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THE GOVERNING FUNCTION OF POLITICAL PARTIES AND ITS REALIZATION IN POLAND

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Riassunto. La funzione governativa e il suo esercizio dai partiti politici in Polonia. La funzione governativa, una delle principali funzioni dei partiti politici, consiste nell'esercizio del potere nello Stato. Il concetto di governabilità è stato a sua volta interpretato in vari modi dalla dottrina. Il legislatore costituzionale e ordinario ha garantito ai partiti in Polonia la partecipazione alla funzione governativa, rispettivamente, nell'art. 11 della Costituzione polacca e nella legge sui partiti politici del 1997. La funzione governativa dei partiti è stata riconosciuta anche dal Tribunale Costituzionale. Il contributo si propone di esaminare la relativa disciplina giuridica e giurisprudenza del Tribunale. L'autore riflette sul ruolo dei partiti giocato nel Parlamento e nel potere esecutivo. Nella parte conclusiva si sottolinea che anche partiti di opposizione sono coinvolti nell'esercizio della funzione governativa.

Parola chiave: partiti politici; funzione governativa; opposizione; Parlamento.

Streszczenie. Partie polityczne i funkcja rządu. Do podstawowych funkcji partii politycznych, obok funkcji wyborczej, należy funkcja rządu polegająca na sprawowaniu władzy w państwie. Pojęcie „rządu” różnie rozumiane jest przez doktrynę, można jednak przyjąć, iż funkcja rządu polega na bezpośrednim kształtowaniu, podejmowaniu oraz egzekwowaniu decyzji. Sprawowanie funkcji rządu jako główny cel partii politycznych zaakcentowane zostało również przez polskiego ustrojodawcę w art. 11 Konstytucji i w ustawie o partiach politycznych z 1997 r. Rola partii politycznej jako podmiotu przede wszystkim biorącego udział w wykonywaniu władzy dostrzeżona została również w orzecznictwie Trybunału Konstytucyjnego. W artykule przedstawiono powyższe regulacje prawne oraz adekwatne orzeczenia Trybunału Konstytucyjnego, jak

również omówiono rolę, jaką partie polityczne pełnią w ramach funkcjonowania parlamentu oraz organów władzy wykonawczej. Na koniec podkreślono również, iż w realizacji szeroko rozumianej funkcji rządzenia biorą udział również partie opozycyjne.

Słowa kluczowe: partie polityczne; funkcja rządzenia; konstytucja, opozycja; parlament.

The basic and the most important functions of political parties, not only in Poland but also in all democratic countries, include their active participation in elections and then governing the country by exercising the state power. In that context it seems clear that the governing function shall be perceived as a natural consequence of successfully realized electoral function and in practice it could not be performed at all if parties were not provided with legal opportunities to influence the electoral process. At the same time, this is undoubtedly one of the most important functions fulfilled by political parties in a democratic country.

As the term “governance” is differently understood in the legal doctrine there are also differences concerning the notion of “governing function” of political parties. However, for the purpose of this paper, it can be assumed that the governing function of political parties involves proposing, shaping, making and enforcing decisions concerning the state. Therefore, its realization is expressed through different decision-making processes (primarily legislative processes) as well as the management of the state apparatus to ensure the implementation of their outcomes¹.

The governing function has been often emphasized already in the definitions of political parties. For example, J. LaPalombary has indicated that a political party is “a formal organization which primary conscious purpose is to obtain and to maintenance public positions for people who will control, alone or in a coalition, the machinery of government”². This feature (function) distinguishes a political party from other organizations. Max Weber defined a political party as an association based on voluntary membership, which primary purpose of activities was “to ensure leaders with power within the organization” pointing out that its task is “to get the ideological or material benefits for its active members”. Also today, the legal and doctrinal definitions of political parties are dominated by the functional approach. A political party is generally perceived as “an organization taking part in the public life of the country, which essential functions – of course, next to the election function (proposing and supporting candidates) – are

¹ M. Chmaj, *Status partii politycznych w Polsce*, Toruń 1995, p. 56.

² *Ibidem*, p. 17.

the governing function meaning the exercise of public authority and the function of articulating citizens' interests and needs (expressing the political will of the nation)"³. A political party is even called "the subject of democratic procedures of governing the country"⁴. In the literature, the governing function is also referred to as the "participation in the development of state policies"⁵.

