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HOW TO ADOPT A NEW CONSTITUTION?*

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Summary. The subject of the article is the attempt to answer the question whether Art. 235 of the Constitution of the Republic of Poland may be the basis for the adoption of a new Polish Constitution. In author's opinion Article 235 of the Constitution may be applied only in the case of amending the Constitution.

Keywords: Constitution of the Republic of Poland; adoption of a new Polish Constitution; amending the Constitution; art. 235 of the Constitution.

Jak uchwalić nową Konstytucję? Niniejszy artykuł jest próbą odpowiedzi na pytanie, czy art. 235 Konstytucji Rzeczypospolitej Polskiej może być podstawą do przyjęcia nowej polskiej Konstytucji. W opinii autora art. 235 Konstytucji może być stosowany tylko w przypadku zmiany Konstytucji.

Słowa kluczowe: Konstytucja RP; uchwalenie nowej polskiej Konstytucji; zmiana konstytucji; art. 235 Konstytucji RP.

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The problem I intend to address with the following deliberations is contained in the question whether under Article 235 of the Constitution of the Republic of Poland which concludes chapter XII of the Constitution titled: „Amending the Constitution” it is also possible to adopt a new Constitution. This problem is noted in literature¹ and has become valid with regard to the recent discussion on purposefulness of establishing a new constitution in Poland to replace the binding constitution of 1997.

My opinion regarding this issue is as follows: Article. 235 of the Constitution of the Republic of Poland defining the procedure for amending the constitution is not suitable for the preparation and passing of a new constitution but merely for its amendment.

Article 235² of the Constitution provides for two modes of amendment of the constitution depending on the regulated matter. The qualified mode for the matter discussed in chapter I, II and XII and the ordinary mode for the matter of the other chapters, i.e. III, IV, V, VI, VII, VIII, IX, X, XI, XIII and the introduction to the Constitution. Such an interpretation of the content of Chapter XII (Article 235) means that it applies only to the amendment of the Constitution, and that partial changes to the Constitution which would eventually lead to an establishment of a new constitution would be unacceptable, even if the rigor of a qualified change prescribed for Ch. I, II and XII was to be extended onto the remaining

¹ L. Garlicki, *Komentarz do art. 235*, [in:] *Konstytucja Rzeczypospolitej. Komentarz*, t. II, ed. L. Garlicki, Warszawa 2001, in particular pp. 66–68 with cited literature.

² Article 235 of the Constitution of Poland: 1) A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic. 2) Amendments to the Constitution shall 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. 3) 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. 4) 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. 5) The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill. 6) If a bill to amend the Constitution relates to the provisions Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment. 7) After conclusion of the procedures specified in para 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland.

chapters. It would be a constitutionally doubtful solution as the Constitution provides for appropriate modes of introducing changes to relevant chapters. This means in my opinion that an amendment of the Constitution cannot refer to an adoption of a new constitution.

In my opinion, based on the provisions of Article 235 it is also unacceptable to claim that the new constitution could be enacted entirely under Article 235, as it would limit the legislator with respect to the structure of the constitution. I would also consider it constitutionally doubtful to allow for the passing of a new constitution solely pursuant to the more rigorous procedure of amending the constitution as stipulated in chapter I, II and XII of the current Constitution. Neither the first nor the second solution find confirmation in the analysis of Article 235 of the Constitution. In the absence of a ban on the adoption of a new constitution following the mode of Article 235 of the Constitution, no conclusion can be drawn regarding such a possibility.

Finally, one must not ignore the circumstance that an amendment to the Constitution (Article 235) is made by an act called an „Act on amending the Constitution”. If we assume that a new constitution could be enacted pursuant to Article 235, the adopted constitution would have to be called the „Act amending the Constitution of the Republic of Poland”. Such a solution would cause that the name „Constitution” would disappear from the legal order in the meaning of the basic law of the state and would remain in conflict with the permitted interpretation of the provisions of the Constitution. It could also lead to the accusation that the constitution, using the words of J. Piłsudski with reference to the Constitution of 1935, was adopted using a „trick”³.

Another argument, next to the analysis of Article 235 whose content, as I have said, refers only to introducing changes to particular provisions and not the whole of the Constitution, which speaks in favour of the above thesis, is an argument derived from the constitutional practice of preparation and adoption of Polish constitutions. To a greater or lesser extent (as regards particular constitutions), the modes of their adoption differed from the previous ones as did the procedures of their amendment contained in the preceding constitutions⁴. Perhaps it was so because over the years each of the Polish constitutions, starting from the Constitution of the 3rd of May, was passed under extraordinary circumstances. However, there is no doubt that it has never been the case that the procedure for

³ Cf. on this subject matter W.T. Kulesza, *Tryb uchwalenia Konstytucji kwietniowej z 23 kwietnia 1935 roku*, [in:] *Tryby uchwalania polskich konstytucji*, ed. M. Wyrzykowski, Warszawa 1998. The paper describes the modes of adoption of the Constitutions of 1791, 1807, 1815, 1921, 1935, 1952 and 1997.

⁴ Cf. on this subject matter: M. Wyrzykowski (ed.), *Tryby uchwalania polskich konstytucji...*

the adoption of a new constitution was foreseen in the previous constitution nor has it never been a constitutional practice that the new constitution would be passed under the procedure for amending the Constitution.

