposition activist, became the head of the government.

The victory of the opposition in the elections of June 1989 led to a further radicalization of political climate and resulted in yet another amendment to the PRL Constitution dated 29 December 1989 called December Amendment. This amendment was a revision of the constitution which changed its major principles. December amendment of the 1952 Constitution put Poland on the way towards a gradual and slow democratization of political life⁶.

December revision rejected the notion of a socialist state and society replacing it with the notion of the state and civil society⁷. Its provisions determined the directions of the restructure of the state. The principle of the sovereignty of the working people of towns and villages was replaced by the principle of the sovereignty of the nation, whereas political pluralism replaced a leading role of the PZPR. Private ownership forced state ownership of production resources out. Citizens' business activity was allowed, which guaranteed economic freedom. Nonetheless, the most significant achievement of December 1989 was the adoption of the principle of a democratic state ruled by law. The democratic character of a state ruled by law corresponded with such guarantees as freedom of the formation of political parties and trade unions. Public authorities were obliged to act according to law and on its basis. Further, the constitution guaranteed the participation of local and professional governments in governing the country. December amendment to the constitution did not include in its scope a catalogue of constitutional rights and freedoms so important in a democratic state. Instead, it contained many provisions of a symbolic nature which were to prove that the socialist system had been gone. Firstly, the introduction to the constitution was removed. Secondly, the Polish People's Republic was renamed the Republic of Poland. Finally, a former national coat of arms with an image of a crowned white eagle was reinstated.

December amendment changed a political system only fragmentarily. Provisions of the communist constitution of 1952 set in the previous period

⁶ Journal of Laws no. 75, item 444.

⁷ December Amendment of 1989 was not a final change of the 1952 Constitution. On 8 March 1990 the Sejm passed an act amending the Constitution of the Republic of Poland (Journal of Laws no. 16, item 94) reintroducing local governments in Poland. The next amendment, which changed the procedure of electing the President of Poland, took place on 27 September 1990 (Journal of Laws no. 67, item 397).

were still in force. These deficiencies of the constitutional order were to be remedied by judicial decisions of the Constitutional Tribunal. First, the constitution derived from the principle of a democratic state ruled by law other principles characteristic of a democratic state and so far not expressed in the Polish Constitution. It served as a normative justification for, among other things, the principle of separation of powers, a right to a fair trial, the principle of a citizen's trust to the state and law, *lex retro non agit*, principles of a good legislation. Furthermore, December Amendment started the process of reinterpretation of the constitution⁸.

Second, the Constitutional Tribunal reinterpreted existing constitutional concepts. As a result of political changes, a new meaning was given to constitutional provisions from 1952. A good example of an incriminated phenomenon is a principle of universality of elections. Its meaning established in the era of real socialism had to be rejected totally. Socialist elections designed to be competitive within only one political option became free and turned to be a competition of many political options. Therefore, with no formal change of principles of election law these principles changed "substantively", which undoubtedly proves the reinterpretation of the constitution. New political principles introduced in December 1989 had an impact on the meaning of other provisions of the 1952 Constitution and on the way they were understood. Judicial interpretation of "existing notions" headed towards their democratization created by a new political situation and new constitutional principles. According to a former judge of the Constitutional Tribunal Leszek Garlicki, the reinterpretation of constitutional provisions of 1952 "was based on the absorption of axiological bases of Western democratic constitutionalism" and "regulations of international law, especially in human rights"⁹. In this process the Constitutional Tribunal set its axiological limits of the reinterpretation of the constitution¹⁰.

Lost constitutional moment and the Little Constitution of 1992

A postulate of passing a new democratic constitution accompanied the political transformation in Poland from the very beginning. Pro-democracy feelings among the Polish society and its rejection of communism constituted a sufficient reason to start the work on a new supreme statute. A need for

⁸ See L. Garlicki, *Aksjologiczne podstawy reinterpretacji konstytucji*, [in:] M. Zubik (ed.), *Dwadzieścia lat transformacji...*, p. 94 et seq.

