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New or Just Amended? On the Legality of the "Major Change" to the Constitution of the Republic of Poland

Nowa czy tylko nowelizowana? O legalności „dużej zmiany" Konstytucji Rzeczypospolitej

ABSTRACT

The article has a scientific and research dimension and addresses an important problem related to the most fundamental legal act of the Polish legal system, i.e. the Constitution of the Republic of Poland of 1997. The problem concerns the decision whether it is legally permissible and lawful in the light of this Constitution to amend it as a whole, i.e. adopt a new constitution with the simultaneous repeal (derogation) of the current one, or on the contrary: the Constitution of 1997 can only be amended (partially amended), but as a normative act *de lege lata* it is "unrepealable". Although a number of publications have tackled the issues of the process of adopting and amending the constitution of Poland and other states in the scientific literature, an original position on this subject has recently been presented. According to Professor Janusz Trzciński, the current constitution rules out the admissibility of its overall change, and for such a process, it would be necessary to amend it in advance, clearly providing for (introducing) the possibility of such a comprehensive modification. The author of this article puts forward an opposite thesis: the Constitution of the Republic of Poland of 1997 is not an immutable act, and its Article 235 does not preclude its application for the procedure of adopting a new constitution, combined with the repeal of the binding force of the existing constitution. The novelty of the research results lies not so much in the thesis itself (in Polish science such a view dominates), but rather in the argumentation behind it, covering not only dogmatic-legal aspects, but also historical and comparative ones. This means a certain new cognitive value in the

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sphere of science, which also has a potential application value, i.e. it can be taken into account in the event of a possible legislative work in the Polish Parliament aimed at adopting a new constitution.

Keywords: constitution; amendment to the constitution; legality; referendum

INTRODUCTION

The aim of the article is to analyze the problem of legal admissibility of a comprehensive amendment to the Constitution of the Republic of Poland of 1997.[1] The main thesis of the article is the statement that Article 235 of the 1997 Constitution does not preclude its application for the procedure of amending and adopting a new constitution, while repealing the binding force of the existing constitution. The study provides a synthetic overview of Professor Wojciech Orłowski's statements on this issue.[2] Then, the course of constitutional work in the years 1994–1997 was outlined to determine whether it was really the intention of the authors of the 1997 Constitution to make this act "unchangeable". The author of this paper also presents and thoroughly analyzes the original view of Professor Janusz Trzciński, according to whom the regulation contained in Article 235 of the current Constitution of the Republic of Poland (Chapter XI "Amendment of the Constitution") cannot be applied to the adoption of a new constitution and at the same time to repeal the existing one, but only to partial amendments to the current constitution. Further on, synthetic comparative comments on the Polish constitutional tradition and the regulations in force in the constitutions of some European Union states are presented. The statutory regulation of the constitutional referendum was also presented, which could only seemingly show the validity of the concept of inadmissibility of a "major change" to the 1997 Constitution. The article closes with legal conclusions and recommendations for possible future legislative work on amending the 1997 Constitution.

The article uses three basic research methods: the legal dogmatic method, used in relation to the 1997 Constitution and the Act of 14 March 2003 on the national referendum;[3] the legal historical method, concerning the course of constitutional work in the Constitutional Commission of the National Assembly, taking into ac-

[1] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, no. 78, item 483, as amended). English translation of the Constitution at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.12.2022).

[2] This is due to the fact that this article was prepared on the basis of the author's paper delivered at the conference devoted to the memory of Professor Wojciech Orłowski entitled "Contemporary challenges of parliamentarism – theory and practice", UMCS, Lublin, 10 June 2021.

[3] Cconsolidated text, Journal of Laws 2020, item 851.

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count the solution contained in the Constitution of the Republic of Poland of 1921;[4] and the comparative legal method, demonstrating how the problem of the admissibility of a comprehensive amendment to the constitution in the light of several currently applicable regulations has been regulated in the constitutions of selected EU states. The main subject-matter of research are the views of scholars in the field and legal regulations mainly forming part of Polish constitutional law. There are no statements of the judiciary in this respect, in particular of the Constitutional Tribunal, because no constitutional change has been covered by its case law so far.

PROFESSOR WOJCIECH ORŁOWSKI ON THE AMENDMENT OF THE CONSTITUTION

Since 2015, there has been a process of political changes in Poland, carried out by a coalition of political groups that took power in parliament and government after the parliamentary elections won in the autumn of 2015 under the slogan of "good change". Without going into reviewing individual political achievements, visible especially in the area of the judiciary (which politicians willingly do, even in debates on city streets), it should be emphasized that there has been no formal change in the 1997 Constitution. On the contrary, the social campaign "Let us talk about the Constitution" initiated by the President, which was held in 2017–2018 and aimed at possibly initiating the procedure of amending the current law or adopting a new constitution, depending on the result of the referendum on this issue, was effectively blocked in July 2018.[5] On the other hand, the deputies' and presidential initiatives to amend the Polish Constitution,[6] had a contextual and limited dimension and did not go beyond the phase of first reading and are not proceeded at all in the parliament.[7] Therefore, they will not be analyzed in this study.

