



International Comparative Jurisprudence



POLISH CONSTITUTION AFTER 20 YEARS

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Received 8 April 2019; accepted 25 May 2019

DOI: <http://dx.doi.org/10.13165/j.icj.2019.05.002>

Abstract. The text studies current constitutional tensions in Poland. The author is analysing political problems in good and effective governance in Poland, which are caused by vague constitutional provisions that construct unclear relations between main state bodies. Therefore, he criticises the constitutional system that, instead of solving problems, only multiplies them. One of the reasons of this situation he blames on the authors of the 1997 Constitution, which gave more importance to the political aims of that time than to the construction of solid and effective system of state bodies. In order to change this situation, the author calls for a profound constitutional reform. To text includes present tensions between the government and the Supreme Court as well as brief information on the 2015–2017 conflict with the Polish Constitutional Tribunal.

Keywords: constitution, political regime, power division.

Introduction

According to many specialists, democratic change in Poland started with the first partially-free elections to the parliament held on the 4th of June 1989 and with the December amendments to the communist constitution (Jaskiernia, 2011, p. 53), which at that time were seen as revolutionary². Even the name of the country was changed, with the former, traditional name ‘Rzeczpospolita’³ being restored. The transition period officially ended with the adoption of the new, democratic constitution in 1997. This act of law has now been in place for more than 20 years⁴. It could be said, therefore, that the first evaluations of it can and should be made. Especially given that over the last 4 years the word ‘constitution’ has been used in Poland many times, mostly in political protests. One of the dimensions of strong political polarisation in Poland refers to the constitution. According to the opposition, the current ruling party constantly breaches it, for instance with its attempts to reform judicial power. On the other hand, representatives of the government declare that everything that they have done has been in accordance with and within the constitutional limits. Nevertheless, we should acknowledge that because of the many vague provisions in the Polish magna carta, it is not easy to decide which side is right.

The current tense political atmosphere means that more of the flaws of our main legal act are starting to appear. In addition, the ways in which the present parliamentary majority takes advantages of the vague constitutional provisions has shown further drawbacks of the political system in Poland and fuelled political movements calling for a new constitution. Opinions that it is time to change it are being more openly expressed and gain more media

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² For example, the removal of eternity peaceful and friendly relations with the Soviet Union clause or that the power belongs to peasants and workers.

³ It should be noted that the English translation of this name as the republic is false because this name has been used in Polish tradition in times were Poland was ruled by kings.

⁴ The Polish constitution entered into force on 17 October 1997.

interest. On the other hand, the current constitution has been constantly criticised since its adoption in 1997, and almost all subsequent parties and political movements have included constitutional reforms in their manifestos (Rogowska et al., 2010). To show that these opinions are at least partially justified, the text is divided into three main parts in which problems regarding the constitutional regulations of every power are presented. That is the executive, legislative and judicial. The following methods of legal research were used: logical, historical and sociological.

Before going into details and for the sake of providing a contextual background, some general information about Poland's most important legal act will first be presented. The fundamental law of Poland has 243 articles divided into 13 chapters. All together it gives the impression of being a lengthy text, containing provisions regarding not only the political system of the country, but also its economic and social system. The longest chapter sets out human rights and freedoms, which are divided into three categories, namely basic human freedoms, civic-political rights and economic and social rights. The constitution itself does provide special regulations regarding the amendment procedure, although the conditions set to change the text are more onerous than those for changing ordinary legislative procedure. The most important features of the Polish political system are as follows: the republic of Poland exists for the common good of all citizens; the constitution is the supreme law of Poland; the bodies of public authority shall function on the basis and within the limits of the law; and the system of government of the Republic of Poland shall be based on the separation and balance of powers between the legislative, executive and judicial branches.

It may seem that a constitution that declares such universally accepted values and rules should be evaluated positively. This is partially true; however, in the text we will have a closer look at the constitution in order to see if the current Polish system of governing bodies established by it does not actually impede effective governance. It is a dream of every citizen to have simple, efficient and affordable management structure to run the country. In Poland, we are still far from achieving it, since more than half of the society does not trust public institutions (CBOS No. 35/2018).