⁹ *Ibidem*, p. 96.

¹⁰ *Ibidem*, p. 97.

its amendment met nation's expectations and we experienced a so-called constitutional moment within the years 1989–1992.

Legal doctrine defines a constitutional moment as a period during which the nation rejects an existing constitutional consensus and changes its attitude towards certain constitutional regulations. The constitutional moment is complex and takes the form of a multi-stage process consisting of the following elements: first, signaling a need for political changes, most often articulated by political elites. Second, it contains a proposal of changes and a public debate in which citizens may participate. Third, the final stage involves a codification of changes which have been accepted by the society. Constitutional amendments which take place during the constitutional moment are essential and fundamental. Other constitutional amendments do not possess such characteristics because they have not been introduced in this exceptional period¹¹.

The Contract Sejm elected in the elections of 4 June 1989 created a Constitutional Commission in order to draft a democratic constitution. In addition, the Senate started to work on its own draft of a supreme statute and established its Constitutional Commission. Members of the Commission promised that the work on the text of the constitution would be intensive because free Poland required a free constitution. It was assumed that the constitution would be passed on 3 May 1991 that is on the two-hundredth anniversary of the Constitution of 3 May 1791. The rough draft of the constitution was prepared by the Constitutional Commission in October 1990, but the final version was accepted by the Commission only in August 1991. The constitution was not passed despite fast work on it. It was suggested that a new constitution should be passed by a new Sejm and Senate elected in really free elections. The Contract Sejm, as stated in legal doctrine, did not have a full political legitimacy. It did not reflect the will of the nation but only a political consensus between communists and part of the opposition. As such it had neither political nor moral authority to pass a democratic constitution¹².

Constitutional work in the Contract Sejm was interrupted due to the shortening of the term. A full free elections to the Sejm and Senate took place on 27 October 1991 and created a democratically legitimate parliament able to pass a democratic constitution of the Republic of Poland. During the first term of the Sejm and second term of the Senate simultaneous work on the Little Constitution¹³ and on a new constitution of the Republic of Poland began.

¹¹ B. Ackerman, *We the People*. Foundations, 1993, p. 287 et seq.

¹² See A. Szmyt, [in:] M. Zubik (ed.), *Dwadzieścia lat transformacji...*, p. 140 et seq.

The constitution regulating relations between legislative and executive powers and the local governments, commonly known as the Little Constitution was passed on 17 October 1992 and was an effect of a three-year political transformation. The constitution was assumed to regulate a political system during a transition period and be in force until a new constitution was passed. Solutions adopted by the constitution resulted from experience associated with functioning of the state in new political conditions. First and foremost, it consolidated a democratic direction of changes in Poland. Moreover, it introduced a principle of separation of powers, *incompatibilitas*, a free deputy's mandate, and rejected the principle of the Sejm supremacy. Relations between an executive power and the Parliament suited a parliamentary government whose manifestation was the participation of the Sejm in the formation of the Council of Ministers, political responsibility of the government and countersigning legislative acts of the president¹⁴.

Article 77 of the Little Constitution revoked the Constitution of 22 July 1952 maintaining in force some of its provisions. The maintained provisions of Chapter 1, 4, 7, 8, 9, 10 and 11 constituted 60% of the revoked 1952 Constitution. Such a legislative operation was symbolic; it showed the rejection of the previous socialist regime as well as socialist values of the state and society. On the other hand, the preserved provisions were in force not because the communist party wanted so but because of the will of a democratically elected parliament and became an expression of the Polish nation's attempts to have a democratic state. Chosen in free elections the Sejm and Senate confirmed a democratic legitimacy of maintained provisions depriving them of the odium of a previous political system¹⁵.

Among the maintained Chapters of the 1952 Constitution there were provisions concerning individual rights and freedoms. It meant that in a democratic state ruled by law a status of an individual was determined by a socialist constitutional legislator. It should be stated parenthetically that in the 1950s and 1960s people believed that the 1952 Constitution as well as individual rights and freedoms it defined were not normative but resulted from gained experience constituting a sort of political profit and loss account.

