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About the Need for Constitutional Variability

O potrzebie zmienności konstytucji

ABSTRACT

Numerous scientists analyzing the functioning of the Polish legal system pay attention to the practice of systemic violation of the law, including the Constitution, by state authorities. On this occasion, they indicate the causes and circumstances of breaking the law in specific cases, but do not establish whether it is only the result of the political will of the rulers or the result of a defective shaping of the legal system. This article is an attempt to make arrangements in this respect. The author claims that the cases of reinterpretation, bending and breaking the Constitution of the Republic of Poland are caused by the discrepancy between its content and the social and political realities. The current Constitution may be amended only by applying a very difficult amendment procedure – it has only been amended twice in 25 years. Therefore, the causes of systemic violations of the rule of law should be seen in the excessively rigid procedure of its change.

Keywords: rule of law; amendment to the constitution; Constitution of the Republic of Poland

INTRODUCTION

The analysis of the scientific discourse conducted in recent years allows us to conclude that numerous legal researchers agree with the thesis that in Poland there is a constant, systemic violation of the provisions of the Constitution of the

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Republic of Poland,[1] by enacting legal acts and making decisions inconsistent with its provisions or the content of the guiding principles of the constitution. In this context, numerous legal acts are mentioned, the content of which or the manner of their adoption contradict the 1997 Constitution: the Act of 25 June 2015 on the Constitutional Tribunal,[2] the resolution on the election of judges of the Constitutional Tribunal of 25 November 2015 ineffective,[3] defective appointment of judges of the Constitutional Tribunal,[4] the activities of the National Council of the Judiciary established in April 2018, acts and regulations issued in connection with the occurrence of COVID-19, e.g. Regulation of the Council of Ministers of 31 March 2020 on the establishment of certain restrictions, orders and bans in connection with an epidemic.[5] The Constitutional Tribunal is also assessed critically, both due to the defective composition and the judicial activity conducted.[6]

RESEARCH AND RESULTS

This phenomenon has intensified in recent years in Poland, and the science of law has proposed a term dedicated to it, namely "systemic depreciation of the rule of law". Its creator, Jan Wawrzyniak, defines it as follows: "We deal with systemic violation of the rule of law, in particular when an action or omission of public au-

[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), hereinafter: the 1997 Constitution. See R. Piotrowski, *Ekspertyza w zakresie zgodności z konstytucją nowelizacji ustawy Kodeks postępowania administracyjnego (druk senacki nr 437)*, Opinie i ekspertyzy OE–348A, Warszawa 2021, https://www.senat.gov.pl/gfx/senat/pl/senatekspertyzy/5927/plik/oe-348.pdf (access: 10.3.2022)); A. Bień-Kacała, *Verfassungsdurchbrechung or Informal Constitutional Change. The Polish Experience*, "Przegląd Prawa Konstytucyjnego" 2020, no. 5, pp. 29–47; A. Barczak-Oplustil, *Naruszenia Konstytucji RP a zakres odpowiedzialności funkcjonariusza publicznego z art. 231 k.k.*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2017, no. 4, pp. 135–157.

[2] Journal of Laws 2015, item 1064. See J. Roszkiewicz, *Spór o Trybunał Konstytucyjny – geneza i istota problemu, skutki, scenariusze na przyszłość*, "Studia Iuridica" 2019, vol. 77, pp. 119–138.

[3] See M.J. Zieliński, *Teoretycznoprawne aspekty stwierdzenia przez Sejm RP braku mocy prawnej wyboru sędziów Trybunału Konstytucyjnego w 2015 r.*, "Przegląd Sądowy" 2017, no. 10, pp. 7–20.

[4] See D. Szumiło-Kulczycka, K. Kozub-Ciembroniewicz, *Konsekwencje uchybień w obsadzie TK (uwagi na tle orzeczenia w sprawie K 1/20)*, "Państwo i Prawo" 2021, no. 8, pp. 81–100.

