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Informal Constitutional Change. The Case of Poland

Keywords: system, informal, change, transformation, amendment, constitution
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Summary

This article describes the theoretical concept of constitutional change. The cases of constitutional changes and amendments since 1989 have been analyzed in the text. The historical approach is used as a background for the current Polish events conceptualization.

The theories formulated by Y. Raznai, R. Albert, B. Ackermann, S. Griffin, D. Landau are applied for purpose of the analysis. The authors consider the problems of: constitutional change, constitutional amendment and dismemberment, constitutional moment, as well as a kind of constitutionalism, which is connected to an abuse of power by the parliamentary majority (illiberal constitutionalism).

This paper analyses following issues: the conceptualization of constitutional amendment procedure and constitutional change in formal and informal ways as well as the constitutional moment. Moreover, the Polish academia opinions on the amendment and change are presented. Eventually, the identification of the recent Polish systemic events from a theoretical perspective and the summary of the research are provided.

The assessment of current events takes into account the historical background – the transformation started in 1989 and ended with the adoption of the 1997 Constitution. The conclusion is connected to identification of the constitutional moments which legitimize or not the transformation of the system.

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Streszczenie

Nieformalna zmiana konstytucji. Polski przypadek

Artykuł dotyczy teoretycznej kwestii zmiany konstytucji. Analizie poddane zostały przypadki zmian i nowelizacji ustawy zasadniczej od roku 1989. Rozważania historyczne stanowią tło dla konceptualizacji obecnie dokonywanych modyfikacji ustroju Rzeczypospolitej Polskiej.

W analizie wykorzystane zostały teorie sformułowane przez Y. Raznai, R. Alberta, B. Ackermanna, S. Griffina, D. Landau. Pozwoliło to na przedstawienie problemów zmiany konstytucji oraz jej nowelizacji, budowy konstytucjonalizmu oraz jego psucia, momentu konstytucyjnego, a także konstytucjonalizmu, który związany jest z nadużyciami demokratycznie uzyskanej władzy przez większość parlamentarną (illiberal constitutionalism).

W kolejnych częściach artykułu omówiono problem nowelizacji konstytucji i działania władzy ustrojodawczej oraz władzy dokonującej jedynie korekt istniejącego systemu. Przy czym czynnikiem legitymizującym podejmowane rozstrzygnięcia ustrojodawcze uczyniono tzw. moment konstytucyjny. Następnie przedstawiono kwestie zmiany formalnej i nieformalnej konstytucji. Po czym przybliżono zdanie doktryny polskiej dotyczące teorii wskazanych w pierwszej części rozważań. Jako tło historyczne oraz materiał porównawczy dla oceny obecnych wydarzeń ustrojowych przyjęto transformację ustrojową rozpoczętą w 1989 r. i zakończoną uchwaleniem konstytucji w 1997 r. Ocena tych wydarzeń związana jest z zaistnieniem momentu konstytucyjnego, który pozwala legitymizować transformację ustroju państwa. Taki też wniosek pojawił się w krótkim podsumowaniu artykułu.

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I. Introduction

The Polish Constitution of 1997 is the one in a formal, procedural and substantive meaning[2]. However, an attempt to reinterpret the role of the Constitution behind "a façade of democratic state ruled by law" can be recognized. According to the current political narration, the Constitution of 1997

[2] See the meaning of a Constitution: A.W. Heringa, P. Kiiver, *Constitution Compared,* Cambridge–Antwerp–Portland 2012, pp. 2–8.

is based on betrayal, and not on the wide agreement of the diverse political options in the name of consensus and continuity of the state and the nation. It brings us to the beginning of the transition to democracy period started by the Round Table Talks (1989)[3]. The Constitution of 1997 is perceived as reflecting the previous communist-type of the state-individual relations. Therefore, a breach of the constitution and changing it informally is justiciable according to the ruling power which has no. constitutional majority needed for its formal amendment.

In this paper, several theories (e.g. by Y. Raznai, R. Albert, B. Ackermann, S. Griffin, D. Landau) are used to conceptualize the current Polish events. There will be references to the positivist, legal and Kelsenian understandings of a constitution as a written, supreme and normative document.