¹³ In the Contract Sejm they realised a need to pass the Little Constitution which would regulate a political, social and economic system of the state temporarily. This need resulted from the fact that a constitutional compromise was difficult to reach whereas a social and political reality differed much from what the amended constitution of 22 July 1952 stated. What was needed was a constitution which would regulate a lot of new problems related to the way state authorities acted in a new political reality. Consequently, on 5 October 1991 the Council of Ministers submitted a draft of a constitution – so-called Little Constitution. The Sejm rejected the draft of the Little Constitution during a constitutional debate.

¹⁴ M. Kallas, *Mała Konstytucja w praktyce ustrojowej RP*, „Przegląd Sejmowy” 1993, no. 2, pp. 25–40.

¹⁵ See L. Garlicki, *Komentarz do art. 77 Małej Konstytucji*, [in:] *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Warszawa 1995, pp. 1–5.

Rights and freedoms were enjoyed to the extent defined by an ordinary law-maker. Such an approach to rights and freedoms should be rejected in a democratic state, whereas maintained provisions should be interpreted according to values of such a state. Therefore, an important role was played by the Constitutional Tribunal whose activity was focused on reinforcing a legal status of a human being. It gave rights and freedoms approved in 1952 a new meaning concurrent with ongoing processes of democratization of a political, social and economic life. It reinterpreted them referring to the experience of European courts including the European Court of Human Rights. In this case an interesting phenomenon could be observed: while the identity of the contents was maintained, its meaning changed. Hence, it can be stated that a substantive change of provisions of the constitution in line with the expectations of the Polish society took place.

The society still waited for a new constitution which could determine a political system of the state and completely break with a socialist past. To fulfill this postulate an act on the procedure of drawing up and adopting the Constitution of the Republic of Poland was passed on 23 April 1992. Pursuant to its provisions the Constitutional Commission of the National Assembly (the combined chambers of the parliament) was appointed. The Commission received 7 drafts of the constitution and had 9 meetings; however, no draft was a subject of the debate during the National Assembly. In May 1993 President Lech Wałęsa dissolved a politically divided parliament. The decision of the head of the state interrupted the work on a supreme statute. In this way the constitutional moment was lost.

The Constitution of the Republic of Poland of 2 April 1997 and a changing political context of its application

It was after eight years of a political transformation¹⁶ that a new constitution was passed for the Polish nation. On 2 April 1997 the National Assembly adopted a supreme statute by a vast majority of votes. 451 members of the National Assembly voted in favour of the constitution, 40 against it while 6 abstained. President Aleksander Kwaśniewski called a national referendum to be held on 25 May 1997. About 42% of those eligible to vote took part in universal voting and only 53% of those who voted approved of the constitution. It can be noticed that the attendance was not high if we take into account its importance for Poland and its nation. This situation resulted from the fact that a Polish constitutional legislator did not make

¹⁶ See M. Kruk, *Transformacja polskiego porządku konstytucyjnego w latach 1989–1997*, [in:] W. Sokolewicz (ed.), *Zasady podstawowe polskiej Konstytucji*, Warszawa 1998, p. 57 et seq.

use of the constitutional moment at the beginning of the political transformation. The Polish society was no longer so involved in a formal change of the system, but it longed for a real change of the character of the state.

The Constitution of 2 April 1997 came into force in January 1998. In this way the process of a constitutional transformation came to an end. The adopted constitution was based on the experience of countries in Western Europe and took into account a Polish constitutional tradition and our experience of the period of political transformation. It sealed the devotion of Poland to democracy and the state ruled by law. Yet, the most important was the fact that the constitution determined again a legal status of an individual giving him a wide range of rights and freedoms as well as instruments of their protection. It confirmed a native and inalienable character of dignity of a man which was a source of rights and freedoms. It was preceded by a preamble which expressed values essential for the Polish nation such as human dignity, justice, beauty, welfare, solidarity. All in all, the Constitution of 2 April 1997 broke off political ties of the Republic of Poland with socialist constitutionalism.

