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The Role of the Constitutional Regulations in the Area of Security and Defense of the Republic of Poland

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Słowa kluczowe: Konstytucja RP, Siły Zbrojne, Prezydent RP, Rada Ministrów, Minister Obrony Narodowej

Summary

The article focuses on the constitutional aspects of defense and security of the Republic of Poland. It analyzes the provisions of the Constitution concerning defense and security, including the tasks and the competences of the state bodies in the area of defense and security, the principles of commanding over the Armed Forces in time of peace and wartime, their tasks in the field of defense and security. According to the author of article the constitutional regulation on security of the Republic of Poland leaves room for numerous doubts. They can be largely attributed to the lack of a distinct division of the state bodies' competencies in the area of security and defense. The Constitution does not stipulate the rules on commanding over the country in wartime. Whereas solutions included in the statutes arouse doubts in terms of their accordance with the Constitution.

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Streszczenie**Znaczenie regulacji konstytucyjnych w obszarze bezpieczeństwa i obronności Rzeczypospolitej Polskiej**

Artykuł jest poświęcony konstytucyjnym aspektom bezpieczeństwa i obronności Rzeczypospolitej Polskiej. Analizie zostały poddane przepisy Konstytucji RP poświęcone problematyce bezpieczeństwa i obronności, w tym zadaniom i kompetencjom organów państwowych w obszarze obronności i bezpieczeństwa, zasadom dowodzenia Siłami Zbrojnymi w czasie pokoju i wojny oraz ich zadaniom w obszarze obronności i bezpieczeństwa. Zdaniem autora konstytucyjna regulacja bezpieczeństwa Rzeczypospolitej Polskiej pozostawia wiele wątpliwości. Związane są one w głównej mierze z brakiem precyzyjnego rozdziału kompetencji organów państwowych w obszarze bezpieczeństwa i obronności. Konstytucja nie określa również zasad kierowania obroną państwa w czasie wojny. Natomiast rozwiązania przyjęte przez ustawy pozostawiają pod tym względem wątpliwości co do ich zgodności z Konstytucją.

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I. Introductory remarks

The Constitution of the Republic of Poland of April 2, 1997² identifies key legal regulations on the fundamental safety principles of the country. The Constitution is a legal act with its unique form, content and highest legal force. The consequence is the principle of hierarchy of the system of sources of law. Constitutional provisions are of key importance in determining nature and substantive regulations of other legal acts (statutes in particular). Creation of law, which would be in conflict with the provisions of the Constitution is forbidden. In the main, this concerns the content of statutes adopted by the Parliament, since statute is a self-existent source of law. The legislator is also obliged to specify the content of law which would be built on the Constitution.

Recognizing by the legislator the Constitution of the Republic of Poland as the supreme law in the area of security and defense of the country, as well as

² Dz.U. No. 78, item 483 as amended.

realization of positive consequences resulting from the highest legal force of the Constitution has been found to be problematic since its entry into force i.e. October 17, 1997. Applied rules have raised concerns as to their compatibility with the Constitution. The aim of this article is to present some of the problems emerging from this area, especially the condition of the constitutional provisions regarding the scope of powers of the state bodies (both the President and the Council of Ministers) concerning command over the Armed Forces.

II. National security in the light of the constitutional provisions

Much attention is paid in the Constitution to the issue of national security. This problem is even mentioned in the introduction part otherwise known as a preamble. Authors of the Constitution considered it appropriate to express their gratitude to their ancestors (“beholden to our ancestors for their labors, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values”). Further on, the legislator refers to “the best traditions of the First and the Second Republic” and pledges to „bequeath to future generations all that is valuable from our over one thousand years’ heritage” and to be mindful of the bitter experiences „of the times when fundamental freedoms and human rights were violated in our Homeland”.

The profound importance of constitutional provisions is best evidenced by the fact that these provisions allow to form a principle of sovereignty and independence of the state³. It was not entered *expressis verbis* in the Constitution of 1997, however, it can be formed on the basis of a number of provisions of basic law. It does not diminish the essential value of the rule of normativeness of abovementioned principle. According to view prevailing in the doctrine and jurisdiction of the Constitutional Tribunal of the Republic of Poland it had already been established that constitutional principle may directly result from the provisions of the Constitution, it can also be interpreted on the basis of one or more provisions.

