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***Verfassungsdurchbrechung* or Informal Constitutional Change. The Polish Experience²**

Keywords: *Verfassungsdurchbrechung*, informal constitutional change, Poland

Słowa kluczowe: *Verfassungsdurchbrechung*, nieformalna zmiana konstytucji, Polska

Abstract

The author assesses constitutional practice after 2015 in Poland in the context of constitutional changes, and indicates that no formal change has occurred. Instead, she is considering qualifying the actions of the ruling majority as *Verfassungsdurchbrechung*, an institution known from the political practice of the Weimar Republic. However, she concludes that an informal constitutional change is a more appropriate institution to describe the political reality in Poland. The author shows practices that can be qualified in this way (reinterpretation and interpretation of the text of the constitution by the CT, creation of competences unknown to the constitution by the legislature and the executive power, emptying of the text of the constitution). Furthermore, these practices also step beyond a simple violation of the constitution, as they aim to build a new system (il-liberal constitutionalism).

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Streszczenie**Przełamanie czy nieformalna zmiana konstytucji. Polskie doświadczenia**

Autorka dokonuje oceny praktyki konstytucyjnej po 2015 roku w Polsce w kontekście zmian konstytucji. Wskazuje, że zmiana formalna nie nastąpiła. Rozważa natomiast kwalifikację działań większości rządzącej jako *Verfassungsdurchbrechung* (przełamania konstytucji), instytucji znanej z praktyki ustrojowej Republiki Weimarskiej. Dochodzi jednak do wniosku, że bardziej odpowiednią instytucją do opisu rzeczywistości ustrojowej w Polsce jest nieformalna zmiana konstytucji. Autorka podaje przy tym praktyki, które mogą być w taki sposób zakwalifikowane (reinterpretacja i wykładnia tekstu konstytucji przez TK, tworzenie kompetencji nieznanymi konstytucji przez legislatywę i egzekutywę, wydrążanie tekstu konstytucji). Praktyki te wyrastają także poza proste naruszenie konstytucji, gdyż zmierzają do budowy nowego ustroju (konstytucjonalizmu nieoliberalnego).

I.

The constitution is a basic law of particular importance. On the one hand, it is a normative act with the highest legal force. On the other hand, it is a social contract that connects the will of past, present, and future generations. Therefore, the constitution is more than just the legal norms written therein. Thus, it cannot be interpreted just like other legal acts. The constitution can be recognized also as the values that make up its spirit, reflecting the specific constitutional morality of the community living under its provisions. The constitution should therefore be a relatively stable act, with the possibility of its modification along with the development and changing will of the sovereign (the people). For this purpose, constitutions usually provide for the possibility of amending their provisions, applying a formal procedure. Departure from constitutional regulations without using the constitutionally provided legislative path should be treated as unconstitutional. The assumption is, however, that an authority that can assess such a behavior exists and operates. The applied measures cause the state of compliance with the constitution to be restored using the tools provided for in the constitution. Howev-

er, sometimes constitutions are subject to modification outside the procedure of their amendment. History knows such situations, including in the form of the *Verfassungsdurchbrechung* or an informal constitutional change. The following considerations are devoted to these institutions in the context of Polish constitutional experience.

In this paper, I discuss in turn *Verfassungsdurchbrechung*, and then the amendment to the Polish Constitution and Polish experiences that may be associated with breaking the basic law. Next, I raise the question about the legal evaluation of political practice in Poland after 2015 to briefly summarize the analysis.

II.

It is commonly known that the political practice of the Weimar Republic, developed among others on the basis of Carl Schmitt's theories, led to the takeover of power by one of the great totalitarianisms using democratic and constitutional institutions. The consequence of systemic changes introduced by a Parliament not legitimized to do so (especially the Enabling Act, 1933) was the introduction in 1949 to the *Grundgesetz* the prohibition of adopting amendments to the Constitution without expressly reflecting them in its text³.

