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Evolution of the Constitutional Organ on the Example of the Polish National Assembly²

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Słowa kluczowe: Rzeczpospolita Polska, Zgromadzenie Narodowe, kreowanie ustroju państwa, wybór prezydenta, odpowiedzialność konstytucyjna prezydenta

Abstract

The Polish National Assembly is a constitutional governing body, endowed with unique powers that cannot be exercised by any other body. However, the status of the Assembly as a separate state organ raises doubts. Since the restoration of the Assembly, its position in the system has changed significantly, which was related to the multiple modification of the competences of this organ. The evolution of this organ in 1989–2020 allows treating it as an interesting research case. Especially since the competences of the National Assembly are crucial for ensuring the continuity of state power.

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Streszczenie**Ewolucja organu konstytucyjnego na przykładzie
polskiego Zgromadzenia Narodowego**

Polskie Zgromadzenie Narodowe jest konstytucyjnym organem władzy, wyposażonym w unikalne kompetencje, których nie może wykonać żaden inny organ. Status Zgromadzenia jako odrębnego organu państwa budzi jednak wątpliwości. Od czasu przywrócenia Zgromadzenia jego pozycja ustrojowa zmieniła się w sposób znaczący, co było związane z wielokrotną modyfikacją kompetencji tego organu. Ewolucja tego organu w okresie 1989–2020 pozwala traktować jako interesujący przypadek badawczy. Zwłaszcza, że kompetencje Zgromadzenia Narodowego należą do kluczowych dla zapewnienia ciągłości władzy w państwie.

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The flexibility of the political system is a desirable feature as long as it does not disturb the systemic stability. However, how easy it is to make changes depends not only on the way in which the constitutional norms regulating it are shaped. It is essential that there is a political will aimed at making changes or blocking them. The optimal situation occurs when the process of rationalizing the political system is ongoing. At the same time, when some constitutional organs are strengthened, others are weakened. This phenomenon can take place both on the formal and informal levels. Poland is no exception in this respect, and the National Assembly is an interesting example of the evolution of the constitutional body.

Since the restoration of the Assembly, its systemic position has changed significantly, which was related to the multiple modifications of the competences of this organ. The legal status of the National Assembly, a body separate from the Sejm and Senate, and having a character other than just a joint assembly of deputies and senators – seems stable. However, recognizing the Assembly as a separate organ of the state is under discussion within the doctrine of constitutional law.

Treating the National Assembly as a separate state organ may raise doubts. Such a position is taken, among others, by W. Skrzydło, who points

out that “the fact that it has specific competences, its own governing body, a specific mode of operation, does not prejudge its character. It also points out that “in the light of Art. 114 the National Assembly (...) is only a form of joint deliberations between the Sejm and the Senate under the chairmanship of the Speaker of the Sejm or his substitute by the Speaker of the Senate”³. Similarly, D. Górecki, who is inclined to recognize the National Assembly – especially under the 1997 Polish Constitution – as a special form of cooperation between the Sejm and the Senate. Based on the practice of its operation, it proves that it is too much dependent on the organs of the Sejm and the Senate in its actions to be considered a fully-fledged organ of the state⁴. This problem is perceived differently by E. Gdulewicz, according to whom: “Most authors recognize the ZN as a separate constitutional organ of the state, representative in nature, belonging to the legislative authorities. They point out that the ZN consisting of deputies and senators sitting and voting together (who should be treated as members of the ZN) meets the criteria of organizational separation, because it is not such a combination of the Sejm and the Senate in which these organs would retain their identity”⁵. Arguments allowing for the recognition of the Assembly as a separate supreme state organ were formulated by B. Banaszak, however, they prove the independence of the National Assembly and not its separateness⁶. Undoubtedly, the National Assembly is closely associated with the chambers of the Polish parliament, and especially with the Sejm. In 1989–1992, the Marshal of the Sejm was the only body authorized to convene the Assembly, since 1992 this issue remains unresolved, but this practice has been maintained.

The assembly is a constitutional organ of power with unique powers that cannot be exercised by any other organ. It has a specific (though not separate) composition and leadership, as well as regulatory autonomy – just like

³ W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2013, p. 145.

⁴ D. Górecki, *Uwagi o charakterze Zgromadzenia Narodowego*, [in:] *Minikommentarz dla maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego*, ed. M. Zubik, Warsaw 2017, pp. 487–488.

⁵ E. Gdulewicz, *Zgromadzenie Narodowe*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, eds. W. Skrzydło, S. Grabowska, R. Grabowski, Warsaw 2009, p. 748.

⁶ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 657.

the Sejm and Senate. The status of the National Assembly as a separate body is accompanied by doubts in parliamentary practice. This is indicated by the reservation placed in the heading of the list of meetings of the National Assembly and joint assemblies of deputies and senators – “not every joint session of the Sejm and Senate is a National Assembly within the meaning of the Constitution of the Republic of Poland”⁷.

This analysis is to show how the competences of the National Assembly and its position in the system have changed. The following research questions are asked: Was it rational to take away the competences related to the election of the president from the National Assembly? Was it justifiable to entrust the Assembly with the function of creating the state system and to later depart from this solution? Is the weakening of the constitutional position of the Assembly permanent or is it a temporary phenomenon?

I.

The restitution of the National Assembly to the Polish constitutional system was related to the so-called of the Round Table in 1989, this body was restored together with the Senate. The original concept of systemic relations between the Sejm and the Senate (which together form the National Assembly) with the President of the Polish People’s Republic was well-thought out. According to the Art. 32a para. 1 of the Constitution of the Polish People’s Republic, amended by the Act of April 7, 1989⁸, “the President is elected by the Sejm and the Senate, combined into the National Assembly”.

This model of electing the president was beneficial for both the government and the opposition. The outgoing authorities wanted to keep as much influence as possible in the new political realities, although they lacked public support. The opposition had the real support of the public, but was not mentally prepared to take power. The election of the President by the National Assembly is sometimes criticized, but it should be remembered that at an early stage of the political transformations taking place in Poland, there was a visible trend to restore the uncritically assessed institutions that functioned in

⁷ <http://www.sejm.gov.pl/sejm9.nsf/page.xsp/zn> (22.03.2020).

⁸ Dz.U. No. 19, item 101.

1918–1939⁹. It is no coincidence that the mentioned provisions sound almost identical to the first sentence of the Art. 39 of the Constitution of the Republic of Poland of 1921: “The President of the Republic is elected for seven years by an absolute majority of votes by the Sejm and the Senate, united into the National Assembly”¹⁰. The only difference concerns the length of the term of office, which the provisions of the Art. 32a para. 2 of the amended Constitution of the Polish People’s Republic established it for six years¹¹.

Entrusting the National Assembly with the right to elect the President (Art. 32a, para. 1, Art. 32b, para. 2, 4, 5) gave him a strong political position. Especially since only the Assembly could: accept the oath of the newly elected President (Art. 32c para. 1), recognize the President’s permanent inability to hold office due to his health condition (Art. 32e para. 1, point 3), consider the matter of imposing the President on accusations before the Tribunal of State (Art. 32d para. 3, Art. 32b para. 1 point 3). Although the Assembly was closely related to the Sejm and the Senate, the balance of political forces in the National Assembly differed from time to time from the balance of power in the Sejm and the Senate, as it turned out during the election of the President of the Polish People’s Republic¹².

⁹ One can get the impression that for the postulators of the restoration of the Senate, poviatal local government, or school education at the lower secondary level, a sufficient argument to justify the implementation of these changes was the fact that they existed in the interwar period and were abolished in 1944–1989.

¹⁰ The Act of March 17, 1921 – the Constitution of the Republic of Poland (Dz.U. No. 44, item 267).

¹¹ More on the model of election of the President of the Republic of Poland at the dawn of the Second Polish Republic: S. Krukowski, *Konstytucja Rzeczypospolitej Polskiej z 1921 r.*, [in:] *Konstytucje Polski. Studia monograficzne z dziejów polskiego konstytucjonalizmu*, ed. M. Kallasa, Warsaw 1990, p. 85.