1. A brief history of adopting the 1997 Constitution

The question is what are the *fons et origo* of this situation? In my opinion, we should look back to the times when the constitution was being written in the national assembly. Poland was one of the last post-communist countries that adopted a new, democratic constitution. The bulk of the work on the new charter was undertaken in the parliament, in which post-communist parties held a majority. The post-solidarity parties, due to their former dissolution into small groups, had not passed the electoral threshold, which resulted in a situation in which around half of the people that had taken part in elections didn't have representation in the parliament (Wybory parlamentarne w Polsce w 1993 roku). In 1995, the chairman of the parliamentary constitutional commission Aleksander Kwaśniewski became the post-communist candidate that faced Solidarity legend Lech Wałęsa running for re-election as the president. However post-communists didn't believe in the success of their candidate and as they had a majority in the parliament, they tried to introduce a system similar to the German chancellery in Poland (Bożek, 2013, p. 264). They hoped that this way they would limit the purview of the president, fearing that Wałęsa would be re-elected. When Kwaśniewski won the elections, the ruling majority decided to shift the constitutional provisions in order to enforce the president's position. Nevertheless, the work on the new text was too far complicated to introduce a presidential system in Poland, so only a few changes were made that, incidentally, weakened the prime minister's position.

This very short description of the historical background shows that the most important legal act was not prepared nor designed for good and efficient governance of the state over a course of years, but rather to achieve a short-term political objective that existed at that time. Therefore, the current political tensions should not be called unexpected, since the relations between different constitutional powers have been badly constructed from the start. This way, the authors of the constitution tried to block into the future any far reaching changes to the system. A system that had been agreed between the former communists and part of the anti-communist opposition. Perhaps

this is one of the reasons why, during the constitutional referendum in 1997, the subject of which was whether to accept or reject the new act, less than 43% of all entitled to vote took part and of those, only 53% voted for the approval of the constitution. This only goes to show how few Poles at that time identified with the constitution. Some might interpret these numbers as showing that only 22% of the Poles actively supported the constitution.

2. Executive power

It is for the most part because of the vague provisions regulating the relationship between the president and the Council of Ministers, that the exact type of political system in place in Poland is not easy to define. It is not a presidential system nor a clear example of a parliamentary one. The constitution declares both offices as constituting the executive power. However, there is no hierarchical relationship between them. On one hand, the president is named as the supreme representative of the Republic of Poland and the guarantor of the continuity of state authority, and his main role is to ensure the observance of the constitution. The president is elected through universal, equal and direct elections, conducted by a secret ballot. His term lasts 5 years and he can be re-elected only once.

On the other hand, the entity that is responsible for governance, and for national and international policy is the Council of Ministers. Moreover, the *magna carta* declares that the Council of Ministers shall conduct all affairs of state not reserved to other state institutions or local government. The most important office held in the government is that of the prime minister. The prime minister selects ministerial candidates who have to have been nominated by the president, though the president cannot block a nomination. They are dismissed by the president too, but at the prime minister's demand. Frankly speaking, the president doesn't have any legal powers with which to influence the members of the government, nor to impose his will on the government, though according to the constitution he may convene the Cabinet Council. This is a special council composed of ministers from the Council of Ministers, whose debates are presided over by the president of the Republic but it does not possess the same powers as the Council of Ministers. It only performs an advisory role and is supposed to acquaint the president with the current issues regarding the governance of the state.

The constitution tries to mask the lack of hierarchical subordination between the President and the Cabinet by declaring the rule of cooperation between them. Unfortunately, because of the unclear constitutional provisions, it is impossible to achieve this principal in practice, especially when the persons occupying the offices of president and of prime minister come from opposing parties. Even the Constitutional Tribunal had trouble declaring which figure is responsible for representing Poland during the European Council meetings. After a thorough study of the constitution (Ruling of the Constitutional Tribunal of Poland from the 20th of May 2009), the judges declared in the first place that both bodies should cooperate in matters of foreign affairs. Secondly, after repeating that the president is the highest representative of Poland, the judges made a reservation when it comes to representing Poland in the European Council. In such case the state delegation shall be headed by the Council of Ministers. However, the president of the Republic may accompany the ministers, but without any representative powers, despite the fact that the same constitution names him as the highest representative of Poland <sic!>.