In a brief manner, this paper provides, the conceptualization (II) of a constitutional amendment procedure (II.1) and a constitutional change in both formal (II.2) and informal (II.3) ways. Then, the Polish academia opinions on the amendment and change will be presented (III). Eventually, I will try to identify the recent Polish systemic events from a theoretical perspective (IV) and later shortly summarize the research (V).

II. The concept of constitutional amendment and change

The concept of constitutional amendment is developed by Yaniv Roznai in the scope of constitutional adjustment[4]. The author understands the term "constitutional amendment" as a formal change of a constitutional text enacted through the amendment procedure. He also recognizes the term "constitutional change" as a modification of a constitution, which takes place outside the formal amendment process (e.g. through judicial interpretations or practice).

According to Y. Roznai, formal constitutional amendments are essential means of a constitutional modification[5]. At the same time, this kind of trans-

[3] In the scope of this paper I would like to discuss the period since 1989. The informal constitutional change will not be analysed in relation to the constitutions before 1989.

[4] Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford University Press, 2017.

[5] Ibidem, pp. 11–13.

formation of a constitutional text is not clear and raises imperative questions from the perspective of constitutional theory. One of the fundamental problems encountered is a proper reconciliation of the tension between flexibility and stability.

First of all, one should remember that constitutions ought to be sufficiently flexible to allow changes by future generations on political, economic, social, and other grounds, as well as these in the society's system of values. Secondly, an amendment procedure is a means of correction of defects or shortcomings that are revealed by time, practice, and experience. Thirdly, the process is connected to the right to peaceful alternation of the existing form of government. It enables to avoid a revolution. Fourthly, the procedure preserves the government's legitimacy and, lastly, it makes the constitution flexible enough to allow its endurance over time.

As far as the stability is concerned, it should be underlined that the constitution must be sufficiently stable due to the rule of legal certainty and the faith in the political order. Secondly, an easy amendment process can endanger fundamental principles and institutions of the existing system as well as place them at risk of usage by majorities who use the amendment procedure to fulfil their political agenda. Thirdly, an overly flexible amendment process might enable an abuse of the amendment power. Fourthly, an easy and careless amendment process might jeopardize the authority (supremacy) of the constitution. Lastly, as Yaniv Roznai underlines, extreme constitutional flexibility is empirically associated with an increased risk of constitutional demise.

The most essential element of the concept is the difference between the constituent power (a power to establish a new constitutional order, unlimited, original power) and the amendment power (limited, derived power, acting within the binding constitution and its identity). It should be underlined that the amendment power cannot completely change the valid constitution. Yaniv Roznai roots his idea in the theory presented by E.J. Sieyes and concludes that the amending power possesses characteristics of both constituent and constituted power simultaneously[6]. Through the amendment provision, the nation (the people, the sovereign) allows a constitutional organ to exer-

[6] Ibidem, p. 92.

cise a constituent authority, which means the authority to constitute constitutional laws. The competence to amend the constitution is based on trust. Thus, the amendment authority acts as a trustee of 'the people' in their original constituent power. Nevertheless, the core of the concept is an explanation of the amendment power as a delegated power (authority). As Y. Roznai clarifies: "when the amendment power amends the constitution, it uses a legal competence delegated to it by the original constituent power"[7]. Consequently, the legal authority of the amendment power arises directly from the constitution and should be perceived as a legal competence authorized to exercise certain legal action (amending the constitution). Therefore, the amendment power may be explicitly (procedurally and substantively) limited. These two powers, according to their combined nature, should be named primary and secondary constituent powers.

Another essential element of the concept is judicial review of the amendments. The adjudication by an unbiased organ ensures that the authorised amending power does not exceed its delegated competence. In consequence, it protects the separation of powers (between the primary and secondary constituent powers)[8].