The exercise of the governing function as the main objective of political parties has been also emphasized by the Polish constitutional maker. Art. 11 of the Constitution, which directly refers to political parties, not only defines the characteristics and the nature of political parties in the context of a democratic society but also describes the functions of political parties in the society and in a democratic state, indicating that their main purpose (function) is to acquire (through elections) and maintenance the state power by using democratic methods. It states that "1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means. 2. The financing of political parties shall be open to public inspection".

In the same spirit, a political party is defined by the current Law on Political Parties of 1997⁶, according to which a political party is a voluntary organization with a specified name that aims to participate in public life by applying democratic methods in order to influence the policy of the State or the exercise of public power (art. 1).

There is no doubt that the governing function in the state is primarily carried out by political parties. However, there is no such unanimity when it comes to the question which parties *de facto* exercise that function. As E. Nowak has suggested there are at least three solutions that can be distinguished. Firstly, it is believed that in the state of parliamentary democracy the function of direct proposing, shaping, making and enforcement of decisions is performed only by those political parties that have won elections and formed the government alone or in a coalition with other parties. Indeed, these parties have a parliamentary

³ R. Herbut, *Teoria i praktyka funkcjonowania partii politycznych*, Wrocław 2002, p. 19.

⁴ W. Sokolewicz, *Komentarz do art. 11*, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. V, red. K. Działocha, L. Garlicki, P. Sarnecki, W. Sokolewicz, J. Trzciński, Warszawa 2007, p. 26.

⁵ See: J. Wojnicki, *Trudna droga do demokracji. Europa Środkowo Wschodnia po 1989 r.*, Warszawa 2002, p. 93.

⁶ Ustawa z dnia 27 czerwca 1997 r. o partiach politycznych, t. j. Dz.U. z 1997 Nr 155, poz. 924, ze zm.; see more: J. Sobczak, A. Gorgol, M. Granat, *Ustawa o partiach politycznych*, Warszawa 2000.

majority, occupy the executive authorities, appoint their people to managerial positions and decide on the contents of normative acts and policies of the state. According to the second view, political parties that have lost elections and therefore formed the parliamentary opposition are also involved in exercising the governing function in a democratic state because they also participate in the process of shaping, making and enforcing state decisions by criticizing and monitoring the authorities of executive power as well as influencing draft laws and government programs. And finally, the third position assumes that the governing function is not only exercised by political parties and political groups which have won the elections or are in the opposition, but also by all other political forces, which are able to influence the governing processes⁷.

The role of political parties as entities primarily performing the governing function has been also emphasized in the jurisprudence of the Polish Constitutional Tribunal. Already in 1993 the Tribunal stated that “the political system of modern democratic states assumes the implementation of the political parties’ governing function and this function should be exercised by the parliamentary mechanism. The main link between a political party and this mechanism is constituted by parliamentary clubs. Therefore, it should be noted that the principle of freedom to create political parties and the requirement to influence by the party the state policies by democratic means [...] require, inter alia, to provide legal conditions in order to enable political parties to freely fulfill the democratic function of shaping state policy, in particular through the parliament. These requirements also apply to regulations concerning the organization and functioning of the parliament. These regulations, in order to be consistent with the indicated constitutional principles, cannot restrict the freedom of political parties and their parliamentary activity”⁸.

The Constitutional Tribunal referred to the question of exercising the governing function by political parties also in other judgments. For example, on 14 December 2004 the Tribunal found that the mere fact of placing art. 11 and art. 13 in the first chapter of the Polish Constitution entitled “the Polish Republic” proved the high rank given to political parties by the legislator. “Their role has been clearly emphasized both in doctrine and in the jurisprudence of the Constitutional Tribunal, which has formulated the thesis about the socio-political importance of political parties. The uniqueness of their role lies in the fact that they are not only one of the forms of the citizens’ right of association, but above

⁷ E. K. Nowak, *Funkcja rządzenia partii i ugrupowań politycznych w Polsce (Zagadnienia wybrane)*, „Państwo i Prawo” 1993, nr 6, p. 48.

⁸ The judgement of the Constitutional Tribunal of 26 January 1993, Case No U 10/92.

all a form of political organization that has an effect on the exercise of power”⁹.

The participation of political parties in the exercise of state power shall be perceived in several dimensions. Firstly, it is the role of political parties in elections. Secondly, the functioning of political parties within the parliament, including the forms of deputies’ organizations and the relation of the club discipline and the free representative mandate. Thirdly, it is the role of political parties in governing the country within the framework of the executive power, including such issues as staffing the state positions by the ruling party (the direct performance of the governing function) and the influence of opposition parties on governing the country (indirect performance of the governing function).