In the political practice of the Weimar Republic, a deviation from the wording of the constitutional provisions could have been made using the mechanism of Art. 48(2) of the Constitution of 1919. According to this provision, in case that the public order and security are seriously disturbed or endangered, the Reich President could take the measures necessary (*nötige Maßnahmen*) for their restoration, intervening, if necessary, with the aid of the armed forces. For this purpose, he could temporarily abrogate, wholly or in part, the fundamental principles laid down in Art.: 114 (personal freedom), 115 (inviolability of the home), 117 (secrecy of correspondence), 118 (freedom of speech),

³ P.L. Lindseth, *Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, "The Yale Law Journal" 2004, No. 7, pp. 1389–1392; P. Chybalski, *Problematyka zmiany Ustawy Zasadniczej RFN*, "Państwo i Prawo" 2018, No. 12, p. 103.

123 (freedom of assembly), 124 (freedom of association), and 153 (property rights). The Reich President was obliged by Art. 48.3, without delay, to inform the Reichstag of all measures taken under the Paragraph 1 or Paragraph 2 of this Article. The Reichstag could vote to annul these measures.

According to C. Schmitt, the President played the role of the guardian of the constitution in these cases⁴. However, as pointed out by C. Schmitt, the constitutional regulation could lead to adopting the position of a dictator⁵. At the same time, C. Schmitt distinguished “commissarial dictatorship [*kommissarische Diktatur*]” which temporally suspended the constitution *in concreto* aiming at the protection of its concrete existence. The President had the power to act in defense of the constitution only within the limits set by the constitution⁶. The second type of *Diktatur* was a “sovereign dictatorship [*souveräne Diktatur*]” aimed at creating a different political situation, in which the imposition of a new constitution became possible⁷. In such a situation, the President could use his authority to restore public security and order by “any means necessary” including change of the Constitution⁸. Nevertheless, Schmitt believed that circumstances might justify the temporary violation of any provision of the Constitution, limited only by the requirement that when things return to normal, the Constitution will be restored⁹.

⁴ Cf. for more detail on the guardian of the constitution – President or court: *The guardian of the constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law*, Cambridge 2015, *passim*.

⁵ C. Schmitt, *Legalność i prawomocność*, Warsaw 2015, pp. 109–135.

⁶ R. Stacey, *Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process*, “International Journal of Constitutional Law” 2011, No. 3–4, p. 593.

⁷ M. de Wilde, *The state of emergency in the Weimar Republic Legal disputes over Article 48 of the Weimar Constitution*, “Tijdschrift voor Rechtsgeschiedenis” 2010, No. 78, p. 144.

⁸ A. Kronlund, *Parliamentary oversight of the exceptional situations in a presidential system. Debating the reassertion of the constitutional powers of the US Congress*, University of Jyväskylä 2013, p. 40.

⁹ S. Turner, *Schmitt, Telos, the Collapse of the Weimar Constitution, and the Bad Conscience of the Left*, [in:] *Telos, Paul Piccone, and the Americanization of Critical Theory*, eds. T.W. Luke, B. Agger, “A Journal Of No Illusions”, Telos Press Publishing, New York 2011, https://www.academia.edu/10361495/Schmitt_Telos_the_Weimar_Constitution_and_the_Bad_Conscience_of_the_Left, p. 129 (4.08.2019); M. Rysiewicz, *Gdy prawo ustaje i wraca siła... Stan wyjątkowy w myśli prawnopañstwowej Carla Schmitta*, “Dialogi Polityczne” 2010, No. 13, *Przemoc w polityce*, pp. 83–84.

The Weimar Constitution provided also a procedure for constitutional amendment described in Art. 76. According to this provision the Constitution might be amended by law, but acts amending the Constitution could take effect only if two thirds of the legal number of members were present and at least two thirds of those present consented. Article 76 allowed the passing of laws *prater legem* and in this way infringing the Constitution. In consequence, Art. 76 played a key role in the definitive transformation of the Weimar Republic into a dictatorship¹⁰. The procedure was used for enacting the Enabling Act in 1933 despite concerns expressed in jurisprudence¹¹.

