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CONSTITUTIONAL REFORMS IN POLAND AFTER 7 APRIL 1989

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Summary. The political events of the late 1980s, as well as the results of the Round Table negotiations, needed their formal confirmation in the Constitution in order to secure their durability. During the political transformation in the years 1989–1991, there were seven amendments of the Constitution of 1952 adopted, out of which the first two were particularly important. The first amendment of April 1989 restored, among others, the office of the President as a head of state and the Senate, as well as established the National Council of the Judiciary as the body protecting independent courts and judges. The second amendment of December 1989 introduced the fundamental principles such as a democratic state ruled by law, social justice, political pluralism, freedom of economic activity and property protection. The current Constitution of 1997 has been amended only twice – in 2006 in regard to the extradition of a Polish citizen (art. 55 par. 3) and in 2009 in regard to passive electoral rights (art. 99 par. 3). As shown by the political experience after 2015, the procedure for adopting the amendment to the Constitution set out in art. 235 is extremely difficult, which has led to a situation in which it is bypassed and the content of constitutional provisions is changed by ordinary provisions.

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Reformy konstytucyjne w Polsce po 7 kwietnia 1989 r. Wydarzenia polityczne końca lat 80. oraz wyniki negocjacji Okrągłego Stołu wymagały formalnego potwierdzenia w Konstytucji, co zdecydowano się uczynić poprzez fragmentaryczne nowelizacje obowiązującej wówczas Konstytucji z 1952 r. W pierwszych latach transformacji ustrojowej 1989–1991 uchwalonych zostało siedem ustaw nowelizujących Konstytucję, z czego dwie pierwsze miały szczególne znaczenie. Na mocy noweli kwietniowej z 1989 r. przywrócony został m.in. urząd Prezydenta jako głowy państwa oraz Senat, jak również powołano Krajową Radę Sądownictwa jako organ chroniący niezawisłość sędziów i niezależność sądów. Natomiast nowela grudniowa z 1989 r. wpisała do Konstytucji podstawowe zasady ustrojowe, takie jak zasada demokratycznego państwa prawnego, sprawiedliwości społecznej, pluralizmu politycznego, wolności działalności gospodarczej i ochrony własności. Obecna Konstytucja z 1997 r. została znowelizowana jedynie dwukrotnie – w 2006 r. w odniesieniu do ekstradycji obywatela polskiego (art. 55 ust. 3) oraz w 2009 r. w odniesieniu do biernego prawa wyborczego (art. 99 ust. 3). Jak pokazują doświadczenia ustrojowe po 2015 r., procedura zmiany Konstytucji RP określona w art. 235 jest niezwykle trudna, co doprowadziło do sytuacji, w której jest ona omijana, a treść przepisów konstytucyjnych zmieniana jest przez przepisy ustawowe.

Słowa kluczowe: nowelizacja konstytucji, transformacja ustrojowa, konstytucja, referendum konstytucyjne.

The purpose of this paper is to present and analyse constitutional changes that have been introduced in Poland by subsequent constitutional amendments since 1989. The temporal beginning of the analysis is not accidental as 1989 went down in an exceptional way not only in the history of Poland, but also in the history of Europe and the whole world. For Poland, as for other countries of Central and Eastern Europe which found themselves behind the “Iron Curtain” in the 20th century, 1989 was a turning point that started a period of profound constitutional changes driven by the pursuit of democracy. In the analysed period, two stages should be distinguished. The period of the first years of transformation immediately after the fall of communism and then building constitutional foundations of a new democratic state in the years 1989–1996 and the period under the rule of the new constitution covering years 1997–2021.

