TORUŃSKIE STUDIA POLSKO-WŁOSKIE XVII – STUDI POLACCO-ITALIANI DI TORUŃ XVII
Toruń 2021

Stanisław Bułajewski*

University of Warmia and Mazury in Olsztyn

Monika Giżyńska**

University of Warmia and Mazury in Olsztyn

PERSPECTIVES AND DIRECTIONS OF THE DESIRED CHANGES TO THE CONSTITUTION OF THE REPUBLIC OF POLAND WITH PARTICULAR FOCUS ON LOCAL GOVERNMENT

DOI: http://dx.doi.org/10.12775/TSP-W.2021.015

Date of receipt: 27.09.2021
Date of acceptance: 30.11.2021

Summary. The present paper focuses on the prospects for and the directions of possible amendments to the current Constitution of the Republic of Poland with particular focus on local government. The authors discuss the scope of the recommended amendments and look for an answer to the question of whether an amendment to the Polish Constitution is needed or, instead, a new Constitution should be adopted.

Keywords: Constitution of the Republic of Poland, amendments to the Constitution, local government.

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* Dr hab. Stanisław Bułajewski – Department of Constitutional Law and State Science, Faculty of Law and Administration, University of Warmia and Mazury in Olsztyn, ORCID: 0000-0002-7067-4153, e-mail: stabul1@wp.pl.

** Dr Monika Giżyńska – Department of Constitutional Law and State Science, Faculty of Law and Administration, University of Warmia and Mazury in Olsztyn, ORCID: 0000-0002-5483-9878, e-mail: monia_s1@wp.pl.

Perspektywy i kierunki pożądanych zmian Konstytucji Rzeczypospolitej Polskiej ze szczególnym uwzględnieniem samorządu terytorialnego. Artykuł dotyczy perspektyw i kierunków ewentualnych zmian obowiązującej Konstytucji Rzeczypospolitej Polskiej ze szczególnym uwzględnieniem samorządu terytorialnego. Autorzy rozważają zakres postulowanych zmian i szukają odpowiedzi na pytanie, czy istnieje potrzeba dokonania w Polsce zmiany (nowelizacji) ustawy zasadniczej lub jej rewizji bądź uchwalenia nowej konstytucji.

Słowa kluczowe: Konstytucja Rzeczypospolitej Polskiej, zmiany konstytucji, samorząd terytorialny.

1. INTRODUCTION

24 years have passed since the entry into force of the 1997 Constitution, which allows us to look at the experience resulting from the application of its provisions from a certain perspective. This makes it possible to formulate the recommended amendments and to search for an answer to the question of whether an amendment to the Polish Constitution is needed. It should be emphasised that the stability of the state and the law it creates is a generally recognised value. However, this is a stability that should not be equated with the inalterableness of the law, including the norms of the Constitution. This is expressed by the constitutional legislator allowing the possibility of the occurrence of socio-political phenomena justifying the need to make appropriate changes to the Constitution. In the last few years, there have been more and more voices in Poland demanding a change of the Constitution, some of them rather dictated by the current conditions and aspirations of specific political forces. These propositions can be described as resulting from the premises of a subjective nature. However, there are also premises for changes that can be described as objective, reasonable and deserving of serious and thorough consideration. Premises defined as objective ones result from two fundamental sources. One of them is the experience of the systemic practice during the 24 years of applying the Constitution of 1997, which proves the existence of gaps in the binding legal provisions, and the lack of specific solutions. The second source is related to important events in 2004, i.e. the accession of the Republic of Poland to the European Union. This fact gives rise to a completely new legal and political situation in many areas, which arose after the entry into force of the existing Constitution.

2. RECOMMENDED AMENDMENTS

This paper will pay special attention to those constitutional provisions that concern the local government and – in our opinion – cause the greatest number of interpretation problems and should be amended in the near future.