The concept of formal constitutional change is based mainly on the alternation of the constitution by the constitution-making (constituent) power which must not use the amendment procedure. The need for such fundamental changes may occur when the people (*demos*) face the transformative "constitutional moment"[9]. Yaniv Roznai underlines its importance in case of building a new constitution. This process can be perceived as the peoples' right to form a constitution. However, in his opinion, the constituent power never acts in a pure vacuum[10]. Therefore, even constituent power is never purely original. Simply and by its nature, it is not necessarily derived from nor is it bound to the prior or existing constitutional rules.

The original Ackerman's concept of the constitutional moment is connected to the real Constitution. As M.W. McConnell noted, in case of the Amer-

[7] Ibidem, p. 101.

[8] Ibidem, p. 174.

[9] The concept of constitutional moments by Bruce Ackerman, 1 We The People: Foundations (1991); 2 We The People: Transformations (1998).

[10] Ibidem, p. 106.

ican system, the Constitution is neither solely the constitutional text nor the Supreme Court's interpretation of the text[11]. The real Constitution is a set of principles adopted by "We, the People" at extraordinary "moments" of intense constitutional participation and deliberation, irrespective of changes in the constitutional text. These "moments" result in the constitutional transformations that should be honoured by the courts and other political actors in the same way as amendments adopted pursuant to Art. V. Nevertheless, the final stage of the constitutional moment is the "codification" and transformation of such "moment" into formal legal doctrine. For a positivist, it should be a new constitutional text, whereas on the American legal ground, the judicial codification is a sufficient means.

According to Richard Albert, the codified written constitutions commonly entrench formal amendment rules that authorize political actors to change the constitutional text in conformity with special procedures[12]. As far as the constituent power is concerned, a regulation providing rules needed for passing a new constitution (e.g. German Basic Law) seems to be very rare. But for the positivists and legal constitutionalists, any changes within the foundations of the constitutional system need a written and published constitutional text (formal constitutional change).

However, in the scope of my research, the formal constitutional change concept will not be elaborated. The reason is simple. In Poland, the current party in power does not have a constitutional majority in Parliament. At the same time, there is no. broad and clear agreement of different political and societal options to replace the binding constitution. This means that such change could not be labelled as legitimate. If this would happen, it should be recognized as abusive constitutionalism, as in the case of Hungary[13]. Nevertheless, this scenario does not to be discussed in the scope of the paper.

Informal constitutional change may be analysed from several points of view.

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[11] M.W. McConnell, *The forgotten constitutional moment*, "Constitutional Commentary" 1994, vol. 11: 115.

[12] R. Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, "Dublin University Law Journal" 2015, vol. 38(2).

[13] D. Landau, *Abusive constitutionalism*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244629 (8.11.2017).

The first meaning, as suggested by S.M. Griffin focusing on the US constitutional field[14], 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 informally[15]. Such modification occurs where 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 emphasised 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.

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 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, the 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 could 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

[14] 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.

[15] R. Albert, *How Unwritten...*, pp. 388–391.

may add that they could be considered legitimate if made as a result of the constitutional moment.

III. Polish academia on constitutional amendment and change

The concept of constitutional amendment and change is not a favourite research subject for the Polish academia. Most of the time, an analysis is concentrated on the constitutional provisions governing the amendment procedure[16]. In 1997, the problem of the entry into force of the new Polish constitution was discussed[17]. Occasionally, the constitutional novelizations have been assessed from a theoretical perspective[18] or in the light of the Constitutional Tribunal (hereinafter the "CT") competences[19] and adjudication[20]. According to one of the constitutional law handbooks[21], the following technics of modifying the constitutional text can be identified: the "amendment" (when a new text is added to the constitution, the so-called US manner) and the "novelization" (when changes are incorporated into the constitutional provisions). Another division is based on the impact and effect of novelization. The term "amendment" is connected to the binding text and the current constitutional system (introducing the EAW into the Constitution of 1997 in 2006). On the other hand, "revision" means changes leading to the system transformation[22]. Going further, a "formal revision" transforms the system by provid-

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[16] W. Sokolewicz, *O gradacji zmian konstytucji*, [in:] *Konstytucja. Wybory. Parlament*, ed. L. Garlicki, Warszawa 2000 and R. Grabowski, *Zróżnicowanie trybu zmiany jako kryterium klasyfikacji konstytucji współczesnych państw europejskich*, Rzeszów 2013.