Poland's membership of the European Union as a factor influencing the contents of the constitution

Despite the fact that the Constitution of 2 April 1997 was passed not a long time ago, it is in force in new political conditions which result from our membership of the European Union. Fifteen years after the first free elections Polish nation, in compliance with democratic procedures, expressed their support for membership of the European Community. In 2004 the Treaty of Accession was signed and the same year Polish citizens elected members to the European Parliament. The accession to the European Union did influence the constitution which underwent so-called Europeanisation¹⁷. This phenomenon can in short be described as the influence of legal regulations of the European Union on the contents of the constitution. The process of Europeanisation may take the form of a formal, but also as a substantive amendment to the Constitution.

It should be explained that the Polish Constitution of 1997 came into force when Poland tried to become a member of NATO and the European Communities and yet it does not know such concepts as NATO, the Europe-

¹⁷ More in: K. Wojtyczek, *Przekazywanie kompetencji państwa polskiego organizacjom międzynarodowym*, Kraków 2007; J. Galster, D. Lis-Staranowicz, *O zjawisku europeizacji polskiego prawa konstytucyjnego*, „Przegląd Sejmowy” 2010, no. 2, p. 29 et seq.; M. Dobrowolski, D. Lis-Staranowicz, *Podstawowe zasady ustroju RP w europejskich orzeczeniach Trybunału Konstytucyjnego*, „Przegląd Sejmowy” 2007, no. 1, p. 9 et seq.

an Communities or the European Union. Nevertheless, authors of the Constitution of the Republic of Poland regulated a procedure of ratifying an international agreement on the basis of which the Republic of Poland may delegate to an international organization or international institution the competence of organs of state authority in relation to certain matters (Article 90). Additionally, it regulated a place of European law in the hierarchy of sources of law stating in Article 91.2 that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

The first and only amendment to the Constitution of the Republic of Poland which results from our membership to the EU is an amendment to Article 55 which forbade an extradition of a Polish citizen and as such it made impossible for Poland to execute a framework decision that introduced the European Arrest Warrant. The problem of implementing the EU decision by a Polish legislation was widely analyzed by legal doctrine which was not unanimous as to the constitutionality of the European Arrest Warrant (hereinafter referred to as EAW). A constitutional regulation which tried to meet the needs of a mutual European policy in judicial matters became a subject of a decision of the Constitutional Tribunal.

In the decision of 27 April 2005 the Constitutional Tribunal considered a legal question about the adherence to the RP Constitution of national means implementing the framework decision of the Council of the EU of 13 June 2002 on the European arrest warrant¹⁸. The Constitutional Tribunal decided that an institution of the European arrest warrant defined in the Polish Code of Criminal Procedure did not comply with Article 55.1 of the Constitution of the Republic of Poland. The Tribunal postponed the date of nullifying the provision of the Code by 18 months claiming that “in a situation when nullification of the provision said to be unconstitutional could lead to the breach of international obligations of the Republic of Poland, the institution of prolonging its application becomes important in the terms of international obligations of the state”. On 8 September 2006 the Sejm amended Article 55 of the Constitution which now reads: “Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: was committed outside the territory of the Republic of Poland, and constituted an offence under the law in force in the Republic of Poland or would have

¹⁸ Z.U.2005/4A/42.

constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of a request”.