The political events of the late 1980s, as well as the the results of the “Round Table” negotiations between the communists and the democratic opposition, needed their formal confirmation in the Constitution in order to secure

their durability. It was particularly important because the new democratic Constitution was not adapted until 1997 so along with the parliamentary works on the preparation and adoption of the new Constitution the profound political and economic changes had to be reflected in the amendments of the Constitution of the People's Republic of Poland of 22 July 1952 (Journal of Laws, No. 33, item 232). The chosen way of introducing the necessary constitutional changes through fragmentary amendments to the then binding basic law adopted by the communist authorities, which after all did not correspond to the spirit and directions of reforms and was widely criticised by the opposition, resulted primarily from the evolutionary, not revolutionary concept of introducing political and constitutional changes, which was expressed in the negotiations and agreements between the opposition and the representatives of the communist regime (Rogowski, 2009, p. 310). On the one hand, a quick adoption of a new constitution turned out to be impossible under the conditions of the time, and on the other hand, it was not decided to repeal the 1952 Constitution in order to avoid, even for a short time, a situation in which the state would have to function without any constitutional foundations. Understandably, the most dynamic changes in the political and economic systems took place at the very beginning of the democratic transformation, which was reflected in numerous constitutional amendments adopted between 1989 and 1991. During the period of these three years, there were seven amendments of the Constitution of 1952 adopted – of 7 April 1989 (Journal of Laws, No. 19, item 101), 29 December 1989 (Journal of Laws, No. 75, item 444), 8 March 1990 (Journal of Laws, No. 16, item 94), 11 April 1990 (Journal of Laws, No. 29, item 171), 27 October 1990 (Journal of Laws, No. 67, item 397), 19 April 1991 (Journal of Laws, No. 41, item 176) and 18 October 1991 (Journal of Laws, No. 119, item 514). However, the first two were the most important. The April amendment constituted a breach in the so far shape of the socialist state while the December amendment *de facto* started the existence of the Third Polish Republic.

The first constitutional amendment of April 1989 was passed by the Sejm (then the only chamber of the Polish parliament) just two days after the end of the “Round Table” negotiations and expressed, almost literally, a compromise between the communist state authorities and the democratic opposition. It reintroduced, among others, the office of the President, who replaced the collegial Council of State, restored the Senate as the second chamber of the parliament and established the National Council of the Judiciary as a body competent to nominate judges and guard the independence of courts and judges, the Commander-in-Chief of the Armed Forces and the National Defense Committee. In addition, the Ombudsman and the President of the National Bank of

Poland, who had operated solely on the basis of statutes, were introduced into the Constitution. Changes concerned also elections, as well as the procedures of appointing and dismissing the Council of Ministers and its members, introducing states of emergency and ratifying international agreements. The introduced changes also required the appropriate amendments of the remaining constitutional provisions concerning, inter alia, the Constitutional Tribunal, the Tribunal of State, the Council of Ministers and its members, national councils, the Supreme Audit Office, the Public Prosecutor General and the armed forces. The April amendment was the most extensive of all, albeit it did not provide for any fundamental changes of constitutional principles that would manifest a departure from the authoritarian structure of power. Just the opposite, the amendment provided for numerous safeguards against the final departure from the current system like only partially free parliamentary elections.

The President of the Republic was to ensure compliance with the Constitution, sovereignty, security, inviolability and integrity of the state, as well as respect for interstate political and military alliances (*de facto* it was about the Warsaw Pact and Comecon which were to guarantee the maintenance of the system). The President was to be elected by the National Assembly for a 6-year term and could be reelected only once. In the event of inability to hold the office or its vacancy, the President was to be replaced by the Marshal of the Sejm. The first and only President of the People's Republic of Poland elected on 10 June 1989 was general Wojciech Jaruzelski, which also resulted from the "Round Table" agreements. The amendment clearly weakened the position of the Sejm in favour of the Senate and, in particular, the President. Granting certain powers to the President without his/her political responsibility before the Sejm resulted in a practical break with the formally binding principle of the uniformity of power concentrated in the Sejm as the highest organ of state power, and thus the political system was modified closer to the tripartite division of powers. Nevertheless, the role of the Senate was limited. It had legislative initiative and participated in the legislative process. The joint sessions of the Sejm and the Senate as the National Assembly were convened only to elect the President, accept his oath, bring him before the Tribunal of State or to recognise his incapacity to hold office.