[17] *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej*, ed. Z. Witkowski, Toruń 1998.

[18] A. Bień-Kacała, *Rewizja czy zmiana konstytucji? (Charakter prawny nowelizacji konstytucji z 1989 r.)*, "Studia Iuridica Toruniensia" 2010, no. 7.

[19] A. Bień-Kacała, *Glosa do wyroku czeskiego Sądu Konstytucyjnego z 10 września 2009 r. (sygn. Pl. ÚS 27/09)*, "Przegląd Sejmowy" 2010, no. 5.

[20] M. Masternak-Kubiak, *Dopuszczalność nieformalnej zmiany Konstytucji RP (uwagi w kontekście prawa wyborczego obywateli Unii Europejskiej)*, [in:] *Prawo w służbie państwu i społeczeństwu*, eds. B. Banaszak, M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2012.

[21] J. Galster, [in:] *Prawo konstytucyjne*, eds. Z. Witkowski, A. Bień-Kacała, Toruń 2015, p. 54.

[22] L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2016, p. 49. This distinction is closed to provided by R. Albert differentiation between amendment and revision of the constitution, R. Albert, *Amendment and Revision in the Unmaking of Constitutions*, Reserarch paper 420.

ing a new constitution (which happened in 1997) whereas a "substantial revision" occurs after changing only one constitutional provision (in December 1989, the rule of law was introduced to the text of the Constitution of 1952). An informal constitutional amendment is almost outside the scope of interest of the Polish academics[23]. The concept occurs in reference to the supranational legal system (the European Union) and the multicentral concept of law.

Undoubtfully, any change should be reflected in a text of a constitution[24]. Any other changes of the meaning of the Constitution without shifting the text, especially creating exception for a one time (e.g. prolonging the term of office of the Sejm) should be assessed as *ultra vires* and eroding the system. In common opinion, if a difference between the text of the Constitution and the practice could be identified, then such occurrence should be classified as an example of the application of the law and not as an informal constitutional change.

According to Art. 235 of the Constitution of 1997, a bill to amend it may be submitted by: at least one-fifth of the statutory 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 in the presence of at least half of the statutory number of Senators. Within this procedure the Senate acts as a veto player.

In 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 vot-

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[23] W. Sokolewicz, *Komentarz do Art. 235,* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. vol. II, ed. L. Garlicki, Warszawa 2001, p. 4; M. Masternak-Kubiak, *Dopuszczalność nieformalnej zmiany Konstytucji RP (uwagi w kontekście prawa wyborczego obywateli Unii Europejskiej),* [in:] *Prawo w służbie państwu i społeczeństwu,* eds. B. Banaszak, M. Jabłoński, S. Jarosz-Żukowska, Wrocław 2012. The Authors do not provide conceptualization of informal constitutional change.

[24] W. Sokolewicz, *Komentarz do Art. 235,* [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. vol. II, ed. L. Garlicki, Warszawa 2001, p. 6.

ing express support for such amendment. However, the requirement of the referendum in 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* regulations in scope of non-novelisation.

Additionally, the competence of the CT to assess the constitutional amendment is uncertain[25]. 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," could we interpret the competence of the Tribunal to the abovementioned 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 two times 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 the ban on person who was sentenced to imprisonment by a final judgment for an intentional indictable offence had been introduced.

If the amendment procedure is engaged, then a formal constitutional change can be identified. However, it must be emphasised that because the most important feature of such change is the transformation of the existing system, to make a change to the constitution, it is not necessary to use the amendment procedure. In case of occurring the changes without launching the amendment process, one can speak about an informal constitutional change.

Considering a formal constitutional change, the revision of the constitution should be identified. As has been said, a substantial revision can replace the system by means of changing even one constitutional provision (December 1989 amendment, the rule of law). A formal revision, in turn, can lead to transforming the system by adopting a new constitution (the 1997 Constitution).

[25] W. Sokolewicz, *Komentarz do Art. 235...*

Taking a theoretical conceptualization into account, one can describe the Polish experience of 1989 (April and December Amendments) using a differentiation between the changes within the existing system and the change of the system itself.