Europeanisation of the Constitution the Republic of Poland may take the form of its reinterpretation. The Constitutional Tribunal does not reject an amendment to the contents of a constitutional rule by a so-called pro-European interpretation. Such a measure was used in case of Article 62 of the said Constitution. Article 62 states that if, no later than on the day of vote, he has attained 18 years of age, Polish citizen shall have the right to participate in a referendum and the right to vote...¹⁹. In case no. K 18/04 the applicant demanded that Article 19.1 of the treaty establishing the European Community stating that every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State, be declared unconstitutional. The applicant observed that the community regulation breached Article 62 of the said Constitution because due to the ratification of the treaty of accession individual rights were unlawfully extended to individuals who are not Polish citizens, but are citizens of the European Union. In the opinion of the Constitutional Tribunal Article 62 of the Constitution does not give Polish citizens an exclusive right to elect or to be elected. It does not prohibit EU citizens permanently residing in Poland from exercising these rights²⁰.

Poland's membership to the EU also influences constitutional principles. It is due to the fact that delegating to the European Union the competence of authorities of the Republic of Poland resulted in some of the functions which used to be reserved for the state being taken over by an foreign entity. Law made by this entity is in force within the territory of the Republic of Poland and has a right of priority in relation to a statute passed by a national parliament. The Union and its authorities are not subject to the nation's superior authority and do not bear responsibility to the Polish sovereign. Before, all the state's tasks used to be performed by its authorities. Now the legislative power has lost a large part of its competence whereas the status of the Council of Ministers has been strengthened because it is in charge of European policy, formulates its directions and presents it in the sitting of the Council of the European Union. In addition, it makes legislative and political

¹⁹ In legal doctrine a necessity of an amendment to this provision and the extension of rights to elect and to be elected to a local government to a citizen of the European Union has been raised.

²⁰ In this case the Constitutional Tribunal did not declare the questioned regulation unconstitutional. Yet, it did not decide that it was in compliance with the Constitution. In other words, it adopted a Solomonic solution stating that Article 62 of the Constitution is an unsuitable model of an assessment of a questioned regulation.

decisions on the European forum²¹. This competence shift between the Parliament and the Council of Ministers is a fact which shows the Europeanisation of the Polish government system. Such a situation has made the meaning of even the principle of the nation's sovereignty and of the division of powers change due to Poland's membership to the EU²². Constitutional doctrine in Poland makes efforts to redefine these principles taking into account the new context. It observes that Poland's membership to the European Union also requires a new approach to major political solutions. The meaning of constitutional principles has to take into consideration a changing political reality.

Drafts of acts amending the Constitution of the Republic of Poland

What is emphasized in legal doctrine is a necessity of an amendment to the constitution in the form which would contain the regulation of the relation of the Republic of Poland with the European Union, a new definition of

²¹ The problem of the president participating in EU politics has been a subject of the dispute between the President and the Council of Ministers. The dispute concerned a question of which of the state authorities (the President or the Council of Ministers) is entitled to represent the Republic of Poland during sittings of the European Council in order to present the state's standpoints there. The constitutional regulations concerning foreign policy constituted a basis for the deliberations of the Constitutional Tribunal. The Tribunal did not notice that apart from domestic and foreign policies there is also EU policy which differs from these two classic forms of governmental activities. Therefore, the settlement of this dispute on the basis of the constitution to which the European Union is an alien institution could not bring an expected result. The Tribunal based its decision on the order of cooperation between the Council of Ministers and the Prime Minister, and the President. Moreover, in the opinion of the Constitutional Tribunal the president as Poland's highest representative may, pursuant to Article 126.1 of the Constitution, take a decision about his participation in a particular sitting of the European Council if in his opinion it is necessary to execute his duties defined in Article 126.2 of the Constitution. Notwithstanding this, according to Article 146.1, 146.2 and 146.4.9 of the Constitution the Council of Ministers determines a standpoint of the Republic of Poland for a sitting of the European Council, while the Prime Minister represents the Council of Ministers during a sitting of the European Council and presents the approved standpoint. In matters related to the execution of his tasks defined in Article 126.2 of the Constitution the President has a right to express his opinion concerning the standpoint adopted by the Council of Ministers. See a decision of the Constitutional Tribunal of 20 May 2009, case number Kpt 02/08.