The institution of *Verfassungsdurchbrechung* should therefore be linked primarily to the activities of the Parliament, not the President undertaking necessary measures pursuant to Art. 48. Thus, *Verfassungsdurchbrechung* should be associated with the adoption of a law introducing a single or multiple derogation from the constitution, but not changing its wording¹². Appropriate regulation required the majority provided for the amendment of the Constitution. In this way, an act on delegation of power was adopted on March 23, 1933 (the Enabling Act, *Ermächtigungsgesetz*, formally titled *Gesetz zur Behebung der Not von Volk und Reich* – Law to Remedy the Distress of People and Reich). It allowed the Reich government to issue ordinances without restrictions and the necessity of the Reichstag to approve them. It means that the Enabling Act and the regulations issued on its basis did not have constitutional grounds. According to the Art. 2 of the Enabling Act: laws enacted by the government of the Reich might deviate from the constitution as long as they did not affect the institutions of the Reichstag and the Reichsrat. The rights of the President remained unaffected. This act is associated with the destruction of the democratic foundations of the Weimar Republic and the transition to the totalitarian period of the Third Reich¹³. In practice, it excluded the Parliament's power to amend the Constitution and, consequently,

¹⁰ M. Goupy, *The state of exception theory of Carl Schmitt and the ambivalent criticism of liberalism*, "Zeitschrift für Politikwissenschaft" 2018, No. 4, p. 397.

¹¹ The issues are described in greater detail by N.M. Tończyk, *Kostytucja Republiki Weimarskiej z 11 sierpnia 1919 roku jako demokratyczna podstawa prawna totalitarnego państwa*, "Studia Iuridica Toruniensia" 2014, No. 14, p. 392.

¹² C. Schmitt, *Verfassungslehre*, Berlin 2010, pp. 99–100.

¹³ K. Loewenstein, *Dictatorship and The German Constitution: 1933–1937*, "The University of Chicago Law Review" 1936, No. 1, pp. 541–542.

any connection between the will of voters and the content of the Constitution. For this reason, the institution of *Verfassungsdurchbrechung* is considered unacceptable in democracy.

The practice based on the Weimar Constitution gave rise to the introduction in Art. 79 of the Basic Law of 1949 of the need to reflect constitutional changes clearly in its text¹⁴. Nevertheless, in the context of international and supranational acts, some violation of the constitution has been accepted¹⁵. The Unification Treaty of West Germany and East Germany concluded on August 31, 1990 changed the Basic Law in several places. The admissibility of such interference by an international agreement was confirmed by the Federal Constitutional Tribunal in September 18, 1990. The breaking (violation) of the constitution is also allowed in the context of allied treaties to which Germany is a party and which do not oppose the Basic Law (Art. 79(1) sentence 2 of the BL) and in the context of the integration clause (Art. 23 (1) of the BL). The institution of permissible constitutional breaking (*zulässige Verfassungsdurchbrechung*) is not negatively assessed, provided that it remains within the constitutionally prescribed boundaries.

III.

When transferring the considerations to Polish solutions, it should be emphasized that in the Polish doctrine of constitutional law any modification of the Constitution without reflecting the changes in the text is generally inadmissible. For this reason, among the sources of generally applicable law (Art. 87 of the Polish Constitution), no constitutional act (*ustawa konstytucyjna*) was provided as an act existing along with the constitution.

According to the Art. 235 of the Constitution of 1997, a bill to amend it may be submitted by: at least one-fifth of the statute number of Deputies, the Senate, or the President of the Republic. Amendments require a statute 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. The amending statute shall be adopted in the same wording by the Senate by an absolute majority of votes

¹⁴ P. Badura, *Staatsrecht*, Munchen 2012, p. 651.

¹⁵ P. Chybalski, *op.cit.*, pp. 104–106.

in the presence of at least half of the statutory number of Senators. Within this procedure the Senate acts as a veto player.

In the case of the amendment procedure, the Constitution provides for a confirmatory referendum. If a bill relates to the provisions of Chapters I, II or XII of the Constitution, at least one-fifth of the statutory number of Deputies, the Senate, or the President may require the holding of such referendum. The amendment to the Constitution shall be accepted if the majority of those voting express support for such amendment. However, the requirement of the referendum in the scope of Chapters I, II and XII does not equal an eternity clause.