Both modifications occurred in connection to the so-called transformative constitutional moment. The moment is described by the Polish academia as the conditions, in which the necessity of adopting a new constitution or at least a revision of the existing one arises[26]. In the 1980s, it was based on the extraordinary discrepancy between the will of the Nation (or its significant part) and the normative and political structure of the state (the Constitution of 1952 and the leading power, the socialist party). From a theoretical perspective, the constitutional moment allows the people (the Nation) to act as a sovereign and revise the social contract (J.J. Rousseau) or *Grundnorm* (Kelsen) and, in consequence, to provide a new constitution. In case of Poland, the moment lasted for a very long time. One should place it between the Round Table Talks in 1989[27] and the enactment of the Constitution of 1997.

The decision to organize the Round Table Talks was made in September 1988 by the opposition and the government. It enabled the transition to (liberal constitutional) democracy. The Talks were conducted on 6 February and lasted until 5 April 1989, when the transformation of the state was agreed upon. Undoubtedly, this procedure cannot be classified as a constitutional amendment, because the consensus did not meet the requirements of the novelization. However, the effect of the Round Table Agreement was colossal and transformative. Therefore, in this situation, one can identify the informal constitutional change, which put the socialist state on the road towards democracy.

One of the demands of the Round Table Agreement was amending the Constitution of 1952, which eventually succeeded on 7 April 1989[28]. The April

[26] Por. B. Banaszak, *W poszukiwaniu „momentu konstytucyjnego", czyli o warunkach zmiany konstytucji*, "Przegląd Legislacyjny" 2007, no. 6, p. 11.

[27] The agreement made by The Round Table is named as social contract e.g. by R. Mojak, [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2007, p. 73; idem, *Kształtowanie podstaw konstytucyjno-ustrojowych III Rzeczypospolitej Polskiej (w procesie transformacji w latach 1989–1992)*, [in:] *Ustrój polityczny i gospodarczy współczesnej Polski*, vol. IV, ed. W. Skrzydło, Lublin 1996, pp. 8–9.

[28] A. Szmyt, *Dokonywanie zmian przepisów konstytucyjnych,* [in:] *20 lat transformacji ustrojowej w Polsce*, Materiały konferencyjne, 51 Ogólnopolski Zjazd Katedr i Zakładów Prawa

Novelization is assessed as the most important of the in-depth constitutional modifications, which remained in the scope of the existing socialist system[29]. Some of its results embraced the fact that the President, the Senate and the National Council of Judiciary (hereinafter the "NCJ") were created. Nevertheless, the Sejm remained the supreme body in the hierarchical structure of the socialist state organs.

Unquestionably, the second novelization dated on 29 December 1989 had a transformative effect[30]. As a result of this amendment, *inter alia* the rule of law, political pluralism and local government were constitutionalised. The December Novelization breached the socialist identity of the Constitution of 1952, notably the rule of law destroyed the substantial core of the existing Constitution and, at the same time, created fundaments of liberal democracy[31]. The system changed in a revolutionary manner[32]. Borrowing the conceptualization of the constitutional amendment and dismemberment from R. Albert[33], one can name the December Novelization as such dismemberment. Its effect was the improvement[34] (transition to democracy) of the system. According to R. Albert's concept, the constitutional dismemberment can be placed between the amendment and the adoption of a new constitution. It aims to unmake the constitution without breaking legal continuity. One can say that such pattern of transformation was chosen in December 1989.

Nevertheless, 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

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Konstytucyjnego, Warszawa, 19–21 czerwca 2009 r., p. 61.

[29] W. Sokolewicz, *Kwietniowa zmiana Konstytucji*, "Państwo i Prawo" 1989, no. 6, pp. 3–4.

[30] W. Sokolewicz, *Rzeczpospolita Polska – demokratyczne państwo prawne (Uwagi na tle ustawy z 29 XII 1989 o zmianie Konstytucji)*, "Państwo i Prawo" 1990, no. 4, s. 12–14. M. Chmaj, *Sejm „kontraktowy" w transformacji systemu politycznego Rzeczypospolitej Polskiej*, Lublin 1996, p. 81.

[31] L. Garlicki, *Aksjologiczne podstawy reinterpretacji konstytucji*, [in:] *20 lat transformacji ustrojowej...*, p. 48.

[32] S. Gardbaum, *Revolutionary constitutionalism*, I-CON1/2017; L. Garlicki, op.cit., p. 50 and A. Szmyt, op.cit., pp. 79–80.

[33] R. Albert, *Constitutional amendment and dismemberment*, 43 "Yale Journal of International Law" (forthcoming 2018).

[34] Dismemberment can either worse the liberal democracy.

constitution[35]. The re-interpretation of the Constitution should be based on the strong axiological fundaments and further enclosed to the text of the constitution in the amendment process[36]. It is justiciable and legitimate only if the transformative constitutional moment could be identified. Certainly, the constitutional moment occurred in Poland. The new meaning of the constitutional provisions had been provided either by the CT, the Supreme Administrative Court or the Ombudsman. In my opinion, such practice and re-interpretation equal the informal constitutional change. It was acceptable during the transitory period, even in relation to the Interim (Small) Constitution of 1992[37]. Finally, the Constitution of 1997 came into force and closed the transformation period. Since that moment, the re-interpretation of the annulled constitutional provisions has made no. sense.

As far as an informal constitutional change is concerned, the interpretative judgements of the CT based on the ground of the Constitution of 1997 should be pointed out[38]. In their operative parts, the decisions provide a binding constitutional interpretation by explaining the constitutional rules and norms. The CT indicates which of the possible meanings should be labelled as binding and constitutional. At the same time, the CT discards unconstitutional meaning of the assessed norms. Nevertheless, the interpretation is not a direct aim of the adjudication. The goal is, according Art. 188, an assessment in the scope of the conformity of statutes to the Constitution (*ex ante* or *ex post*). This kind of judgements is doubtful, because in the scope of the Constitution of 1997, the CT does not have a competence to deliver binding constitutional interpretation *in abstracto*[39]. Nonetheless, the CT can provide the binding interpretation of the Constitution, not being bound by its previous decisions. Obviously, such an activist approach could be recognized as an informal constitutional change. The judgements could be only legitimate

[35] J. Zakrzewska, *Nowa Konstytucja Rzeczypospolitej*, "Państwo i Prawo" 1990, no. 4, p. 4.

[36] L. Garlicki, op.cit., pp. 39–47.

[37] 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.

[38] See more on the interpretative judgements M. Hermann, *Wyroki interpretacyjne Trybunału Konstytucyjnego z perspektywy teoretycznoprawnej*, Warszawa 2015.

[39] The competence to deliver abstract interpretation was annulled by the Constitution of 1997.

if delivered in reference to a constitutional moment. Otherwise, they should be assessed as illegitimate.

Putting the theoretical concept into practice, the CT judgement K 18/04 (18 May 2005)[40], relating to the EU Treaty of Accession, was directly connected to the informal constitutional change. However, in this respect, Małgorzata Masternak-Kubiak did not provide any theoretical elaboration of the transformative effect of the UE accession and, in consequence, possible informal constitutional change[41]. The jurisprudence of the CT, concerning especially the post-accession period, constitutes the main focus of the analysis. In the Tribunal's opinion (as depicted particularly in the case K 18/04[42]), the right to vote and to stand as a candidate at local elections vested in the EU citizens who, although not holding Polish citizenship, are residents of Poland[43] does not breach the Constitution. Especially the provision[44] which guarantees Polish citizens the right to elect, *inter alia*, their representatives to organs 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 EU law can affect supremacy of constitutional norms. The new meaning is understood by the CT as the so-called EU-friendly interpretation. In consequence, one can notice that the informal constitutional change 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.

IV. The recent systemic changes

Since the 2015 parliamentary election, Poland has been facing an illiberal democracy formation[45]. The illiberal system is the result of a peaceful constitu-

[40] http://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf (11.11.2017).

[41] M. Masternak-Kubiak, op.cit., pp. 116–132.

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

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

[44] Art. 62(1) of the Constitution of 1997.

[45] For a conceptualization of illiberal constitutionalism from a legal perspective see T. Drinóczi, A. Bień-Kacała, *Constitutions and constitutionalism captured: shaping illiberal*

tional development, in which democracy, the rule of law and human rights are not respected in the same way as before, in the context of a constitutional democracy. It should be emphasised that illiberal democracy is not in opposition to liberal democracy. The concept rather refers to a state, in which the political power relativizes the rule of law, democracy, and human rights in politically sensitive cases. Consequently, constitutional democracy still exists but its formal implementation overweighs the substantial realization. In the Polish context, we can certainly say that the state events are more than populist morality creation by partisans' actions[46]. The populist narration is used for the transformation of the system (liberal democracy). Due to the fact that the winning political party (Law and Justice) did not gain a constitutional majority, it is trying to change the system using informal instruments[47]. One of the major effects of the undertaken actions is weakening of liberal democracy, which is why the constitutional dismemberment (as named by R. Albert[48]) can be recalled[49].

The following standard measures of informal constitutional change are currently used for democratic dicey: the constitutional interpretation (by the captured[50] CT judges) and practice (both legislative and executive).

As far as the CT judgements are concerned, the decision dated on 20 June 2017 (K 5/17) should be pointed out[51]. The ruling is connected to the

democracies in Hungary and Poland (in publication).

[46] As J.W. Muller assessed [in:] *What is populism,* Pennsylvania 2016.

[47] See more on the usage of formal and informal constitutional amendment in Poland: J. Trzcinski, M. Szwastm, *Formal and informal amendments to the Constitution and in Hungary*: T. Drinóczi, F. Gárdos-Orosz, Z. Pozsár-Szentmiklósy, *Formal and Informal Constitutional Amendment. Both are national reports (manuscripts) for the Comparative Law Congress*, Fukuoka, Japan 2018.

[48] R. Albert, *Constitutional amendment...*

[49] Obviously, R. Albert relates to a formal constitutional amendment when theorizes dismemberment, but in Polish case we should consider importance of changes. They completely affect the main principles of the Constitution of 1997, e.g. the rule of law and independence of judiciary.

[50] More [in:] A. Bień-Kacała, *Polish Constitutional Tribunal: a systemic reform or a hasty political change*, 1 *DPCE* online (2016).

[51] M. Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, VerfBlog, 2017/6/23, http://verfassungsblog.de/how-to-demolish-an-independent-ju-

judiciary reform[52], which intended to change the constitutional character of the NCJ, the terms of office of its members and its organisation. Taking into consideration that the Constitution only contains provisions regulating the main role of the NCJ (i.e. to safeguard independence of the courts and judges)[53] and its composition[54], such reform would be legally possible. The detailed regulations are to be adopted by Parliament[55]. Nevertheless, it must be emphasised that only independent and politically non-biased organ can safeguard independence of the courts and judges. Thus, only such authorities could conduct the reform. In case of Poland, however, the said reform might politically influence the NCJ, because the draft intends to create two units within this body – a political (composed of, for example, the Minister of Justice, an individual appointed by the President, 4 Deputies and 2 senators) and a judicial (composed of judges elected by politicians, for example the Sejm which indirectly means the party in power). The draft of legislation on the reform (especially in scope of the NCJ) was criticised from a constitutional perspective by different entities (for example, the Ombudsman). Therefore, on a motion of the Prosecutor General (simultaneously acting as the Minister of Justice who prepared the draft legislation of the reform), the CT delivered the judgement concerning currently binding regulations. In the ruling K 5/17, the CT created a legal basis for the reform. According to the interpretation of the Constitution, the legislative power is authorized to create an almost totally different organ from the current NCJ as intended in the draft. This situation equals an informal constitutional change by a constitutional interpretation and – in case of passing the draft – by legislative actions.

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diciary-with-the-help-of-a-constitutional-court, DOI: https://dx.doi.org/10.17176/20170623–103309 (31.10.2017).