It was not a 'Solomonic judgment' with three dissenting opinions in which judges emphasised that the president's representative powers could be limited in accordance with the constitution. Moreover, they stressed that the interpretation used by the majority of judges was wrong and violated the hierarchy principle, since the constitution was interpreted via European law, thus infringing article 8 of the Polish constitution, which declares the constitution as the supreme law of Poland.

In order to better understand the problem, we must examine the legal status of the president. He holds the strongest democratic mandate, since he is elected directly by the nation. His term is one year longer than that of the parliament. The latter doesn't control his acts nor can it dismiss him. The constitution entitles the president to end the parliament's term in two situations. One is compulsory, when the third step of forming a new government does not succeed, while the other is facultative, when the parliament fails to present the national budget to the president

within 4 months of receiving it from the government. All of the president's acts should be signed by the prime minister who, by such signature, accepts responsibility to the Sejm. However, this scheme doesn't apply in 30 cases listed in the constitution. In the abovementioned list, there are situations like power of pardon, appointment of judges, members of the Council for Monetary Policy, members of the National Security Council or nomination and appointment of prime minister.

On the other hand, we have the council of ministers and the prime minister as the leader. The prime minister's source of power comes from the lower chamber of parliament, although the candidate to become the prime minister is selected by the president. Officially there is no legal provision limiting the presidential discretion; however, while nominating the president, one should be aware of the composition of the parliament, since the prime minister and the cabinet selected by the president need to get a motion of confidence in the Sejm. The strong position of the prime minister in the government is guaranteed by the constructive vote of no confidence. This legal tool has been adopted into our legal system from Germany in order to avoid situations in which a negative majority (voting against the government) won't change into a positive majority. In other words, in this institution in a single, ballot one government is losing power and at the same time the new government with a new prime minister receives the motion of confidence⁵. Although many motions of these types have been issued, it has never been successful (Pach, 2014). Besides, the prime minister will lose office at the first sitting of a newly elected Sejm, or when a vote of confidence in the Council of Ministers has not been passed by the Sejm or when the prime minister has resigned from the office. These examples demonstrate that a stable parliamentary majority is a crucial prerequisite for the government to exist and function.

Hence, in the mixed presidential-parliamentary Polish system, the person that acts as the leader of the party with the majority in the lower chamber of the parliament controls the legislative branch and, to a large extent, extends executive power without bearing any political or legal responsibility for their actions. No article dictates that the leader of the winning party shall become the new prime minister. This loophole has already been used on various occasions to allow party leaders to avoid legal responsibility. Let me be clear, this is not a new situation we are witnessing with Jarosław Kaczyński and Mateusz Morawiecki. Something very similar has already occurred with the first government, established under the new constitution, which was officially run by Jerzy Buzek, although everybody knew that he was guided from the back seats by the leader of Solidarity, Marian Krzaklewski. This pattern was later repeated several times by different political parties. Because of this, some 'anti-system' leaders call the current political regime a PRL⁶-bis, comparing it to methods of governance used before 1989, when actual power laid in the hands of the central political bureau of the party.

Due to these regulations, the Polish political system cannot be effective and self-limiting, since the real power belongs to the party leaders, who are invariably more focused on consolidating their party. In order to remain in power, they can change prime ministers simply by withdrawing their political support. Sometimes it may lead to weird and surreal situations, like in December 2017. On the 7th of December, the parliament rejected the opposition's motion of a lack of confidence in Beata Szydło's government. The ruling majority defended her strongly; even Jarosław Kaczyński said that her cabinet was the best since the end of communism. Nevertheless, the next day prime minister Beata Szydło resigned, which meant the end of her council of ministers too. Mateusz Morawiecki became the new prime minister. It was an open secret that her decision had been influenced by the leader of the Law and Justice party. According to some journalists, J. Kaczyński even threatened her, influencing her decision to step down voluntarily (Malinowski, Kolanko, 2017).