[5] Journal of Laws 2020, item 566, as amended. See F. Morawski, *Zakaz przemieszczania się w związku z pandemią COVID-19 w świetle konstytucyjnego prawa do poruszania się*, "Przegląd Prawa Publicznego" 2020, no. 9, pp. 7–17.

[6] M. Florczak-Wątor, *Abolicja indywidualna a prawo łaski Prezydenta. Glosa do wyroku TK z dnia 17 lipca 2018 r., K 9/17*, LEX/el. 2018; J. Kędzierski, *Prawo łaski a tzw. abolicja indywidualna – rozważania pro publico bono*, "Palestra" 2016, no. 1–2, pp. 40–45; R. Piotrowski, *Nowa regulacja przerywania ciąży w świetle Konstytucji*, "Państwo i Prawo" 2021, no. 8, pp. 62–80.

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thority constitutes a violation of the binding constitutional law (in its established interpretation so far), and at the same time the authority treats this constitutional law as an instrument for an intentional and significant systemic change that is constitutionally ineffective (e.g. in the form of an act amending the constitution) and presented in the constitutional discourse as consistent (or at least not inconsistent) with the established interpretation of constitutional provisions. In the doctrine, this phenomenon has so far been described as 'a hostile takeover of the constitution', 'an interpretation hostile to the constitution' and 'statutory anti-constitutionalism'."[7]

When looking for an answer to the question about the reasons for this – undoubtedly harmful – practice, it should be determined whether the motivation for such activities is purely political or also non-political. The 1997 Constitution establishes a procedure for amending its norms, devoting a separate chapter to this issue. Even without conducting an in-depth analysis of the problem, it can be determined that during almost a quarter of a century of its validity, only two changes were made, modifying the content of Article 55 (prohibition of extradition of a Polish citizen)[8] and Article 99 (prohibition of standing in elections to the Sejm and Senate of persons sentenced to imprisonment for an intentional crime prosecuted by public indictment).[9] Meanwhile, the previous Polish full constitution, i.e. the Constitution of the Polish People's Republic of 22 July 1952,[10] in force from 1952 to 1997 (i.e. 45 years), was amended 24 times, including 15 changes introduced before 1989. In this context, it should be considered whether one of the reasons for the violation of the 1997 Constitution is the permanent inability to amend the constitution by political groups exercising power in Poland.

In the Polish doctrine of constitutional law, it is not controversial to say that the provisions of Article 235 of the 1997 Constitution are rigorous and make the amendment of the constitution conditional on the fulfillment of a number of difficult-to-meet requirements, at the same time introducing additional difficulties in the event of changing the provisions of selected chapters. Meanwhile, the analysis of the discourse devoted to the phenomenon of systemic violation of the constitution allows us to state that it is often postulated to limit this practice by clarifying the provisions of the constitution in order to limit the possibility of interpreting its

[7] J. Wawrzyniak, *Systemowa deprecjacja praworządności (kontekst ustrojowy)*, "Państwo i Prawo" 2021, no. 9, pp. 67–85.

[8] Act of 8 September 2006 amending the Constitution of the Republic of Poland (Journal of Laws 2006, no. 200, item 1471).

[9] Act of 7 May 2009 on the amendment to the Constitution of the Republic of Poland (Journal of Laws 2009, no. 114, item 946).

[10] Constitution of the People's Republic of Poland adopted by the Legislative Sejm on 22 July 1952 (Journal of Laws 1952, no. 33, item 232, as amended).