Only Art. 30, guaranteeing human dignity, can be considered as an unamendable provision. According to the Constitution, the dignity of the person shall be inviolable. The respect and protection thereof shall be the obligation of public authorities. Such authority is either the legislative power (the Sejm and the Senate) or the Constitutional Tribunal assessing legislation. Nevertheless, the Constitution does not provide *expressis verbis* unamendability.

Additionally, the competence of the CT to assess the constitutional amendment is uncertain¹⁶. According to Art. 188 the Tribunal shall adjudicate the conformity of statutes to the Constitution. Only if we assume that a “statute” means also a “statute to amend the Constitution”, we can interpret the competence of the Tribunal to the mentioned procedure. However, the adjudication process could relate only to the required procedure and competences of the Sejm and the Senate acting as an amending power.

The Constitution of 1997 has been formally amended twice with no legal or political reservations. The first amendment occurred in relation to the European Arrest Warrant in 2006. The second was connected to the right to be elected to the Sejm or the Senate. In 2009 a draft for a ban on a person sentenced to imprisonment by a final judgment for an intentional indictable offence was introduced.

However, no consideration was given to the possibility of adopting a constitutional act that could be binding alongside the Constitution or could modify the meaning of its provisions or introduce a one-off derogation.

¹⁶ W. Sokolewicz, *Komentarz do art. 235*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. vol. II, ed. L. Garlicki, Warsaw 2001, pp. 70–74.

IV.

In the post-war history of the Polish political system, only a few times did we have to deal with a situation that could be described as *Verfassungsdurchbrechung*. Pursuant to the Constitution of 1952, three times the acts were passed by a majority required to amend the Constitution. However, the text of the Constitution was not changed as regards the length of the Sejm's term of office. In this case, the intention was to shorten the term of office of the Sejm in 1971¹⁷ and 1989¹⁸ and to extend it in 1984¹⁹. The constitutional act was used for this purpose. The justification for such action was that the 1952 Constitution did not provide for specific regulations enabling the modification of the term of office of the Sejm²⁰.

On the basis of the 1997 Constitution, no situations are identified that could be similar to the *Verfassungsdurchbrechung*. The possibility of the executive power issuing statutory acts on the basis of the competence expressly described in the Constitution should not be recognized as breaking the Constitution,²¹ because the exercise of such competence does not violate constitutional norms, it is not provided for alongside constitutional provisions, and is not intended to create competences not provided in the Constitution. As for the shortening and extension of the term of office of the Sejm and Senate, it should be emphasized that these institutions have been clearly regulated in the Constitution. Consequently, the adoption of an act cannot be considered in these cases, even by a majority required to amend the Constitution. In the context of ordinary laws and their relationship to the Constitution, it should be noted that from the principle of direct application of the Constitution (Art. 8 of the Constitution of 1997) the necessity of developing the Constitution by means of legislation arises. However, ordinary statutes may

¹⁷ *Terminy rozpoczęcia oraz zakończenia kadencji Sejmu i Senatu od roku 1919*, OT-641, March 2016, Kancelaria Senatu, Biuro Analiz i Dokumentacji, Analiza aktów prawnych, p. 23.

¹⁸ Ibidem, pp. 25–26.

¹⁹ Ibidem, p. 24.

²⁰ A. Bień-Kacała, M. Rączka, *Przedterminowe zakończenie pełnomocnictw parlamentu na przykładzie Polski i Czech*, "Przegląd Prawa Konstytucyjnego" 2010, No. 2–3, p. 63.

²¹ An example of such systemic solutions may be Art. 23 of the Small Constitution of 1992 (ordinances of the Council of Ministers by law) and Art. 234 of the Constitution of 1997 (ordinances of the President of the Republic of Poland with the force of law).

not change the wording or interpretation of the basic law. In addition, from the Art. 7 of the 1997 Constitution results that the bodies of public authority shall function on the basis of, and within the limits of, the law. This means that the bodies cannot assign themselves competences that are not expressly indicated in legal provisions.