While considering the role of political parties in the exercise of state power and, consequently, in representing the interests of the sovereign, the attention should be paid to the structures and functioning of the representations of political parties in the Parliament and their influence on the parliamentary works. It is particularly important because parliamentary fractions and their management have a direct impact on deputies who are the members of the parties, which may lead to certain expectations addressed to fraction (their leaders), concerning for example the way of voting. These expectations may become in some cases in conflict with the deputies’ views or intentions. However, according to art. 100 of the Constitution, political parties are the main entities which have the right to nominate candidates in parliamentary elections so parliamentary fractions can *de facto* influence the specific behavior of deputies threatened to lose the party’s support in the following elections, although formally there a free mandate of deputies specified in art. 104 of the Constitution.

However, from the point of view of the realization of the governing function the most important seems to be the role of political parties in the field of exercising the executive power. First of all, the governing function of political parties makes them the main entities responsible for decision-making processes concerning state policies. The institutional nature of processes concerning governing the country causes that the governing function of political parties is usually carried through its members and representatives serving in the state organs¹⁰. After winning the elections the victorious party, either alone or in a coalition with other parties, takes over the management in the country primarily by creating the ruling majority and making personal cast of high positions and offices in the major organs of the state. By introducing own representatives to state authorities, political parties gain influence on making political decisions, and thus determine

⁹ The judgement of the Constitutional Tribunal of 14 December 2004, Case No K 25/03.

¹⁰ M. Migalski, W. Wojtasik, M. Mazur, *Polski system partyjny*, Warszawa 2006, p. 100.

the basic directions of state policy. They can implement their election program and shape the social, political and economic situation in the country, as well as affect the appointment of executive staff. M. Chmaj indicates that one of the functions of political parties is the “the preparation of human resources, the political elite for the proper management of public services”¹¹. On the other hand, D. Górecki has attributed to political parties the function of “creating political elite by nominating candidates for performing different public functions”¹². Also other authors have emphasized the aspect of the activities of political parties concerning the recruitment and educating senior political activists to work in the party and in the state apparatus.

The formation of the centers of power after the elections mainly includes the parties' participation in the formation of the government according to the procedure specified in art. 154 of the Constitution. Formally this is the President of the Republic who nominates a Prime Minister who then proposes the composition of a Council of Ministers. The President of the Republic, within 14 days of the first sitting of the Sejm appoints a Prime Minister together with other members of a Council of Ministers and accepts the oaths of office of members of such newly appointed Council of Ministers. Next, the Prime Minister, within 14 days following the day of his appointment by the President of the Republic, submits a program of activity of the Council of Ministers to the Sejm, together with a motion requiring a vote of confidence. The Sejm passes such vote of confidence by an absolute majority of votes in the presence of at least half of the statutory number of Deputies. In the event that a Council of Ministers has not been appointed pursuant to the above procedure or has failed to obtain a vote of confidence, the Sejm chooses a Prime Minister as well as members of the Council of Ministers as proposed by him, by an absolute majority of votes in the presence of at least half of the statutory number of deputies. The President of the Republic appoints the Council of Ministers so chosen and accepts the oaths of office of its members. However, if a Council of Ministers has still not been appointed pursuant to the above rules, The President of the Republic, within a period of 14 days, appoints a Prime Minister and, on his application, other members of the Council of Ministers. The Sejm, within 14 days following the appointment of the Council of Ministers by the President of the Republic, holds, in the presence of at least half of the statutory number of deputies, a vote of confidence. This time the simple majority is required. In the event that also that third step of the procedure of forming the government is not successful, the President of the Republic shortens

¹¹ M. Chmaj, *Prawna instytucjonalizacja partii politycznych w Polsce*, Lublin 2001, p. 15.

¹² D. Górecki, *Polskie prawo konstytucyjne*, Warszawa 2012, p. 68.

the term of office of the Sejm and orders new elections. The above constitutional procedure indicates that although this is the President who formally appoints the government it cannot start operating without obtaining a vote of confidence from the Parliament. Therefore, the President is supposed to nominate such person for the post of a Prime Minister who has a chance to get parliamentary support. Otherwise, the Parliament is able to choose the Prime Minister and new government on its own.