²² This problem has also been noticed by the Constitutional Tribunal. In its opinion the development of the European Union in many cases requires a new approach to legal issues and institutions which, in many years' tradition (sometimes even many centuries' tradition), have been established, enriched by judicial decisions and doctrine, and which have become deeply rooted in the consciousness of generations of lawyers. The need to redefine some existing and so far unchanged institutions and concepts has arisen. Its source is an European integration which may sometimes bring a conflict between a usual interpretation of constitutional regulations and a need for an effective reaction on the forum of the European Union which would be in compliance with constitutional principles. See a decision of the Constitutional Tribunal of 11 May 2005, case number K 18/04.

the essence of sovereignty of a Polish state. In addition, there is also a need to define the competence of public authorities in relation to European issues in particular the participation of organs representing the nation in determining and executing EU policy. Postulates of legal doctrine to regulate problems concerning Poland's membership of the European Union have been reflected in drafts of an act amending the Constitution.

Two drafts which address the above-mentioned issues were submitted to the Sejm during its the sixth term. They plan to add additional chapter Xa entitled "The Republic of Poland's Membership of the European Union" or "Delegation of Competence to an International Organization or an International Organ" to the Constitution of 2 April 1997. These two drafts refer to such issues as a procedure of ratifying agreements of accession, ratifying agreements changing the EU, Poland's secession from the European Union or competences of state authorities in EU issues.

The draft of the President of the Republic of Poland, Bronisław Komorowski²³, addresses the largest number of issues related the Poland's membership of the European Union. First, it looks to the future and prepares the Polish constitution for joining the eurozone. Second, it regulates the right to elect and the right to be elected to the European Parliament and gives EU citizens a right to participate in local elections. Third, it regulates a procedure of passing statutes which implement EU laws.

Nevertheless, the most important proposal submitted by the President is Article 227a of the draft which states that the Republic of Poland is a member of the European Union which respects sovereignty and national identity of its member states, observes principles of subsidiarity, democracy, a state ruled by law, respect for inborn and inalienable human dignity, freedom and equality as well as ensures the protection of human freedoms and rights comparable to the protection of such freedom and rights in the constitution. According to the draftsman this provision is to define axiological foundations of Poland's membership of the European Union. A justification of the draft reveals that this provision fulfills three functions. The first one is that it constitutes a constitutional basis for our membership of the EU. The second defines the objectives of Polish EU policy. Polish EU policy has to reflect the values mentioned in Article 227a. The last function of the drafted provision is that it has to determine a "meaning" and "quality" of our membership of the EU. As long as the EU is an organization which respects the values mentioned in Article 227a of the draft, Poland may be its member. Otherwise, the state authorities will have to secede from the European Union in order to alleviate the condition of non-compliance with the Constitution of the Republic of Poland. Poland does not have a constitutional

²³ The Sejm printed matter no. 3598 of 12.11.2010.

obligation, as the justification of the draft states, to exercise EU law which is contrary to the values protected by the analyzed provision.

The presidential draft of the act amending the constitution regulates powers of state authorities in respect of EU issues. It delegates all EU policy to be dealt with by the Council of Ministers whereas the participation of the nation's representative organs that is the Sejm, the Senate and the President is little. Article 227h of the draft states that the Council of Minister conducts Polish EU policy whereas the Sejm and Senate have competences given to national parliaments in treaties being the European Union's base in the scope and forms defined in these treaties. The President is only an organ cooperating with the Prime Minister and a minister in charge of EU policy on the basis determined in the act (Article 227h.3 in relation to Article 227h.4).

The problem of Poland's membership of the European Union is viewed differently in a draft submitted to the Sejm by a group of deputies. First and foremost, Poland may not be a member of the European Union if the system or activities of the Union cannot be reconciled with exercising constitutional principles and objectives of the Republic of Poland. Poland may not be a member of the Union if it closes the way to secession. The decision about Poland's accession to the European Union requires an approval expressed in an statute passed in an ordinary procedure (Article 227b.2). An ordinary procedure is a statute passed in the Sejm and the Senate by a simple majority of votes. In the opinion of the draftsman such a majority is required to secure the state against a political minority blocking the majority of the nation which wants to secede from the European Union.