However, the integration clause may be considered as a *Verfassungsdurchbrechung* (Art. 90 of the Constitution), which was applied in 2003 (accession referendum), and then in 2008 in relation to the Treaty of Lisbon (statutory procedure for expressing consent to ratification). According to the Art. 90(2) of the Constitution, a statute, granting consent for ratification of such an international agreement shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators. The application of this provision means an even higher threshold of consent than in the case of constitutional amendments. In such a situation, it could therefore be accepted that international treaties so ratified break the wording of constitutional regulation. Nevertheless, it was assumed that such an effect does not occur owing to the lack of constitutional grounds enabling differentiation of the legal force of laws related to the procedure of their adoption²². In addition, a special ratification procedure (Art. 90 of the Constitution) does not affect the legal force of the treaties ratified in this manner. They cannot modify the Constitution and are subject to constitutional review by the Constitutional Tribunal. The EU law has also no modifying effect in relation to the Constitution²³. Instead, it has precedence in case of a conflict of laws (Art. 91(3) of the Constitution).

Contrary to the indicated constitutional provisions, it was allowed, however, to reinterpret the text of the constitution as well as modify it by way of the jurisprudence of the CT²⁴. In the context of transformation in 1989, an example of the principle of a democratic rule of law was indicated. The principle of the rule of law included also the principle of separation of powers as

²² A. Bień-Kacała, *Źródła prawa*, [in:] *Prawo konstytucyjne*, eds. Z. Witkowski, A. Bień-Kacała, Toruń 2015, p. 35.

²³ The EAW judgment of the CT, 27 April 2005, P 1/05.

²⁴ L. Garlicki, *Aksjologiczne podstawy reinterpretacji konstytucji*, [in:] *Dwadzieścia lat transformacji ustrojowej w Polsce*, ed. M. Zubik, Warsaw 2010, pp. 94–95.

the latter was not indicated in a separate constitutional provision. However, the text of the Constitution of 1952 changed only slightly. Therefore, the non-amended provisions needed to be re-interpreted in the light of the rule of law and subsequently, it was necessary to introduce a new constitution²⁵. The re-interpretation of the Constitution should be based on the strong axiological fundamentals and further enclosed to the text of the Constitution in the amendment process. It is justiciable and legitimate only if the transformative constitutional moment²⁶ could be identified. Certainly, the constitutional moment occurred in Poland in 1989. The new meaning of the constitutional provisions had been provided either by the CT, the Supreme Administrative Court, or the Ombudsman. It was acceptable during the transformation period, even in relation to the Interim (Small) Constitution of 1997²⁷. Nevertheless, since the 1997 Constitution came into force and closed the transformation period, the re-interpretation of the constitutional provisions has made no sense. Still, the re-interpretation may be applied in the future if a constitutional moment occurs and the need for political transformation becomes updated.

With regard to the jurisprudence of the Constitutional Tribunal, which may affect the wording of the constitutional provisions, it is worth pointing out the CT judgment K 18/04 (May 18, 2005)²⁸ relating to the EU Treaty of Accession. In the Tribunal's opinion (as depicted particularly in the case K 18/04²⁹), the right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship are residents of Poland³⁰, does not infringe the Constitution. Especially the provision³¹ which

²⁵ J. Zakrzewska, *Nowa Konstytucja Rzeczypospolitej*, "Państwo i Prawo" 1990, No. 4, p. 4.

²⁶ Extraordinary "moments" of intense constitutional participation and deliberation, irrespective of changes in the constitutional text. In such circumstances the people invoke their right to form a constitution, B. Ackerman, *I We The People: Foundations*, Harvard 1991; *2 We The People: Transformations*, Harvard 1998.

²⁷ The Interim Constitution of 1992 altered the core provisions of the – still binding – Constitution of 1952. It had no transformative effect, even if one can say that it improved the liberal constitutional democracy. Certainly, the formal constitutional change can be identified here.

²⁸ http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf (1.10.2019).

²⁹ Judgment of 11 May 2005, K 18/04, concerning Poland's membership in the European Union (The Accession Treaty).

³⁰ Art. 19(1) of the EC Treaty, now Art. 20(2)(b) TFEU.

³¹ Art. 62(1) of the Constitution of 1997.

guarantees Polish citizens the right to elect, *inter alia*, their representatives to bodies of local self-government. This constitutional right is not of an exclusive character and might be also vested in the citizens of other states (particularly EU citizens). This interpretation means that the EU law can affect the supremacy of constitutional norms. The new meaning is understood by the CT as the so-called EU-friendly interpretation. It is a product of constitutional adjudication, whereas the accession to the EU (with supremacy of EU law) could be recognized as a transformative constitutional moment.