¹² “(...) against Jaruzelski – the only candidate for the presidency of the People’s Republic of Poland – 6 members of the MPC of the United People’s Party, 4 members of the Democratic Party’s Members ‘Club, and even 1 (Marian Czerwiński) of the Polish United Workers’ Party, and another 13 representatives of the KP ZSL and 3 KP SD abstained. In this situation, paradoxically, Wojciech Jaruzelski was saved by MPs not from a coalition, but from the opposition - the Civic Parliamentary Club. It is true that only one representative of OKP (Stanisław Bernatowicz) voted in favor of his candidacy, but 7 voted invalid (Wiktor Kulerski, Andrzej Miłkowski, Aleksander Paszyński, Andrzej Stelmachowski, Stanisław Stomma, Witold Trzeciakowski and Andrzej Wielowieyski), and another 7 were absent or has refused to

The National Assembly had such broad powers only to amend the Constitution of September 27, 1990¹³, which changed the method of electing the President. The social, economic and political processes taking place in Poland resulted in significant changes among political parties and their leaders. The new political realities required the correction of systemic solutions. Changing the way the President was elected by general election had advantages and disadvantages. For citizens, the resignation of President Jaruzelski was symbolic, and the election of a new President in general elections was a welcome change. Such a change was attractive to the participants of political rivalry, as it opened a new platform for seeking voters' support. For the state system, the change in the method of electing the president was neutral, although the introduction of a more modern institution into the system should be assessed positively. The disadvantage of the amendment to the Constitution of September 1990 was their selective nature – the mandate of the President of the Republic of Poland was strengthened, but his competences were not significantly increased.

The National Assembly's relationship with the President was weakened but not severed. The Sejm and the Senate tried to counteract the further weakening of the importance of the National Assembly by granting it the competence to confirm the validity of the election of the President of the Republic of Poland (Art. 32b para. 1 point 1 of the amended Constitution), while the remaining powers remained unchanged. However, the Assembly exercised its new competence only once (in 1990) – the changes to the Constitution turned out to be temporary, which was typical for the period of shaping the new Polish system in 1989–1997. The National Assembly lost its powers to elect the President with the entry into force of the so-called Small Constitution of 1992¹⁴. From 1992, the powers of the Assembly included: accepting the oath of the newly elected President (Art. 30 para. 1), recognition of the President's per-

vote". G. Majchrzak, *Prezydent nie wszystkich Polaków*, <https://dzieje.pl/artykuly-historyczne/prezydent-nie-wszystkich-polakow> (22.03.2019).

¹³ The Act of September 27, 1990 on the amendment of the Constitution of the Republic of Poland (Dz.U. No. 67, item 397).

¹⁴ Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive powers of the Republic of Poland and on local self-government (Dz.U. No. 84, item 426).

manent incapacity to hold office due to his health condition (Art. 49 para. 1 point 3), impeaching the President (Art. 50 para. 2).

II.

Despite the described reduction of the powers of the National Assembly, its position in the political system has not been weakened. The new constitutional act of 23 April 1992 on the procedure for the preparation and adoption of the Constitution of the Republic of Poland¹⁵ established the rules for the adoption of the new Constitution. The National Assembly (i.e. the combined Sejm and Senate) was given the exclusive right to conduct work on draft Constitution and to adopt it. The decision to adopt the thus adopted Constitution of the Republic of Poland was to be taken by the nation in a referendum (Art. 1 para. 1). One must agree that “This competence has certainly raised the rank of the Assembly in the system of state authorities. Its peculiarity was the fact that it went beyond the established paradigm of the Congregation as an institution operating exclusively on the level of relations with the head of state”¹⁶.

The Assembly became the only body entitled to decide on the state system. Work on the projects on its behalf was to be carried out by the Constitutional Committee of the National Assembly (KKZN). It was composed of 46 deputies elected by the Sejm and 10 senators elected by the Senate, as well as representatives of the President, the Council of Ministers and the Constitutional Tribunal – with the right to submit motions¹⁷. Pursuant to the Regulations of the KKZN, the work was carried out in a committee and in standing subcommittees – this was justified by the number of issues regulated in the Constitution and the number of KKZN. The quality of work on the new Constitution was guaranteed by the participation of experts from committees and subcommittees (permanent and temporarily appointed). During the

¹⁵ Dz.U. No. 67, item 336.