As it is known, the great interest of the late Professor Orłowski was parliamentary law in the broad sense, including the systemic issues of bicameral parliament,[8]

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[4] Act of 17 March 1921 – Constitution of the Republic of Poland (Journal of Laws 1921, no. 44, item 267, as amended), hereinafter: the March Constitution.

[5] It was submitted to the Senate on 20 July 2018. The draft decision of the President of the Republic of Poland to convene a nationwide referendum was disapproved by the Senate on 25 July 2018.

[6] Cf. Druk nr 337, Poselski projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej, 6.4.2020, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?id=DED36818BF-3F27E0C125854B0031EFCD (access: 10.12.2022); Druk nr 456, Przedstawiony przez Prezydenta Rzeczypospolitej Polskiej projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej, 6.7.2020, https://www.sejm.gov.pl/Sejm9.nsf/PrzebiegProc.xsp?nr=456 (access: 10.12.2022).

[7] See *ibidem*.

[8] Cf. W. Orłowski, *Senat Trzeciej Rzeczypospolitej. Geneza instytucji*, Zamość 2000; idem, *Senat Rzeczypospolitej Polskiej w latach 1989–1991*, Warszawa 2009.

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the legislative process[9] and the issue of amending the constitution.[10] In the context of the subject of this article, it is worth recalling some important Professor's thoughts concerning the latter issue.

Professor Orłowski was not convinced of the timeless perfection of the 1997 Constitution, and among other things he pointed to the paradox concerning the role of the Constitutional Tribunal, established to protect the constitutionality of the law. The Tribunal, which itself has created a catalogue of "principles of decent legislation" through its practice in dealing with certain cases (protracted preventive review of the constitutionality of laws, postponement of derogations) contributes to the emergence of a state of "legal uncertainty".[11] This diagnosis was followed by a justified demand to restore the category of presidential decrees with the force of law.[12]

The Professor also emphasized that the lack of regulations on Polish membership in the EU and European integration contained directly in the 1997 Constitution means that they are supplemented by the interpretation of the provisions of the Fundamental Law by the jurisprudence of the Constitutional Tribunal. "Numerous judgments with the accompanying interpretation of the provisions of the constitution can be treated as a development and clarification of its provisions", which he documented in the case law of the Constitutional Tribunal concerning as many as 15 enumerated aspects of the process of Poland's accession to the EU.[13] That is why he put forward two postulates: supplementing the current Constitution by regulating, even in the preamble, the "axiology of Polish membership in the EU" and formulating the authorization to adopt a separate "European" constitutional law.[14]

Of course, the Professor pointed to the inadmissibility of the adoption of a constitutional law in the current legal status, without changes in Chapter III of the Constitution. However, by applying the requirement of a qualified majority of two-thirds in the Senate for constitutional acts (as provided for in Article 90, not

[9] Cf., i.a., newer studies: idem, *O potrzebie optymalizacji procesu ustawodawczego w Polsce*, "Studia Iuridica Lublinensia" 2014, vol. 22, pp. 479–495; idem, *Stare i nowe problemy procesu ustawodawczego*, [in:] *Konstytucja w państwie demokratycznym*, eds. S. Patyra, M. Sadowski, K. Urbaniak, Poznań 2017, pp. 163–184.

[10] Cf. idem, *Zmiany konstytucji związane z członkostwem w Unii Europejskiej*, Kraków–Rzeszów–Zamość 2011; idem, *Refleksje w sprawie trybu zmiany Konstytucji RP z 2 kwietnia 1997 r.*, [in:] *Potentia non est nisi da bonum. Księga Jubileuszowa dedykowana Profesorowi Zbigniewowi Witkowskiemu*, eds. M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka, Toruń 2018, pp. 579–590; W. Orłowski, W. Skrzydło, *O potrzebie i możliwościach stworzenia „rozdziału europejskiego" w Konstytucji RP z 1997 r.*, [in:] *Konstytucjonalizm polski. Refleksje z okazji Jubileuszu 70-lecia Urodzin i 45-lecia pracy naukowej Profesora Andrzeja Szmyta*, eds. A. Gajda, K. Grajewski, A. Rytel-Warzocha, P. Uziębło, M.M. Wiszowaty, Gdańsk 2020, pp. 554–565.

[11] W. Orłowski, *O potrzebie optymalizacji…*, pp. 486–487.

[12] *Ibidem*, pp. 493–495.

[13] W. Orłowski, W. Skrzydło, *op. cit.*, pp. 557–558.

[14] *Ibidem*, pp. 560–563.

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Article 235), "a mechanism would have been created to 'break the provisions of the Constitution', an institution known to Polish political practice during the communist period, when the adoption of a constitutional act allowed for shortening the term of office of the Sejm".