[52] However, this reform has been slowed down by the veto of the President http://www.president.pl/en/news/art,508,president-to-veto-two-judicial-bills-says-will-sign-bill-on-common-courts.html (31.10.2017). At the moment of writing the paper (November 2017), the reform is under preparation by the President and is consulted with J. Kaczyński.

[53] Art. 186(1) of the 1997 Constitution.

[54] Art. 187 of the 1997 Constitution.

[55] Art. 187(4) of the 1997 Constitution – 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.

In the scope of a creative function, the legislative practice, can be depicted by rapid actions of the newly elected Sejm in 2015[56]. The situation concerned the new judges' appointment in the resolution of the Sejm. At the end of its term of office, the previous Sejm elected 5 judges (the constitutionality of the election is irrelevant for the purposes of this article). Although the parliamentary resolution regarding the appointment of new judges is definitive and cannot be set aside, the newly-elected Sejm annulled the resolutions of its predecessor. The Sejm (in office or any another) cannot cancel its decision, invalidate it, state its abstractness (lack of legal force) and not even "amend" it *post factum*. Nevertheless, the newly-elected Sejm did it, which means that it created such competence, and eventually appointed different CT judges. The President who sworn in those different persons recognized the created competence as valid and constitutional. Still, the possibility of annulment the resolution appointing the CT judges is not reviled in the text of the Constitution. In addition, it is not accepted by the CT[57]. Therefore, one can recognize here the informal constitutional change which is, at the same time, unconstitutional. Unconstitutionality is clearer when we take into account the capture of the CT which switched off the constitutional review mechanism[58].

Furthermore, the party in power has been acting in a way that has led to the transformation of the constitutional system by upholding the long-lasting constitutional crisis and incapacitating the proper implementation and enforcement of the constitution. What the political decision-makers did with the CT was based on the constitutional interpretation and the disregard of the rulings provided by this body. The government created a legal basis for not publishing the decisions of the CT, which runs counter to its role in the Polish legal system and the constitutional obligation to release judgments in the official journal.[59] These practices clearly demolish the rule of law, democracy and the protection of human rights and thus liberal constitutional democracy.

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[56] A. Bień-Kacała, *Polish Constitutional Tribunal...*

[57] The judgement dated on 3 December 2015 (K 34/15).

[58] According to the "judicialization of politics" concept, the judges of the CT are servants of political party in power. A. Mazmanyan, *Judicialization of politics: The post-Soviet way*, I – CON 13(1)/2015, pp. 200–218.

[59] *See* e.g, Opinion 860/2016, Opinion on the Act on the Constitutional Tribunal, Adopted by the Venice Commission at its 108 the Plenary Session (Venice, 14–15 October 2016), 16. An overall description can be found in Bień-Kacała, *Polish Constitutional Tribunal...*

Could the process of illiberal democracy making be recognized as a transformative constitutional moment? If yes, the recent Polish events should be assessed as justiciable and legitimate. If not, then we should say that they are abusive, unjust, illegitimate and, finally unconstitutional. In consequence, weakening or even demolishing the constitutional democracy cannot be linked to the transformative constitutional moment. Especially, when we take into account how the constitutional moment is defined. The main feature is that the change must be implemented by "We, the People" and not by the ruling majority. Another point is the intense constitutional participation and deliberation. Definitely, the changes are done without any participation and are rapidly conducted "by night" in a hasty manner. Finally, the moment should be extraordinary and not created as a consequence of the ordinary result of general election.

V. Conclusions

The informal constitutional change is a commonly applied instrument in Poland. However, the concept is not theoretically elaborated by the Polish academia. We use other concepts like novelization and revision. The changes outside the amendment procedures are recognized, though not commonly accepted as ordinary constitutional making and amending instrument.

However, as it has been described, we face informal constitutional changes by interpretation and practice. This instrument of the system modification can be used as a tool in a democratization process as well as for democratic decay. If we put it into the transformative constitutional context, we may or may not assess the changes as justiciable and legitimate. From this perspective, there is a clear difference between the informal changes in period 1988/1989–1997 and since 2015 general election.

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