⁵According to Art. 156(2) of the Polish Constitution, the Sejm shall pass a vote of no confidence in the Council of Ministers by a majority of votes of the statutory number of Deputies, on a motion moved by at least 46 Deputies and which shall specify the name of a candidate for Prime Minister. If such resolution has been passed by the Sejm, the President of the Republic shall accept the resignation of the Council of Ministers and appoint a new Prime Minister as chosen by the Sejm, and, on his application, the other members of the Council of Ministers and accept their oath of office.

⁶ Polska Rzeczpospolita Ludowa ('People's Republic of Poland')—the official name of Poland during communism.

3. Legislative power

The Polish parliament consists of two chambers. The lower one is called Sejm and the upper is called Senate. The Sejm consists of 460 members and the Senate has 100 senators. However, this can be misleading because greater importance is given within the political system to the lower chamber, as it takes part in the formation of the government. It can pass the motion of censure against a minister or whole government or approve the dissolution of Sejm, which also means the dissolution of the Senate. Only the Sejm can appoint an investigative committee to examine a particular matter. Moreover, the Senate's position in the legislative procedure is weaker. The Senate can only introduce new bills as a whole chamber, whereas in the lower chamber this right is assigned to deputies. Furthermore, unlike deputies, senators have a constitutional time limit in which they must consider a bill adopted by the Sejm (they have 30 days to do so). If they fail, the bill is considered to be adopted according to the wording submitted by the Sejm. The constitution empowers the Senate to take part in the appointment of certain constitutional bodies, however, it should be noted that the Senate's powers are lesser than those of the Sejm. For instance, only deputies are entitled to appoint a prime minister and the cabinet, judges of the Constitutional Tribunal, members of the Tribunal of State or the president of the National Bank of Poland. The last nomination is done at the request of the president of the Republic. On the other hand, the Senate shall choose only 2 members of the National Council of Radio Broadcasting and Television (the Sejm chooses 4 members), 2 senators are sitting at the National Council of Judiciary. The Sejm is represented there by 4 deputies. Only when it comes to the composition of the Council for Monetary Policy, both chambers are equally represented. When it comes to the appointment of the president of Supreme Chamber of Control and the Commissioner for Citizen's Rights, the Senate plays a more important role because it approves the candidate elected by the Sejm; however if senators do not approve the candidature, the entire nomination procedure restarts from the beginning (Kuciński, 2003, p. 215). The Senate might thus block the Sejm's choice, but it does not happen very often, since both chambers are elected on the same day with differences in the electoral law, which mainly refers to the electoral principles. Elections to the Senate are majoritarian, whereas elections to the Sejm are proportionate.

Despite the differences, it has never yet happened that a party that had won the elections to the Sejm would not win the majority in the Senate. This only goes to prove that independent candidates do not stand much chance against those presented by parties. Therefore, the representation in both chambers is usually identical, which, frankly, impacts negatively on one of the main roles of the Senate, which is to control the quality of laws passed by the lower chamber.

I would like to highlight the last case, as it shows lack of economic and logical justification to continue having the senate in this form. It occurred in July 2018, when the Sejm passed a fifth amendment to the law regulating the Supreme Court, which was full of legal errors. The first of these errors prevented the nomination of the new president of the court because the bill did not indicate who should summon the court assembly to elect the chairman. The second mistake was even more humiliating, since the new legal provision referred to an article that had already been removed from the legal system. Because of that, the candidates for the judges of the Supreme Court could not add all required documents to their application, since there was no provision that permitted it. Despite the fact that these mistakes were known during the legislative procedure and the media were busy informing the public about them, the senators of the ruling party approved the law. The annual cost of maintaining this chamber reaches almost 200 million złoty (50 million euro). Hence, the economic sense in having a Senate at all is questionable.