Due to further democratisation changes following the parliamentary elections in June 1989, in autumn 1989 the so-called "contract" Sejm¹ and the Sen-

¹ The term "contract" Sejm commonly used in regard to the first chamber of the Polish parliament elected in 1989 refers to the agreement reached during the "Round Table" negotiations. It was agreed that the forthcoming elections to the Sejm would only be partially free,

ate decided about the need to carry out a thorough constitutional change. Both chambers of the parliament established constitutional committees to draft a completely new constitution. At the same time, however, it was decided to simultaneously amend the Constitution of 1952 in the most necessary scope. The December amendment repealed the first two chapters and the preamble and replaced them with a new chapter I which introduced new constitutional basis of the political and economic system. The name of the state was changed from the “Polish People’s Republic” to the “Republic of Poland” and provisions on the leading role of the party and friendship with the Soviet Union were removed. There were also new fundamental constitutional principles introduced, such as a democratic state ruled by law, the sovereignty of the nation, direct democracy, the so-called “social justice”, political pluralism, the freedom of economic activity and the protection of property. The amendment also brought about symbolic changes reflected in the restoration of the crown to the white eagle in the coat of arms of Poland. Nevertheless, a very short time to prepare the final text of the amendment and the perspective of a quick adoption of the entire new Constitution caused that the possible changes of other regulations had been consciously omitted.

The amendments adopted in the following years were not so spectacular, however, they also concerned important issues. The amendment of 8 March 1990 was related to the reactivation of local government. On the same day, the law on territorial self-government was adopted (Journal of Laws, No. 16, item 95).² Legislative works on the preparation of both acts were carried out simultaneously. Despite the fact that the amendment of December 1989 already stated that the local government would play an important role in the state system by providing that “the Polish State guarantees the participation of local government in the exercise of power”, the enactment of the law regulating these issues comprehensively resulted in the necessity to supplement the Constitution in this respect. The amendment was slightly amended by the act of 11 April 1990.

The amendment of 27 September 1990 concerned the election of the President of the Republic and it was adopted simultaneously with the appropriate statutory law regulating the electoral procedure in a detailed manner (Journal of Laws, No. 67, item 398). The main change was the introduction of the uni-

as only 35% of seats were to be democratically elected, and the remaining 65% of seats were reserved for the communist party and its satellite parties.

² The law with numerous amendments is still in force, but in 1999, when two other units of the administrative division were introduced, its title was changed to reflect the fact that it applies to the basic unit of local government, which is the commune.

versal, equal and direct elections of the head of state in a secret voting by the Nation (Rogowski, 2003, p. 358; Haczkowska, 2020, p. 11). The amendment also introduced rules that are still in force today: the President is elected for a five-year term with the possibility of one re-election, and the minimum age of a candidate is 35.

Also the following amendment of 19 April 1991 determined, *inter alia*, the beginning of the parliament's term of office, provided specific regulation concerning the ordering of parliamentary elections by the President, declared strengthening and extending of human rights and freedoms by the Republic of Poland, removed the provisions relating to the working people of towns and villages and socialism. It also introduced regulations on electoral rights which provided that any citizen could be elected to the Sejm and the Senate after turning 21, provided that he or she had been permanently residing in the territory of the Republic of Poland for at least 5 years. Electoral rights were not to be granted to persons incapacitated by a legally valid court judgement due to a mental illness or mental retardation and to persons deprived of public or electoral rights under a court decision. The obligation to reside in the territory of the Republic of Poland for 5 years also applied to a candidate for the office of President. The introduction of this requirement was justified by the experiences of the presidential elections in 1990 and the necessity to guarantee the bonds of deputies, senators and the president with the country and its public life.

The last amendment of 18 October 1991 was aimed at adjusting the constitutional rules of granting asylum by Poland to the provisions of international law. The wording of art. 88 of the Constitution that was: "the Republic of Poland grants asylum to foreign nationals persecuted for defending the interests of the working masses, fighting for social progress, defending peace, fighting for national liberation or scientific activity", was replaced by "Citizens of other countries and stateless persons can enjoy the right of asylum according to principles specified by statutory law".