Introducing constitutional laws into the system of sources of law would not be an end in itself: "It is also worth considering the possible options offered by the institution of constitutional laws in terms of ending the ongoing constitutional crisis in our country". The Professor expressed the hope that "sooner or later, in the interest of the whole community, a political compromise must be concluded to end the current crisis of the state institutions. The degree of mutual distrust between the current ruling forces and the opposition is so great, he wrote, that most of them will not trust the durability of new statutory regulations. This makes it possible to ask whether the instrument of compromise could be the adoption of constitutional laws not only in European matters, but also in a case concerning the system of such institutions as the Tribunal of State, the Constitutional Tribunal, the Supreme Court or the National Council of the Judiciary? All the more so because in the history of Polish constitutionalism there were numerous periods of functioning of the constitution in the material sense". He stressed that a similar "concept of using constitutional laws to overcome the constitutional crisis and the crisis of confidence in political parties was present in many states", with the example of Italy and Austria.[15]

In another text, Professor Orłowski posed the question: "How and what elements of content is to be protected by the more arduous mode of amending the constitution?", emphasizing that "currently the most effective way to modify the content of the constitution are judgments of the Constitutional Tribunal", which was initiated by its rulings on the Senate in 1993 and 1997.[16] In addition, "the actual amendment of the constitution often occurs as a result of the adoption of statutory regulations", and "the way in which the legislature is bound by the provisions of our Fundamental Law does not seem to be too restrictive". In political practice, "we often encounter the view that 'the Fundamental Law does not prohibit' certain activities", and the Constitutional Tribunal itself in its "law-making judgments adopts the term 'is not unconstitutional'," as evidenced by numerous examples.[17]

With regard to the possibility of amending the Fundamental Law, Professor Orłowski stressed the widespread belief that Article 235 of the 1997 Constitution "sufficiently safeguards the permanence of the regulation of our Constitution" and that "at the moment the adoption of a new constitution is also unrealistic legally

[15] *Ibidem*, pp. 563–565.
[16] W. Orłowski, *Refleksje w sprawie trybu zmiany*..., p. 585.
[17] *Ibidem*, p. 586.

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and politically".[18] At the same time, he posed the question: "Does the procedure of amending the constitution fully protect against changing the constitution with 'wit and trick'?".[19]

The answer was negative: "In my opinion, unfortunately not". Although "it may seem doubtful that a special constitutional law on the procedure for the preparation and adoption of a new constitution may be passed", the more arduous procedure of change (with an optional referendum) concerns only the provisions of Chapters I, II and XII, and not Chapter XIII "Transitional and final provisions" of the 1997 Constitution. *Ergo*: if it were possible, similarly to the work on the previous constitutional law, "to consider the provisions of the 1997 Constitution as 'temporary', the appropriate place for them would be the 'final provisions'. Thus, it is possible to pass such changes only by a bill adopted by an appropriate majority in the Sejm and the Senate, without the need to hold a constitutional referendum". Hence the next question: "Do the current regulations allow for the possibility of passing constitutional laws? It seems not, although it should be recalled that until 1992 all scholars of constitutional law agreed that a change to the constitution was possible only as a result of the adoption of the 'law amending the constitution'."

According to Professor Orłowski, however, new circumstances have emerged that better secure the current Fundamental Law: "The Constitution has gained the social acceptance from a large part of society, although its adoption and approval in a referendum [in 1997] was associated with a lack of support from many voters".[20] Referring to the fact that in the work initiated in 2017 by President Andrzej Duda on the amendment of the constitution, the majority of respondents in the CBOS (Public Opinion Research Center) survey of April 2017 were in favour only of a change in the current fundamental law, and not of adopting a new one, an important conclusion is reached: "The current constitution has begun to perform a social function, without which the Fundamental Law remains only a legal act 'with ann arduous procedure for change' and which can be replaced by another, as long as there is a coalition of the majority of political forces necessary to amend it. Paradoxically, the constitutional crisis that followed the year 2015 had a positive impact on making the whole society aware of the importance of the constitution and the principle of the separation of powers for the implementation of human and civil rights and freedoms".[21]

[18] *Ibidem*, p. 588.

[19] *Ibidem*, p. 589. The author refers here to the previously quoted (on p. 579) statement by J. Piłsudski from 1934 that the adoption of the constitution by outwitting and tricking others is not healthy.

[20] *Ibidem*, p. 589.

[21] *Ibidem*, p. 590.

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LOOKING BACK – CONSTITUTIONAL WORK

In this context, it should be noted that quite an original and radical view of Professor Trzciński appeared recently in our scientific literature. Namely, that Article 235 of the 1997 Constitution does not allow its application for the adoption of a new constitution and the repeal of the current one, but only constitutes the legal basis for the amendment of the Fundamental Law of 1997.[22]

To verify this thesis, it would be necessary, first of all, to examine the constitutional work in order to answer the basic question, whether this was really the intention of the authors of the 1997 Constitution. If this hypothesis, and at the same time Professor Trzciński's view, is confirmed, a possible attempt to replace the current constitution with a new one, theoretically speaking, would require a prior amendment to the regulation of the procedure provided for in Article 235.

Without repeating the findings made elsewhere,[23] let us recall in a nutshell that in the work of the Constitutional Committee of the National Assembly on the uniform draft of the constitution, initially (January 1995) in the procedure for amending the constitution, three types of constitution were distinguished: first, "the change of the entire constitution"; secondly, the "amendment of the provisions" of Chapter I ("Foundations of the system of the Republic of Poland"), Chapter II ("Freedoms, rights and duties of man and citizen") and Chapter XI ("Amendment of the Constitution"); thirdly, "other changes".[24]

Although in a later discussion (May 1996) it was recognized that a comprehensive amendment of the constitution required a separate procedure, during the meeting of the Constitutional Committee of the National Assembly the phrase "change of the entire Constitution" was questioned and eliminated from the draft.[25]

Finally (June 1996) at the meeting of the Constitutional Committee of the National Assembly, the formula of the "Act amending the Constitution"[26] was adopted, and at this point in the constitutional work the phrase about "the change of the entire Constitution", understood as "adoption of a Constitution", was finally eliminated, then replaced by a collective term for the instrument of amendment, in the form of an "Act on amending the Constitution".