The parliamentary draft regulates mutual relations between the Council of Ministers, the President and Parliament in EU matters quite differently. First, it ensures a bigger influence of organs elected by the nation on EU politics. Thus, the Sejm expresses its approval of appointing a person to be in charge of a certain function in the EU. Second, according to the draft, the statute is to define rules of cooperation between the Council of Ministers and the Sejm and Senate in matters related to Poland's membership of an international organization to which the Republic of Poland has delegated competence of the state authorities in some matters. Third, the statute has to define matters in relation to which a decision about Poland's standpoint concerning a draft of an act of an international organization is made, on the request of the Council of Ministers, by the President of the Republic of Poland upon the approval expressed in the act, as well as types of matters in relation to which such a decision is taken by the Council of Ministers upon the approval of the Sejm, or the Sejm and the Senate. A failure to take a decision following this procedure will result in a representative of the Republic of Poland supporting a rejection of the draft of an act in a given issue.

The Sejm's Constitutional Commission of the current term (the sixth term) has been working on the amendment to the Constitution of the Republic of Poland which will regulate EU problems. It appears that upcoming elections to Parliament will interrupt the work on a "European amendment" to the Polish Constitution. A new parliament will have to face these problems and pass a European chapter. It would be unthinkable for a member state of the EU to have the constitution to which the European Union is a completely alien institution.

Conclusions

To summarise, it should be stated that firstly, political changes influence the contents of constitution to a large extent. Secondly, political changes may lead to an amendment to the constitution, passing a new constitution or the reinterpretation of constitutional provisions. Thirdly, the process of the reinterpretation of Polish constitutions within the years 1989–1997 was guided by values of democratic constitutionalism and standard human rights determined by judicial decisions of the European Court of Human Rights. Fourthly, the process of the reinterpretation of the Polish Constitution of 2 April 1997 is a consequence of Poland's membership of the European Union. A changing political context has influenced substantially the way in which constitutional provisions are applied and interpreted. Fifthly, Poland's membership of the EU raises a need of an amendment to the Constitution of 2 April 1997.

Streszczenie

Konstytucjonalizacja zmian politycznych w Polsce w latach 1989–2011

Słowa kluczowe: Konstytucja, Okrągły Stół, nowelizacja.

Mówi się, że Konstytucja stanowi rodzaj umowy społecznej między elitami rządzącymi a rządzonymi, określa granice władzy państwowej i zabezpiecza podstawowe prawa człowieka. Umowa ta jest również manifestem politycznym – wyraża wolę narodu, a wola ta jest przedmiotem suwerennej władzy. Konstytucja gwarantuje prawa i wolności obywateli, jak również zapewnia instrumenty realizacji tych praw.

Konstytucja może zawierać tzw. przepisy niezmiennicze, wyłączone z procesu zmian w celu zapewnienia jej stałości, jednak nie jest odporna na przemiany polityczne i społeczne w państwie. To właśnie te zmiany przyczyniają

się do jej nowelizacji. Może się zdarzyć, że poprawki do Konstytucji uchwalone przez odpowiednie organy nie nadszają za tempem zmian politycznych. Wówczas zachodzi niezgodność pomiędzy rzeczywistym systemem rządów a systemem konstytucyjnym.

W niniejszym artykule mam zamiar odpowiedzieć na pytanie, jak zmiany polityczne w okresie transformacji politycznej wpłynęły na zawartość polskiej Konstytucji. Skupię się na dwóch zjawiskach istotnych dla systemu Rzeczypospolitej Polskiej – demokratyzacji życia politycznego i uczestnictwie Polski w Unii Europejskiej. Niektóre omówione w tej pracy aspekty nie mają charakteru aksjologicznego, ale diagnostyczny.