The Constitution of 1952, with the above amendments, was in force till 8 December 1992, when it was replaced by the so-called Small Constitution (nevertheless, some of its provisions were retained in force until 1997; Journal of Laws, No. 84, item 426.). It should be noticed, however, that most of the solutions introduced to the constitutional system by the above amendments were reflected both in the Small Constitution of 1992 and the Constitution of 1997.

The new Constitution adopted on 2 April 1997 (Journal of Laws, No. 78, item 483) provided quite high requirements for adopting constitutional amendment specified in art. 235, which made the whole procedure much more difficult than in case of statutory laws. As the Constitution does not provide for any

restrictions in this respect, theoretically, each constitutional provision may be changed. The only limitation in this regard has a temporal nature as according to art. 228 p. 6, the Constitution cannot be subject to change when one of extraordinary measures (martial law, a state of emergency or a state of natural disaster) is introduced.

The right to submit a draft of constitutional amendment is granted to at least one-fifth of the statutory number of Deputies, the Senate, and the President of the Republic (so neither government nor citizens can do it). Amendments to the Constitution can be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds 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. A special regulation has been provided in regard to amendments of the provisions of Chapters I, II and XII. First, the adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution can take place no sooner than 60 days after the first reading of the bill. Second, if a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the group of at least one-fifth of the statutory number of deputies, the Senate and the President of the Republic may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such application should be addressed to the Marshal of the Sejm, who orders the holding of a referendum within 60 days. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment (Rytel-Warzochoa, 2018, p. 289–301). After conclusion of the above procedures, the Marshal of the Sejm submits the adopted statute for signature to the President of the Republic who shall do it within 21 days. Finally, the President orders the promulgation of the constitutional amendment in the Official Journal of Laws of the Republic of Poland “Dziennik Ustaw” which ends the entire procedure. However, it should be noted that before signing the amendment, also in the case when it was approved by citizens in the referendum, the President can refer it to the Constitutional Tribunal in order to review its constitutionality. Of course, as the constitutional amendment has the same legal force as the Constitution, the Constitutional Tribunal cannot consider the constitutionality of its content but only formal aspects related to the procedure of its adoption specified in art. 235 of the Constitution. So far, the Constitution of 1997 has been amended only twice.

The first amendment was adopted on 8 September 2006 (Journal of Laws, No. 200, item 1471) and it concerned art. 55, which initially set an absolute prohibition on the extradition of a Polish citizen. Poland's accession to the European Union and the need to adapt Polish law to European law forced changes in this area. The new provision of art. 55 p. 2 provides that the extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition was committed outside the territory of the Republic of Poland, and constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of making of the request. Additionally, it was stated that the compliance with the conditions specified above shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.

As it was already mentioned, the amendment resulted from the necessity to adjust Polish law to the law of the European Union. On 13 June 2002, the Council of the European Union issued the Framework Decision on the European arrest warrant and the surrender procedures between Member States (Official Journal of the European Communities, 18.7.2002, L 190/1), which constitutes a source of EU secondary legislation. According to the definition provided by art. 1 (1) of the Framework Decision, the European arrest warrant is "a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order". In general, the obligation to execute a European arrest warrant also exists when a person to whom the warrant relates is a citizen of a Member State where the warrant was received. When Poland acceded to the European Union on 1 May 2004 it accepted the obligation to fully implement European law including the Framework Decision of 13 June 2002. As the framework decisions, as well as directives, are not directly applicable there was a need to transpose the content of the Framework Decision into Polish law which was done in 2004 by amending the Code of Criminal Procedure (consolidated text: Journal of Laws 2021, item 534) in regard to procedures for the extradition of a Polish citizen on the

basis of a European arrest warrant (EAW). However, there were no amendments of the Constitution.