It should be emphasized, however, that I have not found any statements from members of the Constitutional Committee of the National Assembly or experts participating in its work, which would indicate that the procedure for its amendment

[22] Cf. J. Trzciński, *Jak uchwalić nową Konstytucję?*, [in:] *Potentia non est nisi da bonum…*, pp. 783–788.

[23] In my article prepared for publication: *Problem dopuszczalności całościowej zmiany konstytucji w toku polskich prac konstytucyjnych 1994–1997*.

[24] Cf. "Biuletyn KKZN", no. XI, pp. 375–376.

[25] Cf. "Biuletyn KKZN", no. XXXV, p. 32, 34, 44.

[26] Cf. "Biuletyn KKZN", no. XXXVI, pp. 43, 45–46.

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proposed in the new constitution would concern only the amendment of its provisions, excluding the adoption (in the same or another way) of a new fundamental law in its place, combined with the repeal of the existing one.

Let us also recall that in the finally adopted text of the 1997 Constitution, Chapter XII "Amendment of the Constitution" was included, containing Article 235 with the following wording: "1. A bill amending the Constitution may be submitted by at least 1/5 of the statutory number of deputies, the Senate or the President of the Republic. 2. The Constitution shall be amended by means of a bill adopted in the same wording by the Sejm and then within a period not exceeding 60 days by the Senate. 3. The first reading of a bill amending the Constitution may take place no earlier than on the thirtieth day from the date of submission of the bill to the Sejm. 4. An act amending the Constitution shall be adopted by the Sejm by a majority of at least 2/3 of votes in the presence of at least half of the statutory number of deputies and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of senators. 5. The adoption by the Sejm of a law amending the provisions of Chapters I, II or XII of the Constitution may take place not earlier than on the sixtieth day after the first reading of the bill. 6. If the Act amending the Constitution concerns the provisions of Chapter I, II or XII, the entities referred to in paragraph 1 may request, within 45 days from the date of adoption of the Act by the Senate, a confirmation referendum. These entities shall submit a request in this matter to the Marshal of the Sejm, who shall immediately order a referendum to be held within 60 days from the date of submission of the motion. An amendment to the Constitution shall be adopted if a majority of voters are in favour of the amendment. 7. At the end of the procedure referred to in paragraphs 4 and 6, the Marshal of the Sejm shall submit the adopted act to the President of the Republic for signature. The President of the Republic shall sign the Act within 21 days from the date of its presentation and shall order its publication in the Journal of Laws of the Republic of Poland".

DOES THE 1997 CONSTITUTION PRECLUDE THE ADMISSIBILITY OF ITS OVERALL AMENDMENT?

Professor Trzciński[27] posed the question whether "under Article 235 of the Constitution of the Republic of Poland (…) a new constitution could also be enacted", which, as he notes, is an issue addressed in the literature.[28] He replies:

[27] Importantly, in the years 1993–2001 (that is also during the constitutional work) he was a judge and vice-president of the Cnstitutional Tribunal. See Janusz Trzciński, https://pl.wikipedia.org/wiki/Janusz_Trzciński (access: 10.12.2022).

[28] With reference to L. Garlicki, *Komentarz do art. 235*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, vol. 2, Warszawa 2001, pp. 66–68 and the literature cited therein.

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"Article 235 of the Constitution of the Republic of Poland, describing the procedure for amending the constitution, is not suitable for the preparation and adoption of a new constitution, but only for amendments".[29]

The aforementioned provision results in two modes of change (amendment) of the constitution depending on the matter regulated: the qualified mode for Chapters I, II and XII and ordinary one for other matters. Professor Trzciński "reads" Article 235 in such a way that "it applies only to the amendment of the Constitution", while "partial amendments to the Constitution, which in total would have the effect of shaping a new constitution, would be unacceptable", even if the qualified mode were applied to them. "This would be a constitutionally dubious solution" since the Constitution provides for "appropriate modes of amendment for the relevant chapters". And this means, according to Professor Trzciński, that "an amendment to the Constitution cannot mean the adoption of a new constitution".[30]

In addition, "it is unacceptable from the point of view of Article 235" to claim that the new constitution in its entirety could be adopted by means of Article 235, "because it would limit the constitution-maker as to the constitutional structure" and considers it "constitutionally doubtful" to adopt a new constitution only in a rigorous manner. Both of these options "are not confirmed by the analysis of Article 235" and "in the absence of a ban on the adoption of a new constitution under Article 235 of the Constitution, it is not possible to conclude that such a possibility may be adopted".[31] The very definition contained in Article 235: "the Act amending the Constitution" is of great importance; if (out of necessity) the newly adopted constitution were to be so titled, "the name 'Constitution' to designate the Fundamental Law of the State would disappear from the legal order".[32]

Another argument refers to Polish constitutional practice, in which the modes of drafting and adopting new constitutions (which most often took place "in emergency situations") differed from the amendments to the preceding constitutions. According to Professor Trzciński, "one thing beyond doubt is that it has never been the case that the procedure for adopting a new constitution was provided for in the previous constitution and it has never been so in Polish constitutional practice that the new constitution was adopted in the manner set out for the amendment of the constitution".[33]

[29] J. Trzciński, *op. cit.*, p. 783.