In 2015, after general election that did not bring a constitutional majority for the Law and Justice party, the situation became clear that the party was aiming to change the constitutional order of Poland. This willingness included making the CT a less empowered body. The idea was not to review the legislator's decisions by the CT. After the events related to the capture of the CT, the matter became clear³². Since the takeover of the CT in 2017 (the new President of the CT), we have been able to observe various practices that violate the provisions of the Constitution. The effects of these activities are permanent, sometimes repetitive and modifying the understanding of the provisions of the 1997 Constitution, and these practices are not widely accepted.

First of all, the creation of non-constitutional competences by the Sejm (dismissal of selected CT judges) or the Prime Minister (no publication of CT judgments owing to their non-compliance with the Constitutional Tribunal Act and the Constitution) may be indicated. In the first case, the Sejm *de facto* dismissed the CT judges selected by the Sejm of the previous term of office, stating the lack of legal force of earlier resolutions on election. In this way, it created a new reason, unknown to the Constitution and statute, for ending the term of office of a CT judge. In the second case, the Prime Minister granted himself a competence until then unknown to the system, to assess the compliance of a CT judgment with the Constitution and the Act. Both situations were not related to the adoption of the law by a majority provided for constitutional amendment.

The second practice can be defined as emptying the provisions of the Constitution and shifting the regulatory burden from the Constitution to stat-

³² A. Bień-Kacała, *Polish Constitutional Tribunal: a systemic reform or a hasty political change*, "DPCE Online" 2016, No. 1, pp. 1–14.

utes. Reviewing the conformity of the Act on the National Council of the Judiciary³³ with Art. 187(4) of the 1997 Constitution³⁴, the Tribunal stated that the constitution-making power had transferred the fundamental issues related to the functioning of the NCJ to statutory regulation, leaving only a certain minimum standard of constitutionality in the text of the Constitution³⁵. Therefore, the matter of shaping the composition of the Council was passed to a practically discretionary decision of the legislator, establishing only the necessity of majority representation of judges in its composition. The Tribunal also established that the NCJ is not a judicial authority and, consequently, no guarantee of independence and impartiality is applied to it, despite the fact that the constitutional task of the Council is to uphold these values in relation to the judiciary. Therefore, the Tribunal changed the legal nature of the NCJ and allowed the legislator to freely regulate its creation.

The Tribunal went further in the interpretation of constitutional norms when adjudicating on the pardon of the President (Art. 139 of the Constitution) in the judgment delivered on 17 July 2018 (K 9/17). The CT created the new interpretation of the Constitution and explained why a presidential pardon regarding the cases closed without a final judgment is in conformity with the Constitution. The clue here is that the CT selectively employed the constitutional provisions and set aside the previous understanding of the presidential pardon. The Constitutional Tribunal based the new interpretation on the invoking of only the Art. 139 of the Constitution (the pardon) in conjunction with the Art. 144(3)(18) of the Constitution (a presidential prerogative concerning the pardon) and in separation from the Art. 42 of the Constitution (presumption of innocence until guilt has been determined by a final court decision). At the same time, the Tribunal disagreed with the argument that an amnesty granted in individual cases infringes the principle of the separation of powers, as well as the right to a fair trial. In consequence, the CT stated that the President of the Republic may exercise his or her power of pardon

³³ The Act of 12 May 2011 on the National Council of the Judiciary (Dz.U. 2018, item. 389).

³⁴ The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

³⁵ The CT judgment of 25 March 2019 (K 12/18).

in an unlimited manner, including also the power to grant an amnesty in individual cases. The new interpretation of the Constitution is consistent, logical, and coherent. But still, it is new and selective, and it changes the prevalence of values. In this particular case, the CT focused on the state authority and not on human rights.