We would like to begin our discussion with an analysis of the content of Article 94 of the Constitution of the Republic of Poland.[1] This article *in fine* expressly provides that the principles and procedure for issuing acts of local law shall be determined by statute, which, according to some representatives of the doctrine, can be understood in two ways: 1) either as an order for the legislator to enact a separate statute that will comprehensively regulate the issues related to the adoption of local law; 2) or as an order to regulate those issues in individual local government system statutes (Banaszak, 2009, p. 472–473). Unfortunately, the legislator incorrectly – in our opinion – chose the latter option. Therefore, we believe that this provision should be made more precise so as to eliminate any doubt that the Constitution obliges, and not only authorises, the legislator to enact a separate statute that precisely and comprehensively sets out the principles and procedures according to which all local government units will be able to adopt acts of local law. This is important because the acts adopted, in a large part, by the bodies of local government units are the sources of universally binding law in Poland and as such should be treated by the legislator with due importance. The current constitutional provisions do not guarantee such treatment. The great chaos in the area of creation of local law in Poland leads to a situation where the same resolution in one place is an act of local law, while in another it is an ordinary resolution that is not universally binding (Bułajewski, 2010, p. 51–72).

The wording of Article 62(1) of the Constitution also appears problematic. It clearly follows from the linguistic interpretation of this provision that the right to elect, among others, representatives to local government bodies is vested exclusively in Polish citizens. In our opinion, it is therefore necessary to clarify the content of the article in question. At the same time, we would like to point out that the jurisprudence of the Constitutional Tribunal does not notice the constitutional problem in the active voting right, which, according to the

[1] Article 94 of the Constitution of the Republic of Poland provides that local government bodies and local bodies of central government administration, on the basis and within the limits of the authorizations contained in a statute, shall establish acts of local law that are binding in the area of activity of these bodies. The principles of and procedure for the issuance of acts of local law are specified in a statute. Constitution of the Republic of Poland of 2 April 1997, Dz. U. No. 78, item 483.

current Electoral Code, is also granted to citizens of the European Union who are not Polish citizens and who have turned 18 years of age at the latest on the voting day and are permanent residents in the territory of a given commune or municipality.[2] Art. 62 of the Polish Constitution, treats the right to vote to authorities as a civil right, and therefore it applies only to Polish citizens. Pursuant to European Union law, elections to local self-government bodies should allow participation also to European Union citizens who are not Polish citizens, provided that they permanently reside in Poland. Such a solution is not provided for in Art. 62 of the Constitution, which treats the right to participate in the referendum and election of the President of the Republic of Poland, deputies, senators and representatives of local self-government bodies (Article 62 (1)) as a civil right. On the other hand, the EU regulations on the right to vote and stand as a candidate in local elections provide for the participation of European Union citizens residing in a Member State of which they are not citizens. It is, therefore, necessary to introduce appropriate changes to the national self-governing electoral law in order to include them. It is also necessary due to the introduction of the Citizenship of the European Union, which is available to all citizens of the EU Member States.

In our opinion, it is therefore necessary to clarify the content of the article in question. At the same time, we would like to point out that the jurisprudence of the Constitutional Tribunal does not notice the constitutional problem in the active voting right, which, according to the current Electoral Code, is also granted to citizens of the European Union who are not Polish citizens and who have turned 18 years of age at the latest on the voting day and are permanent residents in the territory of a given commune or municipality.[3] On the one hand, the Constitutional Tribunal confirmed that Article 62(1) of the Polish Constitution does not literally provide for an active electoral right of EU citizens, but according to the Tribunal, granting them this right "is […] a consequence of the obligations of the Republic of Poland arising from the Treaty of Accession […] and the Treaty on European Union" (Judgment of the Constitutional Tribunal of 20 February 2006, ref. no. K 9/05, OTK-A 2006, no. 2, item 17). Moreover, in the grounds for one of its decisions, the Constitutional Court stated: "The Constitution […] does not make […] belonging to a self-governing community dependent on having Polish citizenship. Such belonging is determined […] by

[2] See: Article 10(1)(1)(a) of the Act of 5 January 2011 – Electoral Code (consolidated text: Journal of Laws of 2020, item 1319, as amended).

[3] See: Article 10(1)(1)(a) of the Act of 5 January 2011 – Electoral Code (consolidated text: Journal of Laws of 2020, item 1319, as amended).

the place of residence (the center of life activity), which is the basic type of bond in a community of this type. In elections to bodies of local government, […] it is not so much the exercise of the sovereign rights of the Nation that is at stake as the rights of the community of inhabitants" (Judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04, OTK-A 2005, no. 5, item 49). Nevertheless, it is hard not to agree with B. Banaszak, who claims that it is impossible to say that the rights of citizens can be granted to non-citizens by the legislator's decision (Banaszak, 2012). In our opinion, a clear mandate stemming directly from a provision of the Constitution of the Republic of Poland is necessary in relation to active electoral rights for citizens of the European Union.

Another problem we noticed is the imprecise provisions of Article 188 of the Polish Constitution. When analysing that article, one may notice that an application to the Constitutional Tribunal to examine constitutionality only covers normative acts issued by central state bodies. Thus, acts of local law issued by bodies of local government units are outside that scope. It should therefore be pointed out that in the case of applications for a ruling on the compliance of normative acts with acts of a higher order, i.e. abstract control, only normative acts issued by central bodies are subject to control both by the Constitutional Tribunal and by administrative courts. Thus, according to current law, the control of constitutionality of universally binding acts of local law is not possible under the abstract control procedure, but only under the specific control procedure – which in our opinion should also be changed (Dąbek, 2007, p. 301–302). In our opinion, in the near future, on the occasion of amendments to the Constitution, the legislator should broaden the content of Article 188(3) so as to enable abstract control of legal provisions (acts of local law indicated in Article 87(2) of the Polish Constitution) issued by local government units. It must be emphasised that in a democratic law-abiding state it should not be possible to enact legal norms that are not subject to assessment from the point of view of their compliance with the Constitution in a manner that would make it possible to eliminate any existing conflicts (Bułajewski, 2012, p. 25–30).

Another problem that we noticed while analysing the provisions of Chapter VII of the Polish Constitution is the content of Article 168.[4] The semantic interpretation of this provision is clear. However, the authors of the Constitution did not take equal care of all local government units. The aforementioned article clearly states that local government units have the right to set the amount of local taxes and fees to the extent specified in a statute. Unfortunately, so far

[4] Local government units have the right to set the amount of local taxes and fees to the extent specified in a statute.

only communes/municipalities have made full use of this provision and have determined the amount of, among others, local taxes and charges. Districts and provinces (with some exceptions) have practically no such powers and the revenues they receive from the so-called tax authority are symbolic. It should be emphasised that local taxes and charges are one of the few reliable sources of income for all local government units, which allow them can carry out their own tasks and finance necessary investments. Therefore, in our opinion, this provision should be clarified in the text of the Constitution, so that all units of local government, and not only the basic one, have a similar influence on the determination of the amount and local charges. At present, that provision is largely a fiction.

One should also take a closer look at Article 169(1) of the Constitution, which provides that local government units perform their tasks through the decision-making authorities and executive bodies. The questions arise as to whether the provision allows for the appointment of, for example, a third body or whether the list of bodies within the provision is closed. It seems that the legislator cannot establish new bodies within the individual units of local government, because the Constitution contains an exhaustive list of such bodies. In our opinion, when creating local government bodies, the legislator must act within the guidelines established by the authors of the Constitution, which only requires the legislator to regulate the decision-making and executive bodies and thus introduces a prohibition on establishing a third type of body, such as judicial, enforcement or audit bodies. Of course, there may be other bodies within the local government, but in our opinion they will always be auxiliary, advisory, or service bodies (Sarnecki, 2005, p. 2).[5] On the other hand, there is no prohibition on, for example, the decision-making body being a bicameral body. The Constitution only stipulates that the decision-making body must be a collective body, while the executive body may be collective or monocratic. The legislator also has full discretion in determining the number of executive bodies in a particular local government. Thus, the statutory establishment of two or more executive bodies is permissible.

