
Introduction

The year 2017 marks the 20th anniversary of the adoption and entry into force of the Constitution of the Republic of Poland. During these 20 years the constitution, as the most important political document of the Polish state, was subjected to rather moderate criticism. It was amended only twice (in 2006 and 2009) and these amendments did not turn out to be controversial from the political or legal point of view. And though from the perspective of these 20 years, the overall assessment of the Polish constitution is rather positive, it is not devoid of shortcomings, and some of its provisions can be identified as too imprecise. As far as the Polish political scene is concerned, Law and Justice seems to be the political party that in recent years has criticised the constitution in the most serious and severe way. The political documents and election manifestos
of this party were full of postulates aimed at modification of the system of the Polish state – above all in terms of a more precise definition and clarification of the division of powers between two centres of executive power: the head of state and the collegial government headed by the prime minister. In 2010, the party went a step further, developing its own draft of a completely new constitution that would replace the Polish Constitution of 1997.

These postulates did not, however, go into action. Even Law and Justice’s victory in the parliamentary elections in 2015 – albeit grand – did not give this party the so-called “constitutional majority” that would make it possible for them to carry out reforms of a constitutional nature. So all the more surprising was the recent initiative of President Andrzej Duda, who once represented Law and Justice. Speaking in Warsaw at the celebrations related to the adoption of the Constitution of May 3, he announced that in his opinion a national referendum on changes in the Polish constitution should be held in November 2018, to commemorate the 100\textsuperscript{th} anniversary of the restoration of Poland’s sovereignty in 1918. And although we do not yet know the details of the President’s initiative, his numerous press statements suggest that he is in favour of not modifying the current constitution, but replacing it with a completely new constitution.

There are therefore many indications that in the coming months a lively debate will take place in Poland about the direction and nature of the changes in the Polish state. By analyzing both the recent statements of the Polish president and the political documents of Law and Justice published over the last 10 years, one can presume that these are the issues that raise their greatest doubts and reservations. In this context, one of the most interesting and frequently recurring questions about the system of the Polish state concerns the potential incompatibility between the electoral system in the presidential election and the powers the President of the Republic of Poland is vested with as the head of state. Under the Polish Constitution of 1997, the president, despite having a rather limited range of political powers, is elected by the people in direct elections.

This article is therefore an attempt to answer the question whether such regulation of the constitutional position of the president of Poland, taking into account even Polish constitutional traditions or constitutional regulations in other countries, is optimal and justified – both from the political and legal point of view. In attempting to address the research problem outlined above, the Author uses both the historical analysis method and the content analysis method.
Disputes over the system of electing the president of Poland

Every act (including the fundamental statute), which is the result of a political compromise, will be thoroughly imperfect. The Polish Constitution of 1997 was created immediately after the change of regime, under the conditions of clashing various political concepts and visions of the future Polish state. As a matter of fact, the work on this document lasted for quite a long time (five years) and its completion depended on the determination and efficiency of a few key politicians, especially on their ability to reach compromise in order to achieve a final agreement.

The most commonly mentioned imperfections of the Polish constitution are imperfections in the relationship between the two executive institutions – the president and the Council of Ministers, and the fact that the Polish political system is framed very vaguely. In comparison with the 1992 Small Constitution, it lacks the elements which made Poland closer to semi-presidentialism characteristic of the French Fifth Republic, primarily by weakening the position and powers of the president of Poland. It has been deprived of the right to give his opinion on the three ministers (of foreign affairs, national defence and internal affairs), as well as the possibility to veto an act and refer it to the Constitutional Court (the veto itself has also been weakened, because today the qualified majority of 3/5 votes is sufficient to overturn it, whereas it used to be 2/3 votes). Overall, it is clear that the Polish president does not exercise general supervision over domestic and foreign policy. Many of his discretionary powers, or the ones which do not require countersignature, have also been reduced for the benefit of the Council of Ministers and the Prime Minister.

However, such a large reduction of the president’s powers (compared to the previous constitutional provisions), has not been followed by changes in the electoral system. It is often the subject of criticism not only by some of the politicians, but also by the authors of publications in the field of constitutional law. For example, Marek Bankowicz says that such a solution is “an element somehow colliding with the rules of the parliamentary-cabinet model”\(^1\). He also quotes a categorical judgement made by Roman Graczyk who said that “there are no political reasons why the weak president should have a strong

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\(1\) M. Bankowicz, *Transformacje konstytucyjnych systemów władzy państwowej w Europie Środkowej*, Kraków 2010, p. 146.
democratic legitimacy”, and “common presidential election in a parliamentary-cabinet system is an illusion of power”\(^2\).

It seems that such statements are a major simplification and bear no resemblance to reality. Of course, at first glance, a strong democratic legitimacy gained by general election of the head of state should go hand in hand with the strong position of the political system. However, the answer to the question whether (and if so, how), the mode of electing the head of state is correlated with the scope of executive powers assigned to the president is not so clear. Of course, these reflections stay in the circle of parliamentary regimes because in presidentialism and semi-presidentialism, general election of the head of state is a kind of political system axiom. In the parliamentary republics in turn, the situation is quiet different because the head of state may be elected indirectly by the parliament (or a specially convened meeting), or directly by the voters.

If we look at the countries of Central and Eastern Europe most of them have general elections. This solution is used in Poland, Bulgaria, Lithuania, Slovenia, Croatia, Slovakia, and – more recently – in the Czech Republic\(^3\). When it comes to other parts of Europe, we can also find examples in Austria, Ireland, Portugal and Iceland where the president is also elected in general election. The European republics in which the head of state is elected by the parliament are Hungary, Latvia, Estonia and Greece. In the case of Italy and Germany, such choice is made by the specially convened electoral college\(^4\).

Based on the above list, it can be stated that general election of the head of state can, however, go hand in hand with a small scope of presidential powers and Poland is no exception. Examples such as Croatia, Portugal, Austria or Ireland confirm this thesis. In each of these cases, such electoral system has not


\(^3\) The president is elected in general election also in countries such as Romania, Russia, Ukraine or Cyprus, but these are the countries that are far beyond the scope of a parliamentary regime.

\(^4\) In Italy, the president is elected by the electoral college consisting of members of both houses of parliament (the Chamber of Deputies and the Senate) and 58 representatives of the Italian regions. It looks similar in Germany where the president is elected by the Federal Convention (*Bundesversammlung*). Half of it consists of members of the lower chamber (*Bundestag*) and the other half – of delegates of the so-called Landtags, or parliaments for the individual states. An electoral college can be also appointed in Estonia if no candidate gets the required 2/3 of votes from the members of parliament in subsequent three rounds. Then, the president (of the two candidates who received the highest number of votes) is elected by the college consisting of members of parliament and representatives of self-government local councils.
been determined by the president’s authority but a different kind of factors. An
by no means these are universal factors, but the ones individually assigned to
particular states. As far as Poland is concerned, tradition is not this factor (it
would more indicate to the parliament), but these particular circumstances of
the end of the 1980s and the beginning of the 1990s combined with expecta-
tions on the part of Polish society that powers will be restored to the nation.

The problem, therefore, does not lie in whether and to what extent gen-
eral election of president in a parliamentary-cabinet regime can be justified
or not, because it may be justified, just like election made by the parliament
or other electoral body. The problem of the Polish constitution rather lies in
its vagueness. On the one hand, it implies the parliamentary-cabinet system
with a strongly exposed role of the government. However, on the other hand,
while the system does not fully accept the chancellor’s model, the president’s
position is still very strong (given the parliamentary standards). It is reflect-
ed in a relatively high threshold required to reject a presidential veto by the
Sejm. If the situation between the government and the president is tense, it
can lead to a kind of paralysis of the policy pursued by the government. We
have experienced this in Poland in 2005–2010 during the presidency of Lech
Kaczyński, however, we need to remember that Aleksander Kwaśniewski, his
predecessor, successfully vetoed the bills of the AWS-UW government as well.
But the dispute in 2005–2010 concerned primarily foreign policy, who should
adopt it and on what terms. The Polish constitution turned out to be inconsis-
tent in this matter\(^5\) so that the Constitutional Court had to express its opinion
(which, by the way, has not proved to be groundbreaking in any way), and
the parliament had to develop and adopt a special law on cooperation of state
authorities in matters related to the membership on the EU.

Of course, one can say that this dispute was mainly personal and resulted
from mutual hostility between politicians who were holding the positions of
the president and the Prime Minister. And even if that is true, it is not an
excuse for the imprecise and sometimes even inconsistent provisions of the
Polish constitution which could use a little bit more consistency and explic-

\(^5\) On the one hand, there is a provision in it that “the president of the Republic of Poland
is the supreme representative of the Republic of Poland” (Article 126) and “he shall cooperate
with the Prime Minister and the appropriate minister in respect of foreign policy” (Article
133). While on the other hand, the constitution says that “the Council of Ministers shall
conduct the internal affairs and foreign policy of the Republic of Poland” (Article 146). See:
itness in this respect. It therefore seems reasonable to clarify these provisions towards creating a more classical model of cabinet parliamentarism, or even a chancellor’s model in Poland. It would limit the strength and powers of the president by weakening his veto (so that the Sejm could reject it by an absolute majority of votes), and the constitution would have to say that the government, and not the president, is the one responsible for the development of foreign policy. Is it necessary to change the mode of electing the Polish head of state as well? This question does not have a clear answer. Such a change seems unlikely today if only because of the social expectations and the popularity of presidential elections – they have a slightly higher turnout than parliamentary elections, not to mention the local and the European Parliament elections. What is also missing is probably the will of the biggest Polish political parties to change the constitution of Poland. When looking at other European countries, we can imagine that the weakened Polish president would be still elected in general election, which by no means would mean the state “lacking elementary political logic” (here I disagree with M. Bankowicz once again)\(^6\). However, we might as well imagine that such a change would take place and the president would be elected in indirect election, e.g. by the National Assembly like in 1989 and in the interwar period. Besides, when we look at the situation in Central and Eastern Europe, we can see that there have been changes in the way the head of state is elected in some countries in the last few years and more. It should be noted, however, that these were the changes in the opposite direction, i.e. indirect election has been replaced by general and direct election.

The first change like that occurred in Poland in 1990. It was widely accepted and was a part of the next stage of changes in the socio-political system. A few years later, a similar step was taken by Slovakia where, until 1998, the president had been elected by the unicameral parliament by a qualified majority of 3/5 votes. It was a very high threshold, which, moreover, was making this procedure very ineffective. That is why, in 1997, Slovakia experienced a sort of constitutional deadlock when after the end of the Michal Kováč’s term of office, the parliament was not able to elect a new president\(^7\). Also the Czechs

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\(^7\) Of course, it suited the then Prime Minister, Vladimír Mečiar, who served as a president together with the Speaker of the National Council. The constitution of the Slovak Republic was finally amended after Mečiar had lost the parliamentary elections in 1998. As a result of this change, in 1999, the Slovaks elected their president in general election (it was Rudolf Schuster).
in their constitution referred to the tradition of indirect election of the President of Czechoslovakia. And although the change was not introduced until 2011\(^8\), the discussion on its legitimacy continued practically to the division of Czechoslovakia into two separate states, and a serious discussion was held until the late 90s. While changes in the mode of electing the President of the Czech Republic towards general election were supported by the major Czech political parties from the beginning, the major dispute concerned the scope of prerogatives of the head of state elected this way. This change was also motivated by a desire to drum up more interest in Czech politics among the society and to strengthen their feeling of having influence on what was happening in the politics\(^9\). Finally, the introduction of general elections of the head of state was accompanied by a slight reduction of his previous powers with regard to the government and the parliament, as well as a considerable reduction of his immunity (which used to be a lifelong one) and the right to intervene in the criminal proceedings. As we can see, this is another proof that strong political legitimacy (obtained through general elections) is falsely identified with greater authority and powers of the president\(^{10}\).

Some changes were also introduced in Hungary when the new constitution of this country was adopted in 2011, which took place in a rather controversial circumstances and was done in fast motion. However, changes in Hungary compared with the Czech Republic seem to be cosmetic. First of all, the president is still elected by a unicameral parliament (only the election process was

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8 The first president of the Czech Republic elected in 2013 general election was Miloš Zeman.

9 In recent years, the Czechs were a bit unlucky with their politicians, especially those having the most important functions in the state. In 2009, Mirek Topolánek said goodbye to the Prime Minister’s post in a scandalous atmosphere and the former president – Václav Klaus – was famous for his slip-ups and behaviours that were somehow offensive for the head of state’s office (just to mention the famous stealing of a pen during a press conference held during his official visit to Chile). The Klaus’s election for the president of the Czech Republic in 2003 (as a candidate who did not have majority support among members of the parliament) was already a proof of the weakness of this system. Presidential election in the Czech Republic was very politicised and served only to individual parties to fulfil their political interests. However, the cup of bitterness was filled to the brim when it came out how non-partial members of parliament and Senators (whose votes were deciding about the results) were pressured during the last indirect presidential election in 2008.

10 It should further be noted that the president of the Czech Republic does not have the right of legislative initiative (like the Polish president) and his veto is very weak (it can be rejected by a simple majority of votes of the members of parliament).
modified so that elections could be completed fairly quickly), and his traditionally small privileges have been only slightly increased\textsuperscript{11}. 

The attitude of Law and Justice towards the Polish constitution

Over the last several years, the party that subjected the Polish constitution to biggest criticism was undoubtedly Law and Justice\textsuperscript{12}. In its political documents as well as election manifestos the party has repeatedly suggested the need to clarify the rules regarding the powers of the head of state and the relationship between the two centres of executive power. What is more, on many different occasions it also postulated the need to change the character of the Polish political regime and its evolution towards the French model. Such postulates of strengthening the political position of the President of the Republic of Poland were pushed by Law and Justice mainly from 2005 to 2010, when Lech Kaczynski, one of the founders of this party, served as the president. This direction of the desired constitutional reforms was most clearly outlined and confirmed in the draft of the new Constitution of the Republic of Poland presented by Law and Justice in 2010\textsuperscript{13}.

The draft met with widespread criticism from other party politicians, journalists, and constitutional law experts, as many of the proposed changes were considered controversial. Among them were those which strongly reinforced the political position of the President of the Republic of Poland, giving him powers incomparably greater than those laid down in the Polish Constitution of 1997 – such as the discretionary power to dissolve the parliament, which the president would be able to use practically on request, without having to specifically justify it (Article 94 of the draft of the Constitution). Another disputable power of the president would be the possibility of applying the so-called

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  \item For example, he has been given the possibility to terminate the parliament early when the budget law is not adopted in due time.
  \item For example in the 2007 Law and Justice election manifesto we can find the following statement: “We consider that the Polish Constitution of 1997 is a bad act, unclear and based on an erroneous axiology. The new state needs the New Constitution. We have a draft of the Constitution of the Republic of Poland and we will strive for its adoption”. See: \textit{We care about Poland, we care about the Poles. 2007 Law and Justice election manifesto}, http://old.pis.org.pl/bip/download.php?f=progam_pis_2007.pdf [retrieved: 21.10.2017].
\end{itemize}
“special legislative veto”, i.e. calling a national referendum, in which the nation would validly decide on the fate of bills “relevant to public finances or the freedoms and rights of citizens” (Article 103 of the draft of the Constitution). In other words, the disapproval of the nation expressed in such a referendum would not only result in the immediate termination of the legislative process but would also give the president the possibility to dissolve a parliament and call an early election. One more Article of the draft of the Constitution is also worth mentioning and it is Article 122, according to which the president would have the power to “refuse to appoint the president of the Council of Ministers or another member of the Council of Ministers if there is reasonable suspicion that he/she will not obey the law or if there are important reasons for the state’s security against the appointment”. Such a vague statement would undoubtedly make the role of the president in shaping the composition of the council of ministers enormous.

The Law and Justice’s draft of the Constitution was modelled in many ways on the Constitution of the French Fifth Republic, and would thus introduce a completely different type of political regime in Poland. If this Constitution came into force the Polish parliamentary regime would be replaced with one of the variants of semi-presidential regime, in which the president – still of course elected in direct and general elections – would become the centre of executive power, additionally vested with a number of special powers in relation to legislative and judicial branches of government.

Apart from the constitutional issues, controversies over the draft of the Constitution also concerned many other areas related either to civil rights and liberties or to the principles of functioning of the Polish state. This led to the situation in which Law and Justice leaders decided to abandon their idea – the draft of the Constitutions ceased to be the official political document of the party, the Law and Justice politicians seemed to forget that it had ever existed and it even disappeared from the official website of Law and Justice.

In the following years, postulates of constitutional changes were not particularly prominent when it comes to the election manifests and other political documents of Law and Justice. In recent elections, their electoral manifesto was very cautious about the possible change of the Polish constitution, making it dependent on the real and arithmetical possibilities of undertaking such a legislative initiative. This was evidenced by the following statement: “First of all, we foresee changes that do not require the amendment of the existing
Constitution and can be implemented by statute or through deliberate organizational changes. In those cases where the rationalization of institutions and mechanisms according to which the state operates requires constitutional changes, we will seek to obtain the majority needed to carry them out”\textsuperscript{14}. This Law and Justice’s U-turn in the approach to the modification of the constitutional framework of the Polish state (in particular the powers of the President of the Republic of Poland) may look surprising, but it seems that it resulted directly from the failure of the Law and Justice leader – Jaroslaw Kaczynski – in the 2010 presidential elections. It was the Civic Platform candidate – Bronisław Komorowski – who was elected president and the Law and Justice leaders surely did not want to make him more powerful by amending the Polish Constitution of 1997 or replacing it with the completely new constitution. All the more so that there was little indication that the Law and Justice politician would take over this office in the next election. After all this happened.

The year 2015 for Law and Justice was particularly successful. First – in May – their candidate Andrzej Duda quite unexpectedly won the presidential election defeating Bronislaw Komorowski who wanted to be elected for another five-year turn. A few months later, in October, the party won the parliamentary elections getting the absolute majority of seats that allowed them to form a single-party government. As promised, according to the aforementioned electoral manifesto, Law and Justice began to carry out such constitutional changes, which do not necessarily require a revision of the Constitution, but could be implemented through amendments to individual laws. On many occasions, as in the case of changes in the judicial system, such strategy has been challenged by opposition politicians, constitutional experts, or by the judges themselves, who consider it to be a breach of the current constitution and an attempt to politicise the judiciary\textsuperscript{15}.

The possible constitutional changes are mentioned by the representatives of the ruling party only sporadically. They seem to be fully aware that with the present composition of the Polish parliament such an initiative is unlikely to succeed. So even more surprising – also for the Law and Justice politicians


was the speech of President Andrzej Duda made on May 3rd Constitution Day. At the celebration of the 226th anniversary of the declaration of the Constitution of May 3, President Duda announced that he would like to order a constitutional referendum in November 2018 (it will be the 100th anniversary of the restoration of Poland’s sovereignty as the Second Polish Republic in 1918). In the referendum, the Poles would have to define “what constitution they want, what kind of constitutional changes they expect when it comes the system of government in the Republic of Poland nearly 30 years after the constitutional transformation of 1989 and nearly 20 years after the Polish Constitution of 1997 came into force”\(^\text{16}\). The president’s intention, however, would not be a referendum to approve a new constitution – previously drafted and adopted by the National Assembly – but a consultative referendum with very broad questions about the desired direction of constitutional changes in Poland, including those of a systemic nature that are related to the Polish political regime. Only after such a referendum and on the basis of its results, carefully selected lawyers and experts would begin preparing the draft text of the new constitution, which would then have to be adopted by the National Assembly.

Although for the moment we do not know the details of President Duda’s proposals, there is much evidence that the issue of the correlation between the way the Polish president is elected and his/her constitutional powers will be one that will have to be resolved. President Duda himself repeatedly signalled that in his opinion many provisions in the Polish Constitution of 1997 were not precise enough, including the ones that deal with the separation of powers into three branches for they make the position and the powers of the Polish president quite ambiguous and unclear\(^\text{17}\). Referring to German example, he also pointed out that Poles should comment on what kind of president they want – “whether a president who has a strong mandate and his/her general and direct election justifies this constitutional position or maybe they want their president to be so more symbolic, more ceremonial”\(^\text{18}\).


\(^{18}\) Ibidem.
Summary

Amending a constitution or replacing it with a new one is never easy. Even if politicians usually have a lot of ideas how it should be done, the real problem is to put these ideas into practice. If the President Duda’s initiative is to succeed, so in other words – if such a referendum is to be held, the consent of the Senate of the Republic of Poland, i.e. the second chamber of the Polish parliament is needed. According to the Article 125 of the current Constitution the consent of the Senate is given “by an absolute majority vote taken in the presence of at least half of the statutory number of Senators”. And while Law and Justice has such an absolute majority of seats in the Senate, it is difficult to say with certainty whether today, in the face of a rather tight relationship between President Duda and the Law and Justice’s leadership, Senators of this party will support the president’s initiative.

And even if the referendum is held, it will only be the first step. The change of the constitution itself requires either the so-called ‘constitutional majority’ or a bipartisan consent, that is the agreement between the ruling party and at least part of the opposition. For the moment Law and Justice does not have such a constitutional majority, even if it joins forces with Kukiz ’15 parliamentary faction – the only political group that welcomed President Duda’s initiative with great enthusiasm. Other Polish political parties do not want to hear about any constitutional change accusing both Law and Justice and President Duda of repeatedly violating the constitution that is currently in force. Of course, it may change after the next parliamentary and presidential elections scheduled for 2019 and 2020 respectively, especially if Law and Justice gets even better results, what – at least today – is suggested in the opinion polls. Maybe then, to change the constitution, they will not need agreement with any other political party, just like the Hungarian Fidesz after the 2010 elections.

However, there is no doubt that disputes on the competences and powers of the President of the Republic of Poland, especially (but not only) in the context of the way he/she is elected, will return regularly in the discussions on potential constitutional changes. The possible evolution of the Polish parliamentarism into the presidential or semi-presidential regime would force a significant increase in the powers of the head of state, still elected directly by the people. Staying within the framework of the parliamentary regime would require a more precise definition of the constitutional position of the President of the Republic of Poland, leaving open the issue of the way he/she is elected.

Keywords: constitution, president, electoral system, referendum, Poland