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norms, or by introducing greater procedural rigor.[11] Such changes are intended to lead to better protection of the identity of the constitution and to limit its further violation. However, further stiffening of the content or the procedure of amending the constitution may also have the opposite effect from the intended one, intensifying the process of reinterpreting, circumventing, bending and breaking the constitution. The constitution is not a monument that is to remain unchanged, but a legal act to stabilize the functioning of the state.[12] Such changes are intended to lead to better protection of the identity of the constitution and to limit its further violation. However, further stiffening of the content or the procedure of amending the constitution may also have the opposite effect from the intended one, intensifying the process of reinterpreting, circumventing, bending and breaking the constitution. The constitution is not a monument that is to remain unchanged, but a legal act to stabilize the functioning of the state.[13] It is no coincidence that shaping the content of the constitution is of interest to politicians, the attitude to constitutional regulations is a permanent component of party programs, and the problem of changing the constitution – an inseparable element of political campaigns.[14]

The variability of the constitution may result both from the relative ease of implementing the procedure for its amendment and from the flexibility of the solutions established. The 1997 Constitution is flexible in terms of numerous procedures for the functioning of constitutional organs. It establishes three alternative methods of appointing the Council of Ministers (Articles 154 and 155). It offers in

[11] In the context of the functioning of the judiciary, M. Jabłoński (*100 lat definiowania polskiego modelu „separacji" władzy sądowniczej*, "Przegląd Prawa Konstytucyjnego" 2021, no. 4, p. 147) referred to this problem as follows: "The experience to date also provides evidence that the scope and nature of constitutional regulation shaping a specific type of catalog of rules, organization, tasks, competences, and a systemic guarantee dedicated to a specific institution (here: the judiciary, its organs, and keepers) has a significant systemic importance. The more detailed it is, the more it restricts the freedom of both the legislator and the executive branch. It may also constitute – taking into account the truly separated model of operation of the body controlling the constitutionality of the law – a fundamental and basic 'system fuse', which, already at the national level, will effectively eliminate attempts to depreciate or weaken the role and importance of the judicial authorities".

[12] In this context, it is worth quoting the opinion of S. Patyra (*Wszystko już było, czyli dziedzictwo polskiego parlamentaryzmu XX wieku*, "Przegląd Prawa Konstytucyjnego" 2021, no. 4, p. 92) regarding the contraction of perseverance in historical solutions: "Referring in this spirit to the heritage of the Polish parliamentarism of the 20th century, it should be stated that it is largely ruled by the demons of the past. All proposals for systemic changes are perceived through the prism of domestic historical experiences – both the period of the Second Republic and People's Poland – and regardless of how they fit the current needs and reality, they always constitute the basic point of reference, even guidelines for the introduced systemic structures".

[13] P. Szreniawski, *Changes in the Constitution from the Perspective of the Hierarchy Rivalry Theory*, "Przegląd Prawa Konstytucyjnego" 2020, no. 5, pp. 527–537.

[14] D. Szczepański, *Proposals for Constitutional Changes in the Presidential Election Campaign in Poland in 2020*, "Przegląd Prawa Konstytucyjnego" 2020, no. 6, pp. 191–201.

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Article 128 (2) two procedures for the election of the President of the Republic of Poland – under the conditions of the office of president being filled and the office vacated, specifying the conditions for the functioning of the state under conditions of external (martial law), internal (state of emergency), natural disaster or extensive technical failure (state of natural disaster), as well as during the state of war. It must be admitted that in this area the Polish legislator was rational, as it took into account the changing realities of the functioning of the constitutional system and the need for the state to function in ordinary and crisis conditions. The 1997 Constitution does not establish too restrictive norms limiting the material boundaries of the change, allowing for the modification of almost all provisions. Almost, because in a democratic, republican and law-abiding state should be treated as relatively invariable those systemic principles that refer to fundamental assumptions, such as the principle of a democratic state ruled by law, the principle of equality before the law or the principle of legalism. However, it should be borne in mind that the 1997 Constitution contains norms that must be treated as unchangeable in time, e.g. provisions establishing the terms of office of constitutional organs.

