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Division of Power and the Problem of Excessive Concentration of Power in the Light of the Polish Constitution

The idea of division of power has a very long tradition. In the modern times, it has emerged mainly as a counterweight to monarchical absolutism.[1] The efforts to eliminate absolutism led to the formulation of the minimum assumptions on which the division of power should be based: regardless of the form of government, power has a tendency to concentrate; power must not be concentrated in the hands of a single person or entity; unchecked political power leads back to absolutism. In order to guarantee human freedom it is necessary to separate powers according to their functions into the legislature, the executive and the judiciary. This understood, the reason for the division of power and separation of the three powers is the canon and the foundation of contemporary democratic thought. Initially, the separation of powers was the essence of the division of power. The identification and separation of powers corresponded to the then social conditions, as reflected, first and foremost, in Montesquieu's views: the executive – the monarch, the upper chamber – the nobility, the lower chamber – the burghers, courts – as the judicial power that resolved disputes and protected mainly the nobility. But the traditional study of the distribution of power has changed over the years. What has not changed was the reason for it and the axiological grounds for separation. Over time, the emerging systems of government moved away from separation to checks and balances between the powers.

1 See R. Małajny, *Podział władzy państwowej jako przesłanka jej legitymizacji*, "Przegląd Sejmowy" 2014, nr 4, p. 12 ff.

The idea of mutual influence and mutual restraint was noticeable mainly in the parliamentary system, where only courts remained relatively separated. The legislature and the executive were not only to balance each other, but also to cooperate with each other. The requirement of cooperation meant that, rather than focusing on delimiting the spheres of activity of the separate powers, emphasis was placed on the difference of functions of the individual powers and the ways of performing them. In Europe, the weakening of the idea of separation of powers was connected, among other things, with a change of the social foundations of the division of power. The idea of cooperation was also visible in the United States, even though the founding fathers stressed the importance of separation.[2]

Classical systems of government are not based on strict observance of the principle of separation. This is demonstrated by the fact that the government is elected by the parliament or that MPs can be government ministers. The cooperation of the legislature and the executive and the latter's domination is also manifest in e.g. setting the directions for law-making activity and applying laws. The judiciary has been the only power still based on the idea of separation.[3] The evolution of systems of government drew them further and further away from Montesquieu's doctrine, which was called a 'rusty thought pattern."[4] Power coming from elections and having a democratic legitimacy need not be based on the assumption of strict separation of its organs. The individual powers should perform their basic functions, but can cooperate. Such cooperation can be based on an intersection of competences, provided that the essence of performance of a given function is not threatened.[5] The strengthening of the judiciary's separateness is accompanied by a growing range of cases decided by courts. Even though the bodies of the judiciary are not elected, their legitimacy has become stronger. A democratic state should be based on the rule of law whose objective is to protect human rights. In the system

2 < http://www.dadalos-d.org/deutsch/Demokratie/Demokratie/Grundkurs3/Gewaltenteilung/gewaltenteilung.htm >.

3 See R. Małajny, *Podział…*, p. 26.

4 See W. Steffani, *Gewaltenteilung im demokratisch – pluralistischen Rechtsstaat*, "Politische Vierteljahresschrift" 1962, Vol. 3, p. 255 ff.

5 Judgment of the Constitutional Tribunal (hereinafter referred to as: "CT") of 29 November 2005, P 16/04, OTK ZU 2005, series A, No. 10, item 119.

of separated powers, courts became the basic safeguard of implementation of the main assumption underlying the distribution of power. They were to prevent its excessive concentration. The furthest-reaching extension of the judicial power was the creation of constitutional courts.

The mounting tasks of the state and the changes in party systems became the main factors that weakened the separation of powers. From the point of view of the basic (and unchangeable) objectives of the separation of powers, what became particularly problematic was the close links between the government and the parliament in implementing state policy. These links resulted from a rationalisation of parliamentarism, from growth and institutionalisation of political parties and party systems. Traditional instruments of influence on and restraint of the powers could to a lesser and lesser degree ensure their balance and prevent excessive concentration. Therefore the discourse about systems of government, analysis of classical instruments of these systems, such as the votes of confidence and no confidence, the legislative veto or counter-signature, became insufficient for the purposes of guaranteeing the balance of powers. Assuming that the axiological foundation of the distribution of power remains unchanged, it is necessary to distinguish more planes on which this principle functions. In literature we can find many typologies indicating such planes. In order to guarantee the actual distribution of power, we should distinguish at least the following planes of the principle of distribution: the classical horizontal plane of the legislature, the executive and the judiciary; the plane of time limiting of the exercise of power, which ensures transparent and democratic procedures of elections and filling posts to protect against party dictatorship; the vertical plane (federativity) guaranteeing protection against a centralised state; the constitutional plane, guaranteeing that constitutional principles will be safeguarded by the special amendment procedure and court protection (independence of courts protecting human rights and the constitutional court protecting the constitution); the decision-making plane guaranteeing a democratic character of procedures; the procedural plane (constitution) specifying the way of forming political will (of a party, an interest group), guaranteeing the possibility of formulating manifestos and positions, thus protecting against dictatorship; the social plane guaranteeing the protection of social needs, despite the demise of a class-based society,

there is still no equalised society of the middle class, therefore the social dimension of the distribution of power is necessary.[6]

The way in which the separation of powers was defined and implemented in the Polish jurisprudence reflects the aforementioned trends. At the same time it displays certain particular traits. Paweł Sarnecki points out that the separation of powers has full importance when all three organs are directly organs of the sovereign and remain at the same distance from the sovereign. This was the assumption adopted in the Constitution of 3 May, which provided that 'the three powers should be present in the government of the Polish Nation'; the March Constitution, whose Article 2 provided that the authorities of the three powers were 'organs of the Nation,' which, in W. Komarnicki's view, meant that the Constitution gave all of them equally representative character. The Polish Small Constitution of 1947 omits any direct reference of the three powers to the Sovereign, calling them 'organs of the State.' Similarly, the Small Constitution of 1992 and the current Constitution, in Article 10, both omit references to the Nation and simply identify the functions of the three powers. At the same time since 1947 in the subsequent constitutional acts we observe a preponderance of the Sejm.[7] The latter is a result of deeply-rooted Polish systemic traditions, but also a by-product of the communist state and the principle of unity of the state power.

The Polish Constitution[8] having been in force for over twenty years, we can characterise the separation of powers and checks and balances, as well as the way in which they are implemented. This was done well by G. Kuca, who points out that the adopted concept of separation is first and foremost a technical one. The sources of this concept include, without limitation, the local tradition, foreign systems, experiences of the communist times, as well as political and legal disputes after 1989. The classical instruments of separation of powers were fused with peculiar elements, which are noticeable first of all on the plane of creation.[9] The most charac-

6 See W. Steffani, *Gewaltenteilung…*, p. 255 ff.

7 See P. Sarnecki, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, red. L. Garlicki, M. Zubik, Warszawa 2016, p. 333.

8 The Constitution of the Republic of Poland of 2 April 1997, Dziennik Ustaw (Official Journal of Laws of the Republic of Poland) 1997, No. 78, item 483, as amended; hereinafter referred to as: "Constitution."

9 See G. Kuca, *Zasada podziału władzy w Konstytucji RP z 1997 roku*, Warszawa 2014, p. 323, 325.

teristic feature is a polymorphic executive, where the position of the President – the highest authority of the state – is difficult to define. This position largely depends on the style of discharging the presidential duties.[10] Another particularity is the constitutional autonomy of the top authorities to adopt their standing orders (formal autonomy). The considerable possibilities of cooperation between the powers beg the question whether the equality of powