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Amendments to the Constitution of the Republic of Poland Concerning Poland's Membership in the European Union

Keywords: Sejm, Senate, European Union, cooperation, constitutional amendment

Słowa kluczowe: Sejm, Senat, Unia Europejska, współpraca, zmiana konstytucji

Abstract

The Treaty of Lisbon strengthened the legal position of national parliaments in their activities at the level of the European Union. It means that the two chambers of the Polish Parliament – Sejm and Senate, each in its own scope, participate in consideration of issues concerning the European Union. They must share the right to participate in legislative processes with the executive authorities at the national level and with the institutions of the Union. The new legal regulation provides national parliaments with new competences, which should have a constitutional basis.

Streszczenie

Zmiany w Konstytucji RP w związku z członkostwem Polski w Unii Europejskiej

Traktat z Lizbony wzmocnił pozycję prawną parlamentów krajowych w działaniach na poziomie Unii Europejskiej. Oznacza to, iż dwie izby parlamentu polskiego – Sejm i Senat, każda w swoim zakresie, uczestniczą w rozpatrywaniu spraw dotyczących Unii

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Europejskiej. Prawo do udziału w procesach prawodawczych muszą dzielić z organami władzy wykonawczej na poziomie krajowym i instytucjami Unii. Nowa regulacja prawna wyposaża parlamenty krajowe w nowe kompetencje, które powinny mieć konstytucyjną podstawę regulacji.

I.

The Constitution as an act of the highest authority in the State may be amended in a special procedure². It provides citizens with a sense of security, predictability of the activities of public authorities, and legal certainty. Furthermore, an excessively easy process of amending the Constitution allows for *ad hoc* implementation of unfavorable solutions without more profound reflection and may lead to the temptation to abuse power³. On the other hand, a rigid constitution, unresponsive to political and social changes, may become an ornament that is circumvented by those applying the law⁴.

The subject of this article is the issues related to Poland's membership in the European Union and the effects of that membership on the functioning of the Sejm and Senate. The author believes that the reform introduced by the Treaty of Lisbon⁵ "equipped" national parliaments, including the Polish Sejm and Senate, with new competences allowing them to act internationally. Therefore, they require amendments to the Polish Constitution. This article aims to summarize the proposals of amendments to the Constitution of the Republic of Poland to date and analyze the constitutional regulations of the other Member States of the European Union (hereinafter: the EU).

² Art. 235 of the Polish Constitution of April 2, 1997 (Dz.U.No. 78, item 483, as amended).

³ M. Jackowski, *Typologia zmian konstytucyjnych*, [in:] *Konstytucjonalizm polski. Refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej Profesora Andrzeja Szmyta*, eds. A. Gajda, K. Grajewski et al., Gdańsk 2020, p. 1218.

⁴ Ibidem.

⁵ The Treaty of Lisbon of December 13, 2007 amending the Treaty on European Union and the Treaty establishing the European Community (OJEU C 2007/C 306/02), entered into force on December 1, 2009.

II.

Seventeen years have passed since Poland joined the EU, yet there is still a debate in Poland on the advisability of amending the Polish Constitution in regulating issues related to EU membership. It seems that the Polish State is already an experienced member of the EU enough to know that it is becoming important to have national measures which can be used to maximize the effects of membership for the benefit of its citizens⁶. Attempts to amend the fundamental law have been made many times, and bills on amendments to this act assumed changes in individual parts of the text⁷ or the introduction of a new chapter⁸. In the doctrine, negative opinions have been voiced regarding the proposal to include a “European chapter” in the Constitution, since it carries the danger of “overregulation” of the European matter in the fundamental law, as well as the danger of “opening” the Constitution to changes in the other chapters of the fundamental law⁹. It has also been pointed out that a separate chapter may become a set of norms of *lex specialis* character in relation to the provisions in other chapters of the Constitution¹⁰.

Although requiring amendments to the Constitution, an attractive solution is the adoption of a separate constitutional act. It would contain a comprehensive regulation of issues related to Poland’s membership in the EU. Such a solution has several advantages, e.g., the proposed changes would

⁶ R. Balicki, *Funkcja europejska Sejmu RP*, Wrocław 2019, p. 108.

⁷ At the turn of 2009 five bills to amend the Constitution of the Republic of Poland were submitted to the Sejm of the 6th term. For more on this topic see R. Balicki, op.cit., pp. 111–112.

⁸ The parliamentary bill to amend the Constitution of the Republic of Poland (form 3687), submitted on November 26, 2010, provided for the addition of a new chapter Xa Członkostwo Rzeczypospolitej Polskiej w Unii Europejskiej [*Membership of the Republic of Poland in the European Union*], in: *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu*, Bureau of Research of the Chancellery of the Sejm, Warsaw 2010.

⁹ W. Orłowski, W. Skrzydło, *O potrzebie i możliwościach stworzenia „rozdziału europejskiego” w Konstytucji RP z 1997 r.*, [in:] *Konstytucjonalizm polski. Refleksje z okazji jubileuszu 70-lecia urodzin i 45-lecia pracy naukowej Profesora Andrzeja Szmyta*, eds. A. Gajda, K. Grajewski et al., Gdańsk 2020, p. 558.

¹⁰ A. Kustra, “Euronowelizacja” w projektach ustaw o zmianie Konstytucji RP. *Próba oceny*, “Przegląd Sejmowy” 2011, No. 3, p. 36.

not be connected to the systematics of the present Constitution¹¹. Additionally, adopting an act of this kind would “allow for more frequent changes of its regulations without worrying about the cohesion of the regulations of the other provisions of the constitution”. It would also ensure a “proper realisation of the principle of the supremacy of the constitution, set out in Art. 8 of the constitution, as subsequent amendments to the Treaties could be included in the postulated constitutional act”¹². The arguments indicated above are convincing for the adoption of a separate constitutional act. However, the content of the present Constitution of the Republic of Poland does not indicate such a possibility¹³.

The EU Member States have applied various constitutional solutions regarding EU matters. In some constitutions, separate chapters concerning the EU have been introduced, e.g., France, Croatia, Finland, and Austria. If they speak about the EU at all, other countries have included EU regulations in the text of the fundamental law, e.g., Germany, Hungary, and Portugal. Not all States refer directly to the principles of cooperation between the government and the representative body. In Title XV entitled On the European Communities and the European Union, the French Republic refers, inter alia, to the power of both parliamentary chambers to cooperate with the government (Art. 88–4)¹⁴. The principles of such cooperation are also regulated in the constitutions: of the Federal Republic of Germany in Art. 23 (2) and (3), of Austria in Art. 23d and 23e, of Finland quite extensively regulates the issue of Parliament’s participation in the preparation at the national level of decisions made in the EU, § 93, § 96, § 97, of Hungary in Art. 19, of Portugal in Art. 161(n), 163(f), 197(i).

¹¹ W. Orłowski, W. Skrzydło, op.cit, p. 561.

¹² Ibidem.

¹³ Article 235 of the Constitution of the Republic of Poland provides only for an act on amending the Constitution. Moreover, the catalogue of constitutional sources of law does not contain such an act, Chapter III of the Polish Constitution.

¹⁴ More on the amendments to the Constitution of the French Republic: E. Popławska, *Orzeczenie francuskiej Rady Konstytucyjnej w sprawie Traktatu z Lizbony*, “Prawo i Polityka” 2010, No. 1 (2), pp. 47–48; *Europeizacja konstytucji państw Unii Europejskiej*, eds. K. Kubuj, J. Wawrzyniak, Warsaw 2011, pp. 102–104.

III.

A constitution “closed to innovation”, excluding the possibility of amendment/adaptation to a new socio-political situation, does not fulfill its basic functions¹⁵. Paradoxically, the openness of the Constitution and the related possibility to accommodate its text “according to the emerging needs” makes it a permanent act¹⁶. Of course, one cannot speak of frequent amendments to this act and its excessive flexibility. However, in the case of the Constitution of the Republic of Poland, the lack of appropriate actions on the part of the legislator¹⁷ results in its provisions being supplemented by the jurisprudence of the Constitutional Tribunal¹⁸.

Amendments to EU Treaties introduced by the Treaty of Lisbon only highlighted the shortcomings of the previous constitutional solutions regarding relations between Poland and the EU. Under the new provisions, the role of national parliaments is determined by: Art. 12 of the Treaty on the European Union and two protocols: Protocol No. 1 on the role of national parliaments in the European Union¹⁹ and Protocol No. 2 on the application of the principles of subsidiarity and proportionality²⁰.

¹⁵ J. Szymanek, *Zagadnienie „otwartości” konstytucji V Republiki Francuskiej*, “Państwo i Prawo” 2010, No. 10, p. 47.

¹⁶ Ibidem, p. 49.

¹⁷ To date, the Constitution of the Republic of Poland has been amended twice, the first time Art. 55 was changed as a result of EU law, by the Act of September 8, 2006 (Dz.U.No. 200, item 1471). The second amendment was made by the Act of May 7, 2009 (Dz.U.No. 114, item 946) and concerned Art. 99 of the Constitution.

¹⁸ Examples of jurisprudence of the Constitutional Tribunal on EU matters: of May 31, 2004 on the European Parliament Election Law (ref. No. K 15/04, OTK ZU 2004/5/A/47), of April 27, 2005 on the so-called European Arrest Warrant (ref. No. P 1/05, OTK ZU 2005/4/A/42), of May 11, 2005 on the Treaty of Accession (ref. No. K 18/04, OTK ZU 2005/5/A/49), decision of December 19, 2006 on a legal question from the Regional Administrative Court in Olsztyn (ref. No. P 37/05, OTK ZU 2006/11/A/177), decision of the Constitutional Tribunal of May 20, 2009 concerning a competence dispute between the Prime Minister and the President of the Republic of Poland (ref. No. Kpt 2/08, OTK ZU 2009/5/A/78), of November 24, 2010 on the Treaty of Lisbon (ref. No. K 32/09, OTK ZU 2010/9/A/108), of November 16, 2011, on admissibility of control, in the mode of constitutional complaint, of compliance of the European Union regulations with the Constitution of the Republic of Poland (ref. No. SK 45/09, OTK ZU 2011/9A/97).

¹⁹ OJEU C 83/205.

²⁰ OJEU C 83/206.

In connection with the reform of the EU treaties, new regulations would be expected in the text of the Constitution of the Republic of Poland, which should contain provisions regulating the role of parliamentary chambers in relations with the EU, including the scope and forms of participation of the Sejm and Senate in establishing Poland's position in the institutions of the Union. It would also be advisable to include in the Constitution a regulation defining the new function of the Sejm and Senate, for example, by adding an appropriately formulated sec. 3 to Art. 95 of the Constitution. These issues comprise constitutional matters and should not be transferred for regulation by way of ordinary laws. So far, under Polish law, the forms of cooperation between the Council of Ministers and the parliamentary chambers have only been set out in the Act of October 8, 2010 on cooperation between the Council of Ministers and the Sejm and Senate on matters related to the membership of the Republic of Poland in the European Union (hereinafter: the Cooperation Act)²¹ and in the rules of procedure of the Sejm and Senate²². The Cooperation Act replaced the previously binding act of March 11, 2004 with the same name due to new regulations of the Lisbon Treaty concerning the role of Member States' parliaments in the European Union. The Constitutional Tribunal, in its verdict of January 12, 2005, stressed that the fundamental law does not contain provisions directly referring to the participation of the chambers in the mechanism of shaping European law, "therefore, constitutional norms should be interpreted in such a way as to make it possible to incorporate the influence of the organs of the Polish State (including the parliament) on the enactment of EU law into the existing framework of the Republic of Poland"²³.

There is a discussion in the literature on the subject as to whether the Sejm and Senate's cooperation with the Council of Ministers in matters related to the EU falls under the legislative and control function, or whether a new "European" function is taking shape²⁴. Admitting that the assumption of the emer-

²¹ Dz.U.No. 213, item 1395.

²² Resolution of the Sejm of July 30, 1992, Rules of Procedure of the Sejm of the Republic of Poland (M.P. 2021, item 607), Resolution of the Senate of November 23, 1990, Rules of Procedure of the Senate of the Republic of Poland (M.P. 2020, item 306).

²³ Judgement of the Constitutional Tribunal of January 12, 2005, ref. No. K 24/04, OTK ZU 2005/1A/3.

²⁴ W. Sokolewicz, *Formy oddziaływania parlamentu polskiego na prawodawstwo Unii Europejskiej*, "Państwo i Prawo" 2004, No. 8, p. 6; J. Barcz, *Parlament narodowy w procesie decyzyjnym*

gence of a new European function of the Parliament is correct would mean that there are no relevant constitutional regulations and thus no criterion for assessing the constitutionality of the Cooperation Act.

IV.

After Poland acceded to the EU, the discussion on the need to amend the Polish Constitution has become more dynamic. The new political situation forces a deeper analysis of the existing provisions²⁵, which is not aimed at criticizing them but at making the State function more effectively in the EU. Among the many problems which should be taken into account when amending the Constitution of the Republic of Poland, one may point to the participation of the Polish Sejm and Senate in the legislative process of the EU. The Treaty of Lisbon “gives” the representative body new legal instruments to act and appear on the supranational level. So far, the Polish legislature has solved the most important issues related to the EU by enacting the so-called “accession-related laws”.

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²⁵ Identification of basic issues which should become the subject of discussion on the amendment to the Constitution of the Republic of Poland is conducted by J. Barcz, *Od lizbońskiej do postlizbońskiej Unii Europejskiej. Główne kierunki reformy ustrojowej procesu integracji europejskiej*, Warsaw 2020, pp. 509–512.

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