The flexibility of procedures regulating the appointment, selection or functioning of constitutional organs is not, however, able to replace the flexibility of the constitution, understood as the relative ease of changing its provisions. If the amendment procedure is excessively rigid, we will be dealing with attempts to force systemic changes through legislation, parliamentary resolutions or jurisprudence, i.e. breaking the constitution.[15] This phenomenon is known to the science of constitutional law, although rather in theoretical terms. The distance of legal scholars from the political realities of exercising power and the belief that the law effectively shapes reality makes constitutional systems susceptible to violations of the constitution.[16]

[15] This phenomenon is explained by N. Daśko (*Wprowadzenie*, [in:] *Wpływ interesów politycznych na stanowienie prawa*, ed. N. Daśko, Toruń 2014, p. 6) as follows: "There is no law without politics. The modern democratic system is based, i.a., on law-making by elected bodies at various levels, the composition of which reflects the current political preferences of the society. Each law adopted by parliament, each government regulation, each resolution of local self-government bear the more or less visible stigma of these preferences and the divisions they create (…). Political interest is directed at the depths of this or that group or environment. His perspective is not to arrange the world according to his own visions and system of values. On the contrary, the world is shaped in such a way and in such a direction that in the first place will secure the interests of a given formation or even a specific politician".

[16] "The dynamics of socio-political processes at the turn of the 20th and 21st centuries means that the shape of the constitutional systems of modern states is determined not only by the content of constitutional legal acts, but also – to an increasing extent – by other factors. Legal inference, especially based on the formal-dogmatic method, does not allow for a full understanding of the systemic reality. From the perspective of the 20-year validity of the Constitution of the Republic of Poland, it should be acknowledged that there is no real basis for believing in the resistance of constitutional norms to

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The 1997 Constitution is a very rigid act as far as the procedure for its amendment is concerned.[17] The catalog of initiative entities has been limited as compared to the legislative procedure (Article 118 and Article 235 (1) of the 1997 Constitution). The Nation was deprived of the right to actively participate in the amendment procedure, leaving the possibility of holding a referendum approving the change of selected norms, but making it conditional on the political situation (Article 235 (1) and (6) of the 1997 Constitution). Changing selected chapters (I, II, XII) was additionally made more difficult (Article 235 (5) and (6) of the 1997 Constitution). The constitution-maker entrusted the powers to amend the constitution to separate chambers of parliament, requiring the adoption of an identical resolution, but without establishing instruments for agreeing the positions of the chambers (Article 235 (2) and (4) of the 1997 Constitution). Each of these elements of the procedure has a strong impact on the possibility of legally amending the constitution, but the change also depends on meeting the requirements regarding the number of members of the chamber supporting the resolution. The Sejm must pass a bill to amend the constitution by a two-thirds majority in the presence of at least half of the statutory number of deputies, and the Senate by an absolute majority in the presence of at least half of the statutory number of senators (Article 235 (4) of the 1997 Constitution). Taking into account the almost full turnout in such voting, 307 people are needed in the Sejm, and 51 in the Senate. These requirements are slightly different from the point of view of politicians seeking to amend the constitution – 154 deputies are enough to block changes in the Sejm, and 50 senators in the Senate. However, in order to make it impossible to amend the constitution, it is enough to block the change in one of the chambers.

The above findings lead to the conclusion that the changeability of the constitution is a desirable feature of the legal system. It allows the state and its organs to evolve to adapt to changing internal and external realities. On the other hand, constitutional immutability, forced by excessive rigidity, is harmful – by preventing legal changes to the state system, it increases anti-systemic and even revolutionary moods, which may lead to attempts to change the system using non-constitutional or even non-legal methods. The attitude of the legislator, who presented the advantages of a very rigid constitution, should therefore be defined as irrational over its disadvantages.

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the actions of politicians, and thus also to actions carried out in bad faith. The means of implementing the political program of each party include the deliberate circumvention or bending of constitutional norms, and in some cases even the breach of the constitution. It is a mistake to disregard the science of constitutional law from politics, as this leads to its unreal" (R. Grabowski, *Refleksje nad polskim modelem parlamentaryzmu*, "Przegląd Prawa Konstytucyjnego" 2018, no. 5, p. 58).