Recent practice may somewhat resemble *Verfassungsdurchbrechung*, because it is associated with the amendment of the constitution by ordinary laws. Such a situation can be identified in the context of the enactment of the Supreme Court Act³⁶ introducing the retirement of a judge after the age of 65 also for the incumbent I President of the Supreme Court. This resulted in the earlier termination of the constitutionally indicated term of office before the expiry of six years (Art. 183(3) of the Constitution)³⁷. In this situation, without any doubt the constitutional norm was violated by the legislator, nevertheless this act was adopted using the ordinary majority of votes provided for the adoption of ordinary laws. The lack of application of the constitutional majority means that we cannot qualify such a law as *Verfassungsdurchbrechung*. Instead, this could be read as *Formenmissbrauch*, i.e. the abuse of the form of the act to amend constitutional provisions³⁸. In a situation in which such a law is not the subject of the CT adjudication, we apply the presumption of constitutionality and binding force. Consequently, the change in constitutional order will be permanent and stable until it is amended by the legislator.

V.

The presented examples indicate that we could qualify as *Verfassungsdurchbrechung* only cases of modification of the term of office of the Sejm under the 1952 Constitution. After 1989 this situation was not repeated.

³⁶ The statute of 8 December 2017 (Dz.U. 2019, item. 825).

³⁷ M. Bernatt, M. Ziółkowski, *Statutory Anti-Constitutionalism*, "Washington International Law Journal" 2019, No. 28, p. 497. Finally, the statute was changed as a consequence of the CJEU interim measures (19 October 2018). <http://curia.europa.eu/juris/document/document.jsf?text=&docid=206927&pageIndex=0&doclang=pl&mode=req&dir=&occ=-first&part=1&cid=9098379> (1.10.2019).

³⁸ J. Parchomiuk, *Nadużycie prawa w prawie administracyjnym*, Warsaw 2018, pp. 162–173.

However, we can observe various practices of interpretation and reinterpretation of the constitutional provisions, the creation of competences not provided for in the Constitution, and a change in the Constitution by statutes without using the majority required to amend the Constitution. These practices are connected by the fact that they were not reflected in the text of the Constitution; are carried out by a body other than that having constitutional competence; the applied procedure is not a procedure to amend the Constitution; these acts have not been effectively questioned in the context of their constitutionality; they have been confirmed or recognized by the state authorities as valid; and they affect the comprehension of constitutional norms. Such characteristics is similar to the capacious institution referred to as an informal constitutional change³⁹.

Informal constitutional change, as suggested by S.M. Griffin focusing on the US constitutional field⁴⁰, may be the shifting interpretation of particular provisions of the Constitution by the Supreme Court in the course of judicial review. The second is connected to the contemporary governing order (the full range of significant government institutions and practices). This order must not be, however, described in the text of a constitution, but focused on the constitutional practice (legal constitutionalism) or convention (notably political constitutionalism). According to S.M. Griffin's observations, the text of the Constitution of 1789 has not changed much yet, whereas the governance has changed massively.

With regards to the written constitutions, R. Albert states that they may also change informally⁴¹. Such modification occurs when the enforceable meaning of the constitution changes without altering the constitutional text. He links the changes to the interpretation of the constitutional text by the court of last resort. It must be emphasized that judicial interpretation is only one of the possible methods. As pointed out by R. Albert, there are also other means such as legislative enactment and executive action.

³⁹ More: A. Bień-Kacała, *Informal Constitutional Change. The Case of Poland*, "Przegląd Prawa Konstytucyjnego" 2017, No. 6, pp. 199–218.

⁴⁰ S.M. Griffin, *Understanding Informal Constitutional Change*, Tulane University School of Law, Public Law and Legal Theory Working Paper Series, Working Paper No. 16–1.

⁴¹ R. Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, "Dublin University Law Journal" 2015, No. 38, pp. 388–391.

Following S.M. Griffin and R. Albert observations on the relevance and significance of informal constitutional change, one should agree that the transformation may be labelled as informal when it occurs outside the formal amendment or the “ordinary” judicial interpretation.