The above-mentioned statement regarding the separateness of the mode of adopting a new constitution from the mode of its amendment is best illustrated by the mode of preparation and adoption of the Constitution of 1997. Let us remember that for the preparation and adoption of the Constitution, a constitutional law was passed on April 23, 1992 on the procedure for the preparation and adoption of the Constitution of the Republic of Poland. The main provision of this act was to establish that the Constitution of the Republic of Poland adopted by the Sejm and the Senate combined in the National Assembly was to be accepted by the Nation by means of a constitutional referendum. The adoption of the Constitution in the referendum took place when the majority of those participating voted in favour of it. The works were to be managed by the Constitutional Committee of the National Assembly.

The constitutional provisions in force at the time (Article 106 of the Constitution of 1952) entitled „Amendment of the Constitution”, not only for political reasons, were understood as provisions referring only to the amendment of the Constitution or adoption of constitutional laws.

Some of the current constitutions clearly distinguish a change, i.e. an amendment of the constitution from the adoption of a new constitution, providing for separate procedures for these activities.

For instance, such a regulation is applied in the Constitution of Bulgaria. Chapter XIX of the said Constitution is entitled „Amendments and additions to the Constitution. Adoption of a new Constitution.” For the adoption of a new constitution a different procedure is envisaged from the one applied in the case of its amendment (amendments and additions).

Similar distinctions between amendment and adoption of a new constitution may also be found in the Constitution of Spain. In the title X „On constitutional reform” we find provisions referring to constitutional reform, i.e. changes, amendments to the constitution and those referring to a „complete reform of the Constitution”, which also encompasses the so-called partial reform regarding the preliminary title, chapter two of the first section of Title I or Title II (Article 108, paragraph 1).

A similar regulation is known by the Constitution of Georgia, which, under title eight „Amending the Constitution”, distinguishes between a complete or partial change of the constitution. In such a situation, there is no doubt that the provisions of the Chapter „Amending the Constitution” also apply to the adoption of a new constitution (Article 102 paragraph 1), and not only to its amendment.

There are, of course, constitutions which do not introduce such a distinction, sometimes even proclaiming that a change to the constitution is a change consisting in the transformation, addition to or revocation of a constitution, and the bill must then be entitled an „Act introducing an amendment to the Constitution” (Article 46 of the Constitution of Ireland). This precludes the adoption of a new constitution in the manner envisaged for its amendment.

Returning to the main considerations of this study, i.e. to the question whether Article 235 of the Constitution of the Republic of Poland, strictly referring to an amendment of the constitution, could be the basis for the adoption of a new constitution, L. Garlicki⁵ suggests that it could and offers several arguments among which there is the one saying that the adoption of a new constitution could take place in the mode required for chapters I, II and XII, thus in the mode that provides for a referendum. Article 235 paragraph 6, however, only refers to a referendum at the request of at least 1/5 of the statutory number of deputies, the Senate or the President of the Republic of Poland.

I think that one could possibly follow this trail of reasoning, with the reservations that I had previously made, on condition that the referendum would be compulsory and not dependent on the will of one of the three entities mentioned in Article 235 paragraph 1, and also provided that the possibility of applying the mode provided for in chapters I, II and XII, for the enactment of a new constitution would be explicitly provided for in the Constitution itself as it is in the Constitution of Spain in Article 168 paragraphs 1 and 2, which stipulate that: „1) If a total revision of the Constitution is proposed, or a partial revision thereof, affecting the Preliminary Part, Chapter II, Division 1 of Part I; or Part II, the principle of the proposed reform shall be approved by a two-thirds majority of the members of each House, and the Cortes Generales shall immediately be dissolved. 2) The Houses elected thereupon must ratify the decision and proceed to examine the new constitutional text, which must be passed by a two-thirds majority of the members of each House”. The change (reform) of the Constitution is then subjected to ratification by referendum. Other elements of the procedure for amending the constitution are described in Article 167 of the Constitution of Spain.

One could also consider adoption of a new constitution following the mode described in the Constitutional Act of 23 April 1992 on the mode of preparation and adoption of the Constitution of the Republic of Poland, however our system of sources of law after the 1997 Constitution came into force does not know constitutional laws and the ordinary law cannot be used to regulate the constitutional

⁵ Cf. fn. 3.

matter. Therefore, it is possible to pass an act amending the constitution in the mode of Art. 235 of the Constitution, which will become an integral part of the Constitution.

If we accept the above reasoning, there is only one way to solve the problem of adopting a new constitution, namely by amending chapter XII (Article 235) of the Constitution. It could be carried out in two ways. The first is the above-mentioned solution adopted in the Constitution of Spain. It would consist in amending the Constitution limited to Article 235 Paragraph 6, where, alongside the amendment to the Constitution, it would also be necessary to pass a new constitution with the addition of a mandatory ratifying referendum. This would be the minimal plan.

The second way to regulate the issue in question, in my opinion more in line with the importance of the constitution as the basic law of the state (and Polish constitutional practice) would be to add to Article 235 of the Constitution subsequent paragraphs describing the enactment of the Constitution or another article to chapter XII fulfilling the same role. The model and starting point for such a regulation could be the abovementioned Constitutional Act of 1992 on the mode of preparation and adoption of the Constitution of the Republic of Poland. In both cases, this would require changing the title of Chapter XII, which could read: „Amending of the Constitution. Adoption of a new Constitution”.

The adoption of a new Constitution would have to take place in the first stage through the Constituent Assembly, e.g. the National Assembly or other representative body, selected in the general election (the National Assembly expanded with the representatives of the Nation elected in the general election). In the second stage of this procedure, an obligatory ratifying referendum should be held.

Finally, in order to fulfill the postulate often referred to as an argument in favour of legitimation of the Constitution as a form of a social contract, it should be assumed that among entities having the right to the constitutional initiative there should also be a (sufficiently large) group of citizens.

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