[17] This conclusion is based on extensive comparative research. For more, see idem, *Zróżnicowanie trybu zmiany jako kryterium klasyfikacji konstytucji współczesnych państw europejskich*, Rzeszów 2013.

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Our ancestors had a greater understanding of the need to constantly reform the constitution. In Chapter VI para. 4 of the Constitution of 3 May (Government Act of 3 May 1791),[18] the following provision was introduced: "The time and time for the revision and improvement of the constitution every twenty-five years". Also in the Act of 17 March 1921 – Constitution of the Republic of Poland,[19] Article 125 (4), introduces a similar mechanism: "Every 25 years after the adoption of this Constitution, the Constitutional Act is to be revised by an ordinary majority of the Sejm and the Senate, joined for this purpose in the National Assembly". The solutions proposed in the Polish constitutions of 1791 and 1921 have never been applied in practice, therefore it is impossible to assess their effectiveness.

When analyzing the process of preparing and adopting the constitution in Poland, one gets the impression that the creators (politicians, experts, parliamentarians, lobbyists) believed that they were introducing an act of epochal importance, ideally suited to the needs of the state and nation. Therefore, they consider changes to the content of the constitution as undesirable, expressing it by creating a procedure for amending its provisions, which is difficult to implement. On the other hand, their antagonists, excluded from participation in the process of preparing and passing the constitution, seek to amend it (or preferably revise it deeply) by constitutional or non-constitutional methods. Meanwhile, the constitution must change, but not arbitrarily, but in close connection with the ongoing social, economic and political processes. As an example, one can point out the problem investigated by W. Orłowski – to what extent the constitutions of European states have been changed in connection with their accession to the European Communities.[20] Contrary to many European countries, such changes have not been carried out in Poland, which makes it difficult to cooperate with the bodies of the European Union due to the inability to base mutual relations on precise provisions of constitutional law, and at the same time leaves this area constantly open to political dispute.[21]

A question can be formulated: Is it safer for the functioning of the state and the legal system to change the constitution in a procedure that is easier to implement, but fully legally, or – in the name of the postulated but illusory stability of the system (created in different social, economic, political, national and international realities) – the constitution should be secured against changes? In the first case, you need to be aware that sometimes the changes to the constitution will result from the

[18] The text of the Constitution is available on the website: http://libr.sejm.gov.pl/tek01/txt/kpol/1791.html (access: 10.3.2022).

[19] Journal of Laws 1921, no. 44, item 267 and no. 52, item 334. The text of the Constitution is available on the website: http://libr.sejm.gov.pl/tek01/txt/kpol/1921a.html (access: 10.3.2022).

[20] W. Orłowski, *Zmiany w konstytucjach związane z członkostwem w Unii Europejskiej*, Lublin 2011.

[21] I. Grądzka, *Amendments to the Constitution of the Republic of Poland Concerning Poland's Membership in the European Union*, "Przegląd Prawa Konstytucyjnego" 2021, no. 6, pp. 31–38.

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political cyclicalism of the ruling majority, while in the second one you should be prepared for attempts to informally change the content of the constitution, which cannot be legally changed – reinterpreting, circumventing, bending, breaking and even blatant violation of its regulations.

The content of Article 235 of the 1997 Constitution is the result of the work of the Constitutional Committee of the National Assembly, operating on the basis of the provisions of the Constitutional Act of 23 April 1992 on the procedure for the preparation and adoption of the Constitution of the Republic of Poland,[22] amended in 1994. It is worth emphasizing that the Constitutional Act of 23 April 1992 assumed the participation of citizens in the procedure of adopting the Constitution. It was therefore rational to maintain the institution of an obligatory approval referendum also in the event of a constitutional amendment – this would be in line with the actus cotrarius rule. The aforementioned Constitutional Act was amended in 1994, supplementing the catalog of initiative entities with a group of 500,000 citizens.