¹⁶ G. Pastuszko, *Kompetencje Zgromadzenia Narodowego*, “Państwo i Prawo” 2015, No. 5, p. 20.

¹⁷ Resolution of the Constitutional Committee of the National Assembly of January 18, 1994. Regulations of the Constitutional Committee of the National Assembly (M.P.No. 8, item 62).

works, consultations were conducted with representatives of trade unions, NGOs, representatives of churches and religious unions, as well as state bodies and institutions, social organizations and scientific institutions. The National Assembly carried out the work related to the preparation and adoption of the 1997 Constitution of the Republic of Poland in a manner that did not raise any significant objections, but this model of creating the state system was not maintained in the new Constitution. The Assembly lost the right to shape the Polish system with the entry into force of the new Constitution. It is difficult to understand why the Art. 235 of the Constitution of the Republic of Poland of 1997¹⁸ introduced a procedure for amending the Constitution different from the one in which it was adopted. As part of a separate analysis¹⁹, I showed that the procedure for amending the Constitution of 1997 was established during the work of the KKZN. The adopted ones do not come from the constitutional act regulating the preparation and adoption of the new Constitution, nor from the draft constitutions submitted to the National Assembly. The amendment to the Constitution of 1997 belongs to the Sejm and the Senate, acting separately, the right of initiative in this matter is exercised by other entities, the constitutional referendum is organized on different principles. The members of the KKZN did not treat the procedure regulating their work as a model for the new constitution. As a result, the National Assembly, which shaped the content of the new Constitution, deprived itself of its most important competence.

III.

The scope of the National Assembly's competences related to the exercise of the office of President has remained almost unchanged from the very beginning. Beginning in 1989, the Assembly was authorized to: 1) take the Presi-

¹⁸ Constitution of the Republic of Poland of April 2, 1999 (Dz.U. No. 78, item 483 as amended).

¹⁹ R. Grabowski, *Zasady zmiany konstytucji w projektach polskiej ustawy zasadniczej rozpatrywanych przez Zgromadzenie Narodowe oraz w aktach prawnych w latach 1992–1997*, [in:] *Współczesne wyzwania państwa i prawa. Księga jubileuszowa prof. Jerzego Jaskiernii z okazji 45-lecia pracy naukowej*, eds. Ł. Baratyński, P. Ramiączek, K. Spryszak, Toruń 2017, pp. 300–314.

dent's oath (and later the oath), 2) recognize the President's permanent incapacity to hold office due to his health condition, 3) decide whether to impeach the President before the Tribunal of State. This scope of competences was maintained by successive constitutional legal acts, making only minor corrections. For example, the Act of 27 September 1990 amending the Constitution of the Republic of Poland²⁰ changed the provisions of Art. 32c para. 1 by withdrawing from the oath of the newly elected president before the National Assembly and introducing the oath.

Another change in the regulations shaping the relations between the National Assembly and the President came with the adoption of the Constitution of 1997. According with the provisions of Art. 140 "The President of the Republic may address a message to the Sejm, the Senate or the National Assembly". The president, who has so far been deprived of such a possibility, has been given the opportunity to speak in parliament, especially on the occasion of events of special importance. The President's message may not be the subject of debate, which is to emphasize its character, different from the current political activity of the parliament. In practice, the delivery of the message by the President at the forum of the Assembly was not possible until the adoption by the National Assembly on May 29, 2014 of the regulations governing the organization of the meeting convened to hear the message²¹. Filling this gap in the law meant that successive Presidents of the Republic of Poland willingly use this policy tool, and making a speech in the National Assembly has become the norm.

IV.

The given example shows the basic problem related to the functioning of the National Assembly – the lack of comprehensive and consistent provisions regulating the exercise of competences. Despite the fact that the Assembly has few competences, their implementation is often impossible – as can be clearly seen in the example of the message – due to the lack of statutory regulations

²⁰ Dz.U. No. 67, item 397.