Additionally, for S.M. Griffin, a significant problem attached to the informal change is legitimacy. Such change is questionable, because it was not adopted through the formal amendment process. Taking the Kelsenian concept into account, one should notice the following relation: if modifications cannot be passed using the amendment process, the changes will be achieved through other means. Then, most probable is a new interpretation of the formally binding constitutional provisions (usually made by the judicial power) or a practice different from the usual (conducted by the legislative or the executive branch of government). For S.M. Griffin, informal changes can be assessed as legitimate if they ensure smooth adaptation to the flow of history or mirror state-building and the creation of new institutional capacities. One may add that they could be considered legitimate, if made as a result of the constitutional moment.

All of the listed possible ways of informal constitutional change can be identified in the constitutional practice in Poland since 2015. So, we are dealing with a reinterpretation of the Constitution (presidential pardon), with legislation changing the wording of constitutional norms (term of office of the first President of the Supreme Court), the activities of the legislature (dismissal of CT judges), and the executive power (refusal to publish CT judgments) creating their own competences beyond the wording of the Constitution. These actions were not taken in the procedure of formal amendment of the Constitution (Art. 235) and were taken outside the so-called constitutional moment. The majority obtained as a result of elections without reaching a constitutional majority cannot be considered such a moment. Consequently, the changes cannot be considered legitimate, even because of formal reasons. Moreover, the described actions may be considered to have been carried out against the principle of loyalty to other authorities⁴², in particular the judiciary. Most of all, it is about respecting its constitutional competences.

⁴² The principle is described in the German and Anglo-Saxon contexts by J. Parchomiuk, *op.cit.*, pp. 178–181.

This is also how the President's action pardoning a person who has not been finally sentenced can be assessed. On the other hand, the courts, especially the Constitutional Tribunal, lack the virtue of restraint⁴³, and their actions are carried out in the spirit of illiberal judicialization of politics⁴⁴ and strive to validate the actions of the ruling party. These circumstances also mean that simply describing the bodies' activities as unconstitutional will not be sufficient. In the case of unconstitutionality, we assume that mechanisms to protect the constitution exist and are effective. However, the constitutional reality in Poland showed that these mechanisms, especially the constitutional review, have been switched off.

All the described practices are closely connected with the creation of a new system called illiberal democracy or illiberal constitutionalism⁴⁵, and in Poland they are undertaken on the way of informal constitutional change. However, no change occurred using the *Verfassungsdurchbrechung* mechanisms. The obvious reason is the constitutional majority required, which would also allow a legitimate change in the system. It also means that the lack of a constitutional majority is not an obstacle to the remodelling of the 1997 Constitution into an illiberal constitution constituting the basis of the newly created system.

VI.

In conclusion, it is worth using the sentence: "Learning from Weimar meant doing differently from Weimar"⁴⁶. Putting this sentence into Polish reality,

⁴³ W. Włoch, A. Bień-Kacała, *Cnotliwi sędziowie: kilka słów o powściągliwości sędziów Trybunału Konstytucyjnego*, [in:] *Potentia non est nisi da bonum: księga jubileuszowa dedykowana profesorowi Zbigniewowi Witkowskiemu*, eds. M. Serowaniec, A. Bień-Kacała, A. Kustra-Rogatka, Toruń 2018, pp. 871–885.

⁴⁴ A. Bień-Kacała, *Illiberal judicialization of politics in Poland*, "Comparative Law Review" 2019 (forthcoming).

⁴⁵ T. Drinóczi, A. Bień-Kacała, *Constitutions and constitutionalism captured: shaping illiberal democracies in Hungary and Poland*, "German Law Journal" 2019, No. 8 (forthcoming).

⁴⁶ R. Car, *A reply to Sujit Choudhry's 'Resisting democratic backsliding': Weimar legacy and self-enforcing constitutions in post-WWII left-wing constitutional theory*, "Global Constitutionalism" 2019, No. 2, p. 406.

“differently” does not necessarily mean more democratic or more liberal. It means using different tools and methods from those used by Weimar. What we have been witnessing in Poland is a systemic remodelling toward illiberal constitutionalism based on informal constitutional change as the ruling majority did not achieve a constitutional majority. In such circumstances, *Verfassungsdurchbrechung* cannot be identified. Nevertheless, the will of remodelling is so strong that the ruling majority makes the change despite not having support for it as 2019 general election revealed. Consequently, the illiberal remodelling is not only based on societal values, but also on the will of politicians supported only partly by voters.

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