State bodies pursuant to constitutional and law provisions are responsible for maintaining the independence. It regards to different activities, even

³ G. Kryszewski, K. Prokop, *Aksjologia polskiej konstytucji*, Warsaw 2017, p. 141.

those not directly affected the issue of independence, as far as they lead to increasing the potential of Poland in the field of political, military, economic, demographic or any other⁴.

III. The role of constitutional state bodies in the area of security

Ensuring the country's security is vested in the executive branch. Detailed division of tasks and powers in the area of safety results primarily from adopted by authors of the Constitution the mode of the system. In case of the Constitution of the Republic of Poland we are dealing with parliamentary system of governance, in its rational version, characterized by strengthening the executive – in comparison with classic model.

The Council of Ministers shall ensure the internal and external security of the Republic of Poland (Article 146, sec. 4, items 7–8). The Council of Ministers shall also exercise general control in the field of national defense (Article 146, sec. 4, item 11). Consequently, the Council of Ministers is entitled to make critical decisions in the field of defense. The Council of Ministers shall consist the Minister of National Defense, who in times of peace shall exercise command over the army. He is entitled to issue commands to the highest military commanders of the Polish Army. He is also politically accountable to the Prime Minister and to the Sejm. Pursuant to Article 159 of the Constitution the Sejm may pass a vote of no confidence in him.

The President of the Republic on the other hand, acts as a guardian of sovereignty and security of the State as well as the inviolability and integrity of its territory (Article 126 sec. 2 of the Constitution)⁵. The President shall perform this task through a scope of powers such as appoint in, for a period of war, the Commander-in-Chief of the Armed Forces (Article 134 sec. 4). In the event of a direct external threat to the state the President shall order deployment of the Armed Forces in defense of the Republic of Poland (Article 136).

⁴ K. Dunaj, *Konstytucyjne podstawy bezpieczeństwa*, [in:] *Aspekty prawne bezpieczeństwa Narodowego RP. Część ogólna*, eds. W. Kitler, M. Czuryk, M. Karpiuk, Warsaw 2013, pp. 145–146.

⁵ *Leksykon wiedzy politologicznej*, eds. J. Marszałek-Kawa, D. Plecka, Toruń 2018, pp. 544.

The provisions of the Constitution, in particular Article 134 sec. 2, stipulate the role of the President. In the light of that provision, the President of the Republic, in times of peace, shall exercise command over the Armed Forces through the Minister of National Defense⁶. However, in spite of this provision it is not clear what are specific powers of the President over the Armed Forces. The provision cannot be interpreted in a way that undermines leading role of the Council of Ministers in ensuring State's security. The President with the aid of his powers – as guardian of the sovereignty and security of the state as well as the inviolability and integrity of its territory – can influence this policy, however, it is the government that has the casting vote. Under the provisions of the Constitution in the emergency situation, the decision can be made after obtaining the approval of the President.

On the basis of the provisions of the Constitution of the Republic of Poland, the President, with respect to the state security, shall appoint the Chief of the General Staff and commanders of branches of the Armed Forces (Article 134 sec. 3). In light of the provisions of the Constitution, the President shall not act on the request of the Minister of National Defense which is not a right solution as in times of peace, the Minister of National Defense is a Commander-in-Chief of the Armed Forces.

The President and the Council of Ministers are supposed to cooperate in the field of state policy and in the field of defense and security. This cooperation results from the mechanism of parliamentary-cabinet system. It was also declared in preamble („... hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on [...] cooperation between the public powers”).

IV. The Armed Forces as a tool to ensure national security

The Article 26 of the Constitution specifies the obligation to summon up and maintain the Armed Forces⁷. The legislator puts emphasis on servile role of the

⁶ K. Dunaj, *Miejsce i rola Ministra Obrony Narodowej w systemie kierowania bezpieczeństwem narodowym*, [in:] *Minister Obrony Narodowej i Naczelny Dowódca Sił Zbrojnych w systemie kierowania bezpieczeństwem narodowym RP*, ed. W. Kitler, Warsaw 2013, p. 76.

⁷ K. Dunaj, *Konstytucyjne...*, p. 146.

Armed Forces and the fact that they should be subject to civil and democratic control. This means that the Armed Forces cannot in an autonomous way determine the manner of exercising the tasks entrusted to them. They serve as a tool for constitutional authorities, which are responsible for preserving security of the Republic of Poland. Under the Constitution, the Armed Forces include military formations intended for defending the state and subject to the Minister of National Defense⁸. Such understanding of the Armed Forces results from the Article 134 sec. 2 of the Constitution.

The highest in rank soldier in active military service is the Chief of the General Staff of the Armed Forces. Until the appointment of the Commander-in-Chief of the Armed Forces he shall exercise command over the Armed Forces through Commanders of branches the Armed Forces: the General Commander of the Armed Forces, the Operational Commander of the Armed Forces and the Commander of Territorial Defense Forces. The Commanders are appointed by the President on the basis of the Article 134 sec. 3 of the Constitution.

The current state of regulations stipulating command over the Armed Forces results from changes in law which have occurred in recent years. The Law of 21 June 2013 amending the law on the office of the Minister of the National Defense and certain other laws⁹ depreciated the position of the Chief of the General Staff. It resulted in a legal situation which was in conflict with provisions of the Article 134 sec. 3 of the Constitution¹⁰. In this situation, the Sejm enacted Law of October 4, 2018 to amend the law on position of the Minister of National Defense and the law on universal duty to defend the Republic of Poland¹¹. By virtue of the Law the provision defining the Chief of the General Staff as the highest in rank the officer in active service exercising command over the Armed Forces was restored.

⁸ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 192; J. Marszałek-Kawa, *The Institutional Position and Functions of the Sejm of the Republic of Poland after the Accession to the European Union*, Odessa 2019, pp. 608; W.J. Wołpiuk, *Sily Zbrojne w regulacjach Konstytucji RP*, Warsaw 1998, pp. 18–19.

⁹ Dz.U. item 852.

¹⁰ K. Prokop, *Konstytucyjne podstawy bezpieczeństwa narodowego – kilka uwag krytycznych*, [in:] *Współczesne oblicza bezpieczeństwa*, eds. E.M. Guzik-Makaruk, E.W. Pływaczewski, Białystok 2015, pp. 280–281.

¹¹ Dz.U. item 2182.

During wartime there is a different set of rules on exercising command over the Armed Forces. Pursuant to the Article 134 sec. 4 of the Constitution, the President of the Republic, for a period of war, shall appoint the Commander-in-Chief of the Armed Forces on request of the Prime Minister. He may dismiss the Commander-in-Chief of the Armed Forces in accordance with the same procedure. The Constitution does not address however, the subordination of the Commander-in-Chief of the Armed Forces. The Article 16 sec. 1 of the Law of 29 August 2002 on martial law and powers of the Commander-in-Chief and his subordination to the constitutional authorities of the Republic of Poland¹² says, that Commander-in-Chief of the Armed Forces subordinates directly to the President. It can be presumed that it is a wrong solution. It leads to the loss of influence by the Minister of National Defense (more broadly: Council of Ministers – supervisory authority in the field of defense) on the Armed Forces in wartime, which is not changed by countersigning of the acts by the President. It therefore appears, that the act on martial law should include the provision on subordination of the Commander-in-Chief of the Armed Forces to the Minister of National Defense. Only then the principle of the subordination of the Armed Forces to civil and democratic control can be provided (Article 26 sec. 2 of the Constitution).

V. Summary

The Constitution of the Republic of Poland expresses its concern for appropriate regulation of the problems relating to national security. This, however, does not change the fact that constitutional provisions let for raising interpretative doubts. In particular, this applies to the President – the Council of Ministers relationships as well as command over the Armed Forces in wartime. In law there are provisions which are contrary to the Constitution or at least do not implement directives resulting from the Constitution.

Therefore, there is an urgent need to undertake research on the condition of constitutional and statutory solutions in the fields of defense and security. The condition of constitutional and statutory provisions must be analyzed and questionable provisions should be indicated. A particular attention

¹² Consolidated text in: Dz.U. 2017, item 1932.

should be paid to command over the Armed Forces in wartime. The author of this report is convinced that in its present condition the system is highly dubious, to say the least.

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