[30] *Ibidem*, p. 784.

[31] *Ibidem*.

[32] *Ibidem*, pp. 784–785.

[33] *Ibidem*, p. 785. This sentence is in fact doubly wrong – it is contradicted by the norm of the March Constitution and its application to the adoption of the April Constitution, which will be discussed later.

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This is illustrated by the example of the regulation and constitutional work on the Constitution in force in Poland today,[34] supplemented by an indication of the constitutions of several other states. And so, the Constitution of Bulgaria regulates "Amendments and additions to the Constitution. Adoption of a new Constitution"; the Spanish Constitution differentiates between amendments and partial reforms and a "complete reform of the Constitution"; the Constitution of Georgia distinguishes the total and partial amendment of the constitution; finally, the Constitution of Ireland, which allows for differentiated amendments, "precludes the adoption of a new constitution in accordance with the procedure laid down for its amendment".[35]

Next, Professor Trzciński leans towards the view (following the reasoning of L. Garlicki) that the adoption of a new constitution in a rigorous manner would be possible, but under two conditions: if in such a situation the referendum were obligatory, and not only optional, and secondly, if such a possibility were "clearly provided for in the constitution itself", as is the case, e.g., in Spain.[36]

The application of the method of a special procedure for the adoption of the Constitution, provided for in the Constitutional Act of 23 April 1992 on the procedure for the preparation and adoption of the Constitution of the Republic of Poland,[37] is impossible, given the elimination of this category from the catalogue of sources of law by the new constitution. And if so, it is only possible to "pass a law amending the Constitution pursuant to Article 235 of the Constitution, which becomes an integral part of the constitution".

As stipulated by Professor Trzciński, if we accept this reasoning, "there is only one way to solve the issue of the adoption of a new constitution, namely the amendment of Chapter XII (Article 235) of the Constitution". Such an amendment, following the example of Spain, would be limited to Article 235 (6), in which "it would be necessary to take into account, in addition to the amendment of the constitution, also the adoption of a new constitution with the addition of a mandatory approval referendum", which would constitute a "minimum plan".[38]

However, Professor Trzciński recommends another way of regulation, more adequate to the rank of the constitution and our political practice, namely adding to Article 235 "further paragraphs describing the adoption of the constitution" or "adding another article to Chapter XII fulfilling the same role", using the model solution of the Constitutional Act of 1992. In any variant, however, it would be necessary to change the title of Chapter XII, e.g. in the form: "Amendment of the Constitution. Adoption of a new Constitution".

[34] *Ibidem*, pp. 785–786.
[35] *Ibidem*, p. 786.
[36] *Ibidem*, p.787.
[37] Journal of Laws 1992, no. 67, item 336, as amended.
[38] *Ibidem*, pp. 787–788.

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In addition, he proposes that the National Assembly or another representative body elected by universal suffrage be involved in the constitutional process and the obligatory approval referendum be held. On the other hand, in order to meet the demand for "legitimisation of the constitution as a form of social contract", it would also be necessary to ensure the right of constitutional initiative of a "sufficiently large" group of citizens.[39]

ANALYSIS OF THE CONCEPT OF THE "IMMUTABILITY" OF THE CONSTITUTION

Responding to the above argumentation, the following issue should first be raised. If Article 235 of the 1997 Constitution allegedly "is not suitable for the preparation and adoption of a new constitution, but only for [its] amendment" – in the opinion of Professor Trzciński, did the creators of this constitution consciously give it, as a whole, the value of relative immutability?

The cited position contains a *contradictio in adiecto*, insofar as it recognizes that the 1997 Constitution allows for a change using the rigorous mode in the provisions of its first two chapters (I and II), containing, i.a., basic constitutional principles and the regulation of human rights, which may potentially even constitute a radical change (revision) of these regulations. Therefore, if no partial regulation of the 1997 Constitution is "unchangeable" (in the above sense) and is not excluded from the possibility of its amendment or even revision, why should such a value be granted to the entire constitutional act? Is the rule of *pars pro toto*, but *a contrario*, applicable here? And if so, if such a conclusion does not follow directly from the wording of Article 235 of the 1997 Constitution, on the basis of what kind of legal inference would it be derived from this provision?

One cannot agree with the argument that the possible adoption of a new constitution "by means of Article 235" ("in its entirety") would limit the constitution-maker as to the "constitutional structure" – after all, neither the structure (systematics) nor the content of the new constitution is subject to any restrictions on the basis of the current constitution. Here we have another internal contradiction: if Article 235 of the 1997 Constitution does not assume its application to the procedure for adopting a new constitution, it cannot determine the "structure" of this new fundamental law.