Financial arguments are not the only ones presented against maintaining the Senate in its present form. Nowadays, commentators emphasise that the only motivation behind re-establishing the Senate in 1989 was political and done in order to check public support for communist leaders in the free elections. Because elections to the Sejm were partially free, where a guarantee of 65% of the seats in the lower chamber was granted to the communists during the negotiations with the Solidarity union (Ciemieniowski, 2010). Critics oppose maintaining the Senate in its current form, declaring it useless (Skotnicki, 2010), despite having the right to reject a bill accepted by the Sejm. Frankly, senators do not use this tool very often, since the political composition of both chambers is almost

identical; therefore, it does not happen often that a bill is rejected by the Senate. Even if it does happen, the Sejm may still reject the Senate's resolution by an absolute majority vote in the presence of at least half of the statutory number of deputies.

An unequal position between the two chambers of the Polish parliament negatively affects the Senate and its position within the constitutional structure of state bodies. Because of that, some authors call it a 'legislative bureau' (Jamróz, 2013, p. 511), which in many situations does not oppose adopting low quality laws. To overcome this issue, proposals to strengthen the higher chamber are being presented. Among them, for instance, the following proposals are being mentioned: changes in electoral law; separation of terms between the Senate and the Sejm; raising the majority in the Sejm able to reject the Senate's position in legislative procedure from absolute majority to 3/5 (Dobrowolski, 2009).

4. Judiciary power

The last type of power regulated by the constitution is judiciary. According to the constitution, in Poland we have courts and tribunals, but only the first group is responsible for the administration of justice, which consists of the Supreme Court, common courts, administrative courts and martial courts. There are only two types of tribunals: constitutional and state. The latter is half professional, since only half of the chairpersons must possess the qualifications required to hold the office of a judge. We will thus omit it.

The judiciary power is regarded negatively by the people. Mostly because of systematic inefficiency regarding the administration of justice. In particular, the common courts are highly criticised, despite their uncomplicated system⁷. Moreover, Poland has one of the highest number of judges per 1000 inhabitants⁸, but the system is still inefficient. A major reason is formalised, time-consuming, complicated and expensive procedures. It is a burning problem for Polish society, since those courts settle disputes in civil, family, criminal, labour, social security and tort law cases, but not for the politicians.

The current ruling party started its judicial reforms with the Constitutional Tribunal. The organ was chosen intentionally because the former government passed a law in the last months of the previous parliament, which empowered the old parliament to elect to the constitutional tribunal not 2 judges, but five. The bill was constitutionally doubtful, since only mandates of two judges were to be ceased before the parliamentary elections in October 2015. This meant that the previous parliament could have elected only two judges. However, the bill empowered the old parliament to elect 3 more judges who should have been elected already by the new Sejm, since their mandates were expiring in November and December 2015, i. e. after the elections. The law was officially prepared by the President of the Republic⁹; however, many expressed public doubts that the chairman and the vice-chairman of the Constitutional Tribunal of that time had actually written it (Stępień, 2015). This way, the Civic Platform hoped to guarantee itself a majority of judges in the Constitutional Tribunal in order to be able to block far reaching reforms of the new government. However, we must note that in the spring of 2015 we celebrated presidential elections in which the Law and Justice candidate Andrzej Duda won. He was against the new law, which regardless had been signed by the exiting president in the last weeks of his term (Law on Constitutional Tribunal, 2015). Therefore, when Duda took over the office, he refused to appoint five new judges and the new parliament passed an amendment changing the law on the Constitutional Tribunal, while, at the same time, declaring the election of five judges by the old parliament as void and choosing five other judges who were later appointed by the president. On the other hand, the chairman of the constitutional tribunal denied those five newly elected judges access to the tribunal.

⁷The common courts in Poland consist of three types: municipal, circuit and appeal courts.

⁸ Poland has 26 judges per 1 000 inhabitants. European average is 22 judges per 1 000 inhabitants. The lowest number are in Ireland, England and Wales, whereas the biggest amount is in Monaco (Cepej, 2015).

⁹ At that time this office was taken by Bronisław Komorowski who was supported by the Civic Platform.