The last problem we would like to indicate concerns the content of Article 171(3) of the Polish Constitution. It provides that the Sejm, at the request of the Prime Minister, may dissolve a decision-making body of the local government if this body grossly violates the Constitution or statutes. We note two – in our

[5] In Prof. Sarnecki's opinion, it is possible to set up new independent bodies of self-governing communities by virtue of a provision of a law or bylaws, with the sole provision that they must function outside the sphere of "establishing" or "performing" tasks.

view – significant problems in this provision. First, the term "gross violation" is not defined in the Constitution. It seems that this term, given the essence of the adopted solution, should be directly articulated in the Constitution. Secondly, a resolution of the Polish Sejm dissolving a local government body is not subject to appeal to any other constitutional body of the state. In the opinion of the Constitutional Tribunal, "a resolution of the Sejm is not a supervisory decision, but *sui generis* a repressive and disciplinary measure towards a body that systematically violates the Constitution or statutes. It is a measure applied at the request of the supervisory authority supported by previous supervisory decisions or decisions of the Supreme Administrative Court. The Sejm […] is not a supervisory body. Without deliberations as to the constitutional position of the Sejm in the system of state bodies and the lack of constitutional basis for the judicial-administrative control of its resolutions, the Constitutional Tribunal shares the view of the Prosecutor General that a resolution of the Sejm on dissolution […] of a commune council is not subject to judicial-administrative control (Resolution of the Constitutional Tribunal of 5 October 1994, ref. no. W 1/94). In our opinion, there should be no exceptions in the Polish legal system as far as two-instance proceedings are concerned. By this provision, the Constitution of the Republic of Poland allows for situations where there is a risk of infringement on the independence of local government units, which is subject to judicial protection according to Article 165(2) of the Constitution. As a constitutional body of the state, the Sejm should not be treated differently in this case and, therefore, local government should always be able to protect itself from illegal interference by the Sejm.

3. FINAL REMARKS

This article is not intended to present an exhaustive analysis of the problems related to constitutional provisions applicable to the institution of local government in Poland. However, the 24-year period since the entry into force of the Polish Constitution, as well as the practical and judicial experience gained, enable the authors to present a few comments containing an assessment of the constitutional provisions together with recommendations for the future.

We would like to point out that the constitutional regulation of local government is too general and sets out only its basic principles. We see good as well as bad sides of the adoption of those provisions, as we have shown in the deliberations presented in the paper.

While preparing the text of the Constitution of the Republic of Poland, the authors did not foresee many aspects related to Poland's accession to the European Union. The statutory reality in this respect, including that concerning local government, often differs from the specific provisions of the Constitution or at least causes great problems in their proper interpretation. In our opinion, this situation should not be tolerated by the Polish legislator for too long. That is why we consider it not only necessary, but also advisable to make certain modifications to Chapter VII of the Constitution and to those provisions that are closely related to the institution of local government in Poland. This refers specifically to the following articles of the Constitution: Article 62(1), Article 87(2), Article 94, Article 168, Article 169, Article 171(3), and Article 188(3).

We would like to point out the necessity of changes results mainly from the existence of legal loopholes within the existing regulations. The answer to the earlier question of amending the Constitution is obvious. Numerous premises justify the necessity to introduce changes to the fundamental law. Some of them are indispensable, others are purposeful, some are necessary to bring the current law into full compliance with the Constitution of the Republic of Poland of 1997. All the proposals, however, concern amending constitutional provisions, eliminating the existing legal loopholes. None of them concerns the essence of the current political system, and therefore does not seek to revise the Constitution or imply the necessity to pass a new one.

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