During the work on the principles of amending the constitution, the Committee rejected all proposals of the drafters. However, it created a proprietary procedure for amending the constitution, which makes it practically impossible to change systemically important regulations.[23] The rejection of the proposals formulated in the draft constitution is surprising, although such an attitude could be justified if the Constitutional Committee of the National Assembly used a ready and working model, i.e. the procedure established in the aforementioned constitutional act. Referring only to the quantitative criteria, it demanded that the National Assembly (the Sejm and the Senate deliberating in a joint session) be supported by two-thirds in the presence of at least half of the members of the Assembly (i.e., with a full turnout of 374 votes). The necessity to obtain the support of 374 members of the National Assembly seems more difficult than gaining 307 votes in the Sejm and 51 votes in the Senate (358 in total), but in practice the constitutional majority in the National Assembly is not the same as the constitutional majority in the Sejm and the Senate, and the number of minority blocking any change is 186 votes.[24] It is also important that there is no need to agree the positions of each of the houses of parliament.

[22] Journal of Laws 1992, no. 67, item 336, as amended.

[23] For more, see R. Grabowski, *Ewolucja pozycji ustrojowej Zgromadzenia Narodowego w latach 1989–2019*, "Studia Politologiczne" 2019, no. 53, pp. 149–152.

[24] The analysis of the distribution of seats in the Sejm and in the Senate in subsequent terms of office after the entry into force of the Constitution of the Republic of Poland of 1997 shows that the constitutional majority was available once every three terms, i.e. in the years 2001–2005 and 2011–2015. Therefore, building a constitutional majority in the National Assembly in those years would be possible, taking into account the impossibility of building a sufficiently large blocking minority. Of course, the success of the draft amendment to the constitution would depend on the subject of the changes and their scope.

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CONCLUSIONS

In conclusion, it can be stated that the reasons for the growing discrepancy between the norms of the constitution and the practice of the functioning of the state should be sought, among others, in an overly rigid constitution. Without changing the procedure for amending the 1997 Constitution, regulated in Article 235, the necessary changes to this legal act will probably not be brought about, which will be less and less corresponding to the social and political realities, both national and international. The consequence of this state will be a systemic drift. The social polarization taking place in Poland makes a broad, cross-party coalition to amend the constitution unattainable. In this situation, breaking the provisions of the constitution and their reinterpretation will probably become a permanent element of the Polish legal system. Paradoxically, the practical impossibility of changing the constitution is both the primary cause of the currently observed phenomena, signaled at the beginning, and it will also make it impossible to remedy the malfunctioning state organs and legal institutions in the future.

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ABSTRAKT

Liczni naukowcy, analizujący funkcjonowanie polskiego systemu prawnego, zwracają uwagę na praktykę systemowego łamania przepisów prawa, w tym także Konstytucji, przez organy państwa. Przy tej okazji wskazują przyczyny i okoliczności złamania przepisów w konkretnych przypadkach, jednak nie dokonują ustalenia, czy jest to jedynie wynikiem woli politycznej rządzących czy też efektem wadliwego ukształtowania systemu prawnego. Niniejszy artykuł stanowi próbę dokonania ustaleń w tym zakresie. Autor stawia tezę, że przypadki reinterpretacji, naginania i przełamywania Konstytucji Rzeczypospolitej Polskiej są spowodowane rozdźwiękiem pomiędzy jej treścią a realiami społeczno-politycznymi. Obowiązująca Konstytucja może zostać znowelizowana wyłącznie przy zastosowaniu bardzo utrudnionej procedury zmiany – dokonano w niej tylko dwóch poprawek w ciągu 25 lat. Przyczyn systemowego łamania praworządności należy zatem upatrywać w zbyt sztywnej procedurze zmiany konstytucji.

Słowa kluczowe: praworządność; zmiana konstytucji; Konstytucja Rzeczypospolitej Polskiej