In December 2015, the full chamber of the constitutional tribunal declared unconstitutionality of the provision that allowed the old parliament to elect 2 judges in advance. Those whose terms were finishing in December 2015 (Decision of the Constitutional Tribunal, 2015). Despite this judgment PiS didn't step back and when A. Rzepliński's¹⁰ term came to an end, he was replaced by a new chairman Julia Przyłębska who granted access to those judges. She was a candidate presented by PiS. In the past, she had been a judge in a common court in Poznań in the Social Security and Labour Law division and she had been negatively evaluated on a number of occasions by other judges (Cieśla, 2016).

Right now, the government is trying to take control of the Supreme Court of Poland. In order to do this, a new law has been passed, according to which all judges, irrespective of their gender, are required to retire upon reaching 65 years of age. However, they may request the president to extend their term for 3 years if they are in good health. This provision has been challenged by the Supreme Court judges in a preliminary question to the Court of Justice of the European Union. According to Polish judges, this regulation violated the principle of independence and non-discriminatory clause because of age, known as ageism. Sending this preliminary question, the Supreme Court decided to temporarily uphold the new law, using an article from the civil procedure code as the justification for this precedential decision. Both, the members of the government and the president declared the injunctive provision as void, saying that no government or legislative body in Poland should be entitled to suspend a law that had already entered into force. The interim resolution was published on the 15th of November 2018 (Decision from the 15th of November 2018, C-619/18). As a consequence, the procedure described above has been eliminated and now all judges are required to retire at the age of 65. Nevertheless, women will be entitled to do so at the age of 60. It should be noted that this procedure does not apply to judges who took their office before the 3^d of April 2018. They are entitled to retire, irrespective of their gender, at the age of 70, as in the past.

The main issue of this reform was that the government wanted to end the term of the First President of the Supreme Court prof. Małgorzata Gersdorf by changing the retirement procedure. The only problem was that her term was established by the constitution, hence it could not be changed nor terminated by any act other than the one at the constitutional level.

Although the current government very often repeats that one of their main aims is to reform the judiciary system, all of their efforts are focused on substituting people occupying the most important posts in courts and tribunals rather than changing the system. Because of this, problems regarding the impunity of judges, democratic control over this branch of power, long waiting periods for court sentences, transparent procedures detailing ways to become a judge, elimination of constitutional tribunal together with administrative courts are not being resolved. Hasty procedures in which low quality laws, containing errors are adopted wastes the huge level of public support for a profound reform of one of the most expensive and slowest judiciary systems in Europe. Instead of that, time and energy is nonsensically spent on personal wars.

Conclusions

Since humans are prone to make mistakes, nothing that is created by them can be perfect and error-free, even a constitution. The actual Polish magna carta is an act that, over time, causes more problems than resolves. The way in which it was written and the ambiguity of its provisions are used against its article one, which declares that the Polish state is for the common good of all citizens. The partial compromise reached in the 90's to approve it influenced the text of the constitution in a negative manner. We constructed a system in which no one bears full responsibility for their actions and can easily shift their guilt onto someone else. The current system allowed the construction of different, strong groups of interests that may impede changes and reforms. The latter, by the way, are highly needed and gain more and more social support. However, the biggest parties are strong and satisfied with the polarisation of the Polish society, which results in almost 60% of the Poles not taking an active part in any form of political participation (elections, referendums). Party leaders seem to underestimate the nations will

¹⁰ The former chairman of the Constitutional Tribunal.

to have a fair and effective government, giving space to movements or parties nowadays referred to as 'anti-system'. Maybe new 'people's tribunes' will have enough energy and will to construct a new constitution with effective and self-restraining government.

On the other hand, this constitution is not completely bad. Some of its provisions should be included in the new text. For example, the articles governing the shift in power when the president of the Republic suddenly dies. Moreover, the chapter regulating sources of law, which was copied by other countries, like Albania, or the constitutional limit of public debt, which shall not exceed three-fifths of the value of the annual gross domestic product, should not be omitted in the new text. Nevertheless, the rearrangement of the political system is needed and to do so, a new social contract - to paraphrase J.J. Rousseau - should be signed.

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