²¹ Resolution of the National Assembly of May 29, 2014. Regulations of the National Assembly convened to hear the message of the President of the Republic of Poland (M.P. item 397).

specifying the manner of their implementation. Although Art. 114 para. 2 of the Constitution of the Republic of Poland of 1997 imposed on the National Assembly the obligation to adopt its regulations, but to this day this has not happened. The Assembly – as it did under the previous regulations – adopts partial regulations to enable the exercise of a selected competence. This usually takes place immediately before taking up the activity, e.g. the regulations governing the meeting to hear the message of the President of the Republic of Poland were adopted on May 29, 2014, while the delivery of the message was scheduled for June 4, 2014²².

This practice should be assessed critically – the provisions of Art. 114 of the Constitution of 1997 prescribe the adoption of one consistent regulation, not many resolutions. Due to this neglect, there are no procedural provisions that would allow, for example, recognition of the President's permanent incapacity to hold office due to his health condition (Art. 131 para. 2 point 4) or indictment of the President for violation of the Constitution, statute or offenses (Art. 145 para. 2). This state of affairs violates the constitutional principle of legalism and violates the principle of legal certainty, which violates the standards of a democratic state ruled by law.

V.

Objective assessment of the organs and institutions of the political system is possible in the long term. Thirty years of the functioning of the National Assembly in Poland, including more than twenty years since the adoption of the 1997 Constitution, provides such an opportunity. This authority has relatively few powers, although they have significant systemic importance. Due to the fact that the powers permanently assigned to the Assembly are related to the exercise of the office of President, they are exercised occasionally. As for the competences related to shaping the state system, they can be described as episodic, because in the analyzed period they were exercised once. Along with the changes in the scope of competences of the National Assembly, its political position and the rank of the organ change.

²² Detailed information is available in the list of National Assembly meetings published on the Sejm website: <http://www.sejm.gov.pl/Sejm9.nsf/page.xsp/zn> (15.06.2020).

The example of the Polish National Assembly shows how the constitutional system is influenced by ill-considered and selectively implemented changes. Due to the fact that in 1990 the Assembly resigned from the election of the President, it lost its most important competence, and thus the sense of existence. The election of the President by the nation strengthened the political position of the President, but no care was taken to increase the powers of the President. As a result, a permanent element of the Polish political system has become a rivalry between two centers of executive power – the Council of Ministers and the President. The 1990 decision, dictated by current political interests, significantly weakened the National Assembly, destabilized relations between the President and the Council of Ministers, and led to rivalry between these bodies, although the constitution requires them to cooperate.

The deprivation of the powers of the National Assembly related to the adoption of the constitution also is criticized. This organ was up to the task of creating the state system, so it is difficult to rationally justify the departure from this solution. Logic dictated that the Congregation was entrusted with the power to amend the Constitution, and the nation was to approve the amendments. The analysis of the most ineffective attempts to amend the Constitution of 1997 leads to the conclusion that the provisions on the amendment of the Constitution (Art. 235) are too strict and the adoption of the amendment is not facilitated by the autonomy of the parliamentary chambers in this respect. The specificity of the National Assembly makes it easier to obtain systemic compromises²³.

In the light of the findings, the hypothesis concerning the rationality of changing the manner of electing the President was verified negatively. The introduction of the election of the President by the nation in 1990 was undertaken under the influence of current political interests, without considering the long-term consequences for the functioning of the state. Hopes connected with the change by politicians applying for the office have only partially been fulfilled. However, there was an increase in political rivalry and the involvement of the President in current politics, which was unfavorable for the state.

²³ As K. Skotnicki aptly put it, the Sejm, the Senate and the National Assembly have a “completely different political composition”. K. Skotnicki, *Zgromadzenie Narodowe, [in:] Zagadnienia współczesnego prawa konstytucyjnego*, ed. A. Pułło, Gdańsk 1993, p. 98.

The conducted analysis makes it possible to positively assess the legitimacy of entrusting the National Assembly with the competence to create the state system, and to evaluate negatively the departure from this solution. Creating the state system that puts the interests of the state above the current political interests of the party, and the National Assembly was created for this purpose.

It is difficult to verify the last hypothesis concerning the weakening of the political position of the National Assembly. Since the entry into force of the 1997 Constitution, the constitutional position of the Assembly has been weak, but the powers at its disposal may contribute to its strengthening. If the President is indicted under the provisions of the Art. 145 of the Constitution, the rank of the Assembly will increase again. However, due to the episodic nature of such activities, it will be temporary.

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