The problem was that art. 55 of the Polish Constitution provided then that “the extradition of a Polish citizen shall be prohibited” without providing any exceptions. In 2005, the Regional Court in Gdańsk, which considered the public prosecutor’s application for the surrender of a Polish citizen on the basis of a European arrest warrant for the purpose of conducting a criminal prosecution against her in the Kingdom of Netherlands, referred to the Constitutional Tribunal to decide on the constitutionality of the provisions of the Code on Criminal Proceedings implementing the European law on the European arrest warrant (case No. P 1/05).

In the judgement of 27 April 2005, the Constitutional Tribunal decided that the Code of Criminal Procedure, as it permitted the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European arrest warrant and that way implemented secondary European law into Polish law, was inconsistent with art. 55 p. 1 of the Constitution. At the same time, the loss of the binding force of the challenged provision was delayed for 18 months following the day on which the judgement was published in the Journal of Laws. The Constitutional Tribunal pointed out that the judgement created an obligation for the legislator to undertake actions aiming at rapid elimination of the defects of legal regulations indicated by the Tribunal, if possible before the lapse of the time period stipulated in the judgement. The Tribunal also stated that, as a consequence of the judgement, the amendment of the Constitution might be required in order to ensure the compatibility of domestic law with the EU law followed by the re-introduction of statutory provisions concerning the European arrest warrant. As a consequence of this judgement, on 16 May 2006, the President of the Republic of Poland submitted a draft of the amendment of the Constitution of the Republic of Poland (Rytel-Warzocha, 2017, p. 207–218).

The second amendment to the Constitution of 1997 was adopted by the Sejm on 7 May 2009 and it concerned the extension of the prerequisites for passive electoral rights by adding art. 99 par. 3. The new provision states that “no person sentenced to imprisonment by a final judgment for an intentional indictable offence may be elected to the Sejm or the Senate”. The amendment entered into force on 21 October 2009 and it became applicable from the subsequent parliamentary term of office. The intention of the applicants was to introduce additional prerequisites for the so-called criminal record. In the explanatory note to the draft, the deputies from the Civic Platform pointed out that the proposed amendment aimed to meet social expectations that there should be no

persons convicted of intentional crimes prosecuted by public prosecution in the Sejm and the Senate and the law should not be made by criminals. Eliminating criminals from the Polish parliament was to improve the image of the legislative authorities. The analogous changes had already been introduced by the legislator with regard to the mandates of members of local government bodies. There were no doubts that the standards required from deputies and senators could not be lower than those required from local government officials. The above amendment tightened the constitutional requirements for candidates to the Sejm and the Senate of the Republic of Poland and thus at least to some extent it contributed to the elimination of pathologies in politics.

To sum up, it should be stated that the Polish Constitution of 1997 is a rigid constitution which guarantees the stability of the constitutional system. The qualified procedure for adopting the amendment to the Constitution of the Republic of Poland, specified in its art. 235, makes the amendment of the Constitution difficult, in particular according to a high requirement of the majority required for its adoption. Both amendments that were successfully passed in 2006 and 2009 were not controversial. On the other hand, numerous other legislative initiatives of a significant political nature ended in failure, usually succumbing to the principle of discontinuation of the parliament's work in connection with the end of the term of office. The high degree of difficulty in introducing changes to the Constitution can be illustrated by the situation Poland found itself in after 2015, when in parliamentary elections for the first time in history one party won an absolute majority of seats in the Sejm and Senate, and its candidate won the presidential election. Despite such a significant advantage, the amendment of the Constitution turned out to be impossible due to the requirement of a high qualified majority in the Sejm. As shown by the Polish experience after 2015, the particularly difficult procedure for adopting constitutional amendments may lead to situations in which the rulers, unable to formally amend the Constitution, will *de facto* change its content through ordinary legislation. It can lead to the erosion of the hierarchical system of sources of law, uncertainty as to the applicable law and the gradual transformation of the Constitution into a certain legal fiction.

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