I also do not accept the argument that "in the absence of a ban on the adoption of a new constitution under Article 235 of the Constitution, it is impossible to draw a conclusion about such a possibility". In my opinion, the opposite is true! And not only on the basis of an extralegal rule: What is not forbidden is allowed, but also respecting the generally recognized methods of legal inference. The aforementioned

[39] *Ibidem*, p. 788.

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"prohibition" of the adoption of a new constitution, if it could be interpreted from Article 235 of the 1997 Constitution – while respecting the principles of logical and correct reasoning – would be so unusual and unprecedented in democratic constitutionalism that it should be established *expressis verbis*! And since it is not established, it means that it does not exist normatively and in fact, but only in scientific speculations.

In my opinion, Professor Trzciński attaches too much importance to the wording of Article 235: "the Act amending the Constitution". It does not follow from this formulation that such a literal wording must bear the title of any amendment to the constitution, *ergo* with its postulated application also to the newly adopted "large" constitution, the name "constitution" "would disappear from the legal order". Somewhat humorously, it can be said that giving the act repealing the old constitution a title, indicating not a "change", but a "replacement" of the constitution – would fully save the situation. Not to mention the fact that "change" in legal and colloquial language can mean just that: not only an improvement in the existing state of affairs, but its completely new form.[40]

On the other hand, I do not deny the postulate of restoring the participation of the National Assembly in the constitutional procedure and I strongly support Professor Trzciński's postulates regarding greater empowerment of citizens in the constitutional process, both in terms of the right of constitutional initiative and the obligatory referendum approving the new constitution.

I maintain the view that the 1997 Constitution – drafted, i.a., on the basis of the preliminary civic project of Solidarity in 1994 and approved in a national referendum – completely irrationally ruled out the possibility of citizens initiating constitutional changes directly and unjustly depreciated the importance of the institution of a referendum, including a constitutional referendum.[41]

COMPARATIVE REMARKS

I consider the argument referring to the Polish political practice to be inaccurate: "It has never been the case that the procedure for adopting a new constitution was provided for in the previous constitution and it has never been so in Polish constitutional practice that the new constitution was adopted in the manner provided for the amendment of the constitution".

[40] For example, "change of the will", "change of the creditor", or – in terms of political slogans – "good change".

[41] D. Dudek, *Referendum – instrument czy iluzja władzy polskiego suwerena?*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, vol. 80(1), pp. 169–185.

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After all, the March Constitution in Article 125 stated: "An amendment to the Constitution may be adopted only in the presence of at least half of the statutory number of deputies, or members of the Senate, by a majority of 2/3 of the votes. A motion to amend the Constitution should be signed by at least 1/3 of the statutory number of deputies, and announced for at least 15 days. The second elected Sejm in a row on the basis of this Constitution may revise the Constitutional Act by its own resolution, adopted by a majority of 3/5 of the voters, in the presence of at least half of the statutory number of deputies. Every 25 years after the adoption of this Constitution, the Constitutional Act is to be reviewed by an ordinary majority of the Sejm and the Senate, merged for this purpose into the National Assembly".

Let us add that although two further methods were reserved for the "revision" of this constitution, it was the first mode that was used in the years 1934–1935 to adopt a completely new April Constitution,[42] which, however, was not without violations of constitutional and statutory requirements.[43]

Therefore, if Professor Trzciński's view were to be considered correct, it would mean not only a strongly "masked" intention of the authors of the 1997 Constitution to hinder the amendment procedure, but even the petrification of this regulation,[44] which is a phenomenon unparalleled in contemporary constitutionalism. Although the immanent feature of any constitution is the assumption of its relative permanence (*constans*), which is expressed in the more arduous mode of modifying its provisions, through limited amendments or changes of a thorough nature, i.e. revision of the basic principles of the constitution, only occasionally the constitutions declare some of their most fundamental provisions completely unchanged.

For example, Article 79 (3) of the Fundamental Law of the Federal Republic of Germany of 24 May 1949 states that it would be "unacceptable" to change it, violating the division of the Union into federated states (*Länder*), the fundamental participation of the federated states in legislation or the principles expressed in Articles 1 and 20, concerning: directly applicable fundamental rights, including human dignity and the recognition of inherent and inalienable human rights, as well as the democratic and federal form of the state, the supremacy of the nation, the division and legalism of the authorities, and the right of the Germans to resist. According to Article 89 (5) of the Constitution of the Republic of France of 4 October 1958, "the republican form of government may not be the subject to constitutional amendment". Similarly, according to Article 139 of the Constitution of the Italian

[42] Constitutional Act of 23 April 1935 (Journal of Laws of the Republic of Poland 1935, no. 30, item 227).

[43] In more detail, see D. Dudek, *Prawo konstytucyjne II Rzeczypospolitej Polskiej*, [in:] *Synteza prawa polskiego 1918–1939*, eds. T. Guz, J. Głuchowski, M.R. Pałubska, Warszawa 2013.

[44] Metaphorically speaking, this constitution could appear as a constitutional "Trojan horse" left behind by a grouping legitimately associated with the communist era, the legal and moral heir of the then-ruling hegemonist communist party.