In many countries, the direct involvement of the party in governing the state is manifested by the fact that its leader is appointed for the highest positions in the country. For example, in the UK or Spain, the leader of the party or coalition that has won elections and has majority in parliament is automatically proposed as a candidate for the post of a prime minister. That solution results in a situation in which the most important person in the party not only *de facto* but also formally holds the power. Such political practice has not been established in Poland and it is not considered as a basis of the Polish political system. The practice in this respect has been different, however, in a great majority of cases the leader of the winning party was not nominated for the post of a Prime Minister. Since 1989 only five out of fifteen Prime Ministers were at the same time the leaders of their parties¹³. The problem, which can arise on that background is primarily the matter of responsibility, the political responsibility but also the constitutional responsibility, which are not directly shared by the most important person in the party. What is more, in the situation when the party leader is not the formal leader of the government, the most important state decisions *de facto* are made not by the government but by non-constitutional entities – the party leaders. They are not in the government therefore they are formally not responsible for their decisions.

A characteristic feature of Polish political parties that win elections is personnel staffing of not only political positions (such as prime minister or ministers) but also all other important positions in the state, as well as the authorities of lower levels of government, according to the principle that “the winner takes all”¹⁴. The new ruling party therefore occupies the position of deputy ministers,

¹³ These were: Waldemar Pawlak (PSL) in the period from 26 October 1993 to 7 March 1995, Leszek Miller (SLD) in the period from 19 October 2001 to 2 May 2004, Jarosław Kaczyński (PiS) – in the period from 14 July 2006 to 16 November 2007, Donald Tusk (PO) in the period from 16 November 2007 to 22 September 2014 and Ewa Kopacz (PO) in the period from 22 September 2014 to 12 November 2015 (after the resignation of Donald Tusk she performed the duties of the President of the party while being the Prime Minister).

¹⁴ Despite the passage of 23 years such statement presented by E. K. Nowak in 1993 is still current, see: E. K. Nowak, op. cit., p. 55.

secretaries and undersecretaries of state, heads of departments, provincial governors, directors and the members of the boards of directors in public enterprises and many more. It should be noted that changes in managerial positions are usually accompanied by some confusion and commotion caused, among others, by the fact that new managers begin their work on the reorganization of the areas assigned to them instead of solving current social problems¹⁵. The doctrine of law repeatedly pointed out that the kind of “ejection” of deputy ministers, heads of departments, provincial governors etc. (called “political purges”) after winning elections by an opposition party has been a characteristic feature of the realization of the governing function by political parties in Poland since 1989¹⁶.

In the Polish political practice there is also a phenomenon called the “taxation” of the party’s members and supporters who occupy various functions and offices from the party’s recommendation (such as functions in the authorities of local government, leadership positions in government, membership in management and supervisory boards of State Treasury companies etc.). The object of taxation is the income derived from their function or position, and the tax itself is called a “VIP – fee”. For example, in the Social Democratic Party (SLD) this special contribution is 7% of the salaries of the employed in public service¹⁷ and in the Civil Platform (PO) it is 10%. As indicated by M. Chmaj, such practice can result in the progressive politicization of numerous political functions and positions, because the decisive criterion used for their staffing is not the competence of a person but his/her loyalty to the party and the income. This solution therefore favors the rapid development of the party nomenclature in the country. Having in mind the weakness of the institutions of civil service in Poland, the internal “taxation” of the party members occupying specific positions from the party’s recommendation can slow their development. There is also a simple relationship that the more nomenclature positions means the more money for the party. What is more, this can affect the increase of salaries in companies or local authorities¹⁸. In the literature it is pointed out that the admissibility of the above practice is a loophole in the law, which strengthens the ruling party which has the ability of staffing state positions and functions. Donations should be unforced and voluntary form of support for political parties. Practice shows, however, something completely different¹⁹.

¹⁵ E. K. Nowak, op. cit., p. 55.

¹⁶ M. Chmaj, *Status...*, p. 59.

¹⁷ A. Stankiewicz, P. Olwert, M. Chudy, *Polska partia spółka zoo*, Newsweek of 31.03.2009.

¹⁸ M. Chmaj, *Wolność tworzenia i działania partii politycznych. Studium porównawcze*, Olsztyn 2006, pp. 131–132.

¹⁹ J. Łapiński, *Kartel wyborczy partii politycznych (uwagi na temat systemu finansowania*

Another problem associated with the realization of governing function by political parties is the excessive multiplication of official posts. W. Kieżun called that trend “the pathology” documenting a drastic increase in the administrative apparatus, which consisted of 42 000 posts in 1988, 46 000 in 1990 and 125 000 in 1999. Among the reasons for such a significant expansion of the apparatus of state power the important role was played by political conditions. The subsequent ruling parties and coalitions tried to provide their members with benefits in the simplest way: by creating new public offices and functions²⁰. It seems, however, that in recent years this trend has been halted, as the number of officials in 2015 was approximately 119 000.