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Republic of 27 December 1947, "the republican form of government may not be subject to constitutional review".[45]

On the basis of separate research,[46] I can conclude that contemporary European constitutionalism is dominated by legal regulations that provide for either explicitly (e.g. Austria, Spain) or implicitly (e.g. France, Germany) the admissibility of adopting a new constitution in combination with the derogation of the existing fundamental law. This applies to both old (e.g. indicated above) and new political democracies (e.g. Bulgaria, Lithuania, Hungary). If, on the other hand, the constitutions differentiate the mode of their overall revision and partial amendment, which is not always the case, they usually "stiffen" the former, at the same time formulating a catalogue of certain provisions that are "unchangeable" or more difficult to "change". However, these relatively "unchangeable" norms do not prejudge the impossibility of adopting a new constitution, while respecting the existing constitutional principles.

Sporadic attempts to "freeze" a given constitution and rule out its overall amendment, unless it is the position of the scholarly opinion rather than the constitution maker (e.g. Greece, Portugal), results either from a certain traditionalism and respect for age-old fundamental laws in monarchical states (e.g. the Netherlands, Luxembourg) or from international conditions (e.g. Bosnia and Herzegovina), or finally from the shortcomings of the political system, i.e. the real lack of democracy in nominally republican states (e.g. Russia, Belarus).

It cannot be decisive that some modern constitutions of several European states make a verbal and procedural difference between the mode of change (understood as amendment) and the adoption of a new constitution. As I have already pointed out, European constitutions, even in the absence of a specific procedure, generally do not preclude the possibility of replacing them with a new constitution.

Therefore, since such a special procedure does not have to be "expressly provided for in the Constitution itself", I do not share the view that for the adoption of a new Constitution it would be necessary to amend Article 235 of the 1997 Constitution in advance, supplementing the regulation of the amendment of the Constitution with provisions directly concerning the adoption of a new Constitution, with a simultaneous modification of the title of Chapter XII, clearly indicating the "amendment of the Constitution" and the "adoption of the new Constitution".

[45] The texts of the above-mentioned constitution as cited in *Konstytucje państw Unii Europejskiej*, ed. W. Staśkiewicz, Warszawa 2011, passim.

[46] In my article prepared for publication: *Tryb zmiany konstytucji we współczesnych państwach europejskich*.

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STATUTORY REGULATION OF THE CONSTITUTIONAL REFERENDUM

To be fair, it should also be admitted that the regulation contained in the Act of 14 March 2003 on the national referendum could speak in favour of the quoted view of Professor Trzciński. It governs the rules and procedure for holding a nationwide referendum of any kind, i.e. those regulated in Article 125 and Article 90 (3) of the 1997 Constitution, but also a constitutional referendum under Article 235 (6) of the 1997 Constitution (Article 1 of the Act).

In Chapter 10, this Act regulates the "Referendum approving the amendment of the Constitution of the Republic of Poland" (Articles 76–79). In particular, the law defines quite strictly the formula of this referendum, stating that the question in the referendum begins with the words: "Are you in favor of adopting the amendment to the Constitution of the Republic of Poland of 2 April 1997, made by the Act of … (title of the law)?" (Article 78 (1) of the Act).

The quoted statutory formula may indeed raise doubts as to whether it allows at all, or on the contrary: precludes *a limine* such a form of "amendment of the constitution" that would consist in a "complete change", that is, the replacement of the existing constitution with a new one.

The fact is that the supporters of restrictive interpretation belong to a definite minority. In addition to the view of Professor Trzciński as quoted and critically discussed above, this kind of doubt was raised by P. Tuleja and B. Szczurowski, among others. Ultimately, however, these authors accept the view proposed by W. Sokolewicz that in the procedure under Article 235 of the 1997 Constitution it is permissible to carry out a "comprehensive change", i.e. the adoption of a new constitution, treated as a "maximum of fragmentary changes".[47]

Apart from the fact that laws should be interpreted in the light of compliance with the constitution, and not *vice versa*, I believe that as far as the currently applicable law is concerned the literal wording of the statutory formula of the referendum question in the constitutional referendum – in fact, does not constitute any substantive argument for the thesis of inadmissibility of the overall amendment of the constitution, using the procedure under Article 235 of the 1997 Constitution.

On the other hand, it is to be concluded that it is the statutory level where it would be possible to clarify the regulation of the constitutional referendum towards a clear indication of adoption of the new constitution as its possible subject. It would be sufficient to simply add in Article 78 (1) of the Act on the national referendum that a question in a constitutional referendum may have two variants and begin with the words, respectively: A. "Are you in favour of adopting the new Constitution of the Republic of Poland of … (date)?" – if it is enacted by the Parliament,

[47] See P. Tuleja, B. Szczurowski, *Komentarz do art. 235*, [in:] *Konstytucja RP. Komentarz*, eds. M. Safjan, L. Bosek, vol. 2, Warszawa 2016, p. 1645, 1647.

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and: B. "Are you in favour of adopting the amendment to the Constitution of the Republic of Poland of 2 April 1997, made by the Act of … (date and title of the law)?" – if the Parliament passes only an amendment to the 1997 Constitution. The novelty would apply only to option A, e.g. as an added provision of Article 78 (1) (a), while option B could correspond to the current form of the provision, marked as Article 78 (1) (b).

At the same time, I believe that the current title of Chapter 10 of the Act on the national referendum "Referendum approving the amendment of the Constitution of the Republic of Poland" – would not require modification and would remain adequate to determine both variants of the constitutional referendum, concerning both the adoption of the new and the amendment of the "old" constitution.

CONCLUSIONS

In the light of the findings and analyses made above, I consider the following conclusions to be justified:

1. Article 235 of the 1997 Constitution does not preclude its application for the procedure of passing and adopting the new Constitution, while repealing the binding force of the existing Constitution.
2. Such a thesis is supported both by historical interpretation, i.e. the course of constitutional work in Poland in the years 1992–1997 and systemic interpretation – the Constitution radically "stiffens" some of its provisions (contained in Chapters I, II and XII), requiring a qualified procedure for their possible amendment (Article 235 (5) and (6) of the 1997 Constitution), while not treating any of its provisions as "unchangeable" at all.
3. A different concept (presented by Professor Trzciński), which attaches an unprecedented value to the immutability of the constitution as a whole and is not confirmed by comparative studies, is based not so much on linguistic legal interpretation as on the "textological" approach. It has no deeper juridical or axiological justification, and in its effects it would lead to unacceptable consequences in the form of depriving the sovereign of its constitutional function, or at least of seriously weakening it.
4. For the correctness and legality of holding a referendum in the future regarding the adoption (approval) of the new constitution by the Nation with the simultaneous repeal of the existing one, it is not necessary to modify the current wording of Article 235 of the 1997 Constitution. On the other hand, it would be desirable to amend the statutory regulation on the national referendum in the direction of clearly indicating such a possible subject of decision taken *via* referendum.

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5. By anticipating and refuting possible objections of opponents in this respect, it would also be possible to adopt under Article 235 of the 1997 Constitution an act, literally entitled "Act amending the Constitution of the Republic of Poland of 2 April 1997", the content of which would include the regulation of three issues. Firstly, the procedure for work on the drafting and adoption of a new constitution and its ratification by the Nation by means of a mandatory referendum; whereas the concept of the National Assembly as constituent assembly can be revisited and the admissibility of the citizens' initiative to present a draft new constitution can be taken into account. Secondly, the repeal of the current 1997 Constitution on the date of entry into force of the new constitution. Thirdly, possibly the basic introductory provisions, including in particular *vacatio legis*, in so far as the new constitution would make significant changes in the system of public authorities.
6. Although even a partial amendment of the current Fundamental Law in the light of Article 235 of the 1997 Constitution and the politically determined experience of the practice of the Polish system of government is a very difficult process to carry out, perhaps the future will bring a chance to reach an agreement beyond the existing divisions of the political scene in terms of adopting a new fundamental law.
7. The current 1997 Constitution has certainly not lost its regulatory potential and has not become anachronistic, although it does not contain a regulation fully adequate to current Poland's domestic and international situation. However, it should be stated with equal certainty that it does not constitute a legal barrier to making a legal "big change", i.e. the adoption of a new Constitution of the Republic of Poland.

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ABSTRAKT

Artykuł ma wymiar naukowo-badawczy i dotyczy istotnego problemu wiążącego się z fundamentalnym aktem prawnym polskiego systemu prawnego – Konstytucją RP z 1997 r. Problem dotyczy rozstrzygnięcia, czy w świetle tej Konstytucji jest prawnie dopuszczalna i legalna jej całościowa zmiana, czyli uchwalenie nowej konstytucji z jednoczesnym uchyleniem (derogacją) obecnej, czy też przeciwnie – Konstytucja z 1997 r. może być wyłącznie nowelizowana (zmieniano częściowo), ale jako akt normatywny *de lege lata* jest „niederogowalna". Jakkolwiek problematyce procesu uchwalania i zmiany konstytucji polskiej i innych krajów poświęcono w literaturze naukowej szereg publikacji, niedawno przedstawiono oryginalne stanowisko w tym przedmiocie. Według Profesora Janusza Trzcińskiego obowiązująca konstytucja wyklucza dopuszczalność swej całościowej zmiany, a dla ewentualnego przeprowadzenia takiego procesu konieczne byłoby uprzednie dokonanie jej zmiany, wyraźnie przewidującej (wprowadzającej) możliwość zmiany całościowej. Autor niniejszego artykułu stawia tezę opozycyjną: Konstytucja RP z 1997 r. nie jest aktem niezmienialnym, a jej art. 235 nie wyklucza swego zastosowania dla przeprowadzenia procedury uchwalenia i przyjęcia nowej konstytucji, połączonej z uchyleniem mocy obowiązującej dotychczasowej konstytucji. Oryginalność wyników badań dotyczy nie tyle samej tezy (w nauce polskiej pogląd taki dominuje), a raczej jej argumentacji, obejmującej nie tylko aspekty dogmatycznoprawne, lecz także historyczne i porównawcze. Oznacza to pewną nową wartość poznawczą w sferze nauki, posiadającą również potencjalny walor aplikacyjny, czyli możliwą do uwzględnienia w przypadku ewentualnego podjęcia w przyszłości w parlamencie polskim prac legislacyjnych zmierzających do uchwalenia nowej konstytucji.

Słowa kluczowe: konstytucja; zmiana konstytucji; legalność; referendum