As indicated in the literature, the process of governing the country is based on the competitive struggle of political forces, some of which are currently ruling the state and others that remain in the opposition to the government and seek to reverse the situation in the next elections. The governing function is thus realized also indirectly by influencing the policy of the state. Therefore, opposition parties also take part in that process as they, by all means, try to affect the activities of state authorities. That way they perform their basic function, which is controlling the government.

As indicated by S. Bożyk, the opposition, regardless its nature and organizational forms, aims to mark its presence on the political scene and for that purpose it tries to use mainly such institutional mechanisms through which it can influence the content of the decisions taken by public authorities²¹. In this context, the political opposition should be understood as all political groups that do not participate in the exercise of power, but take a critical stance towards the government and its policy and seek to seize power using the forms of political competition guaranteed by the Constitution and ordinary law, as well as other mechanism within the framework of the existing law, with the intention to implement specific political reforms or changes in the existing political system and socio-economic development.

Opposition parties are operating in two directions: they prepare for the victory in the next elections and try to take part in state governance. The first direction is realized by criticizing the activities and political program of the ruling

polityki w Polsce), in: *Konstytucja – ustrój polityczny – system organów państwowych: prace ofiarowane profesorowi Marianowi Grzybowskiemu*, red. S. Bożyk, A. Jamróz, Białystok 2010, p. 287 and next.

²⁰ M. Gulczyński, *Siedem grzechów głównych partii politycznych III RP*, in: *Partie polityczne: permanentne problemy*, red. J. Kornaś, Kielce 2005, p. 39.

²¹ S. Bożyk, *Opozycja parlamentarna jako forma opozycji politycznej*, „Przegląd Sejmowy” 2004, nr 5(64), p. 28.

party and preparing their own political agenda. The second direction is expressed also by the criticism, but less destructive, aimed at obtaining influence on the current state policy. Opposition parties attempt to join the co-governing of the state, especially by using the existing opportunities to influence the content of the decisions which can be made after the agreement between the ruling party and the opposition. Such situations occur usually when decisions which are to be made do not raise objections from the opposition, relate to issues of fundamental importance to the state or are the result of the concessions of the ruling party faced with demands made by opposition parties. The opposition's attempts to influence state policy are defined as "corrective criticism". Such activities of the opposition parties, even if the final result of such actions is negligible, should be treated as a form of their participation in the implementation of the governing function. It should be also noted that the parties which have no influence on state policy and are not taken into account when making state decisions, often resort to such measures as strikes or street demonstrations.

The opposition in Poland is not as formal as in some other countries, although in the past there were various proposals in this regard. For example, in March 1989 the Confederation of Independent Poland²² proposed the creation of a "shadow cabinet" in Poland similar to the solution functioning in the UK. However, the attempt to introduce it was unsuccessful. The rights of the opposition parties include submitting interpellations, parliamentary inquiries and questions on current issues as well as initiating the motion of no confidence. Generally speaking, the activities of the opposition parties in Poland can be characterized by a total criticism of government. It was so in the early 1990s, it is so today. On the other hand, the ruling parties do not treat the opposition parties as a constructive opposition, the "loyal" opposition, usually rejecting their proposals. The change of the ruling majority after the elections in Poland is characterized, among other things, by the fact that the new government questions, criticizes and even condemns all activities of the previous government. The total criticism of the ruling party by the opposition which accompanies the election campaign continues also after winning elections by the opposition. The relationship between the ruling party and the opposition is getting even more difficult at the moment, as for the first time in the Polish political system after 1989 the ruling party has an absolute majority of seats in the parliament. The opposition in the absence of the possibility to influence the activities of the ruling party often moves to the streets.

²² Anticommunist party founded on 1 September 1979 by Leszek Moczulski.

In conclusion it should be noted that the necessary prerequisite for the effective implementation of the governing function by political parties (as well as their other functions) is the respect and guaranties for the principle of political pluralism. Political parties can effectively participate in the implementation of election and governing functions only in the conditions of political pluralism. It cannot be denied that only the consistent application of the constitutional principle of political pluralism can guarantee the equality of political parties and the use of various forms of influencing the state governance, including active participation in the implementation of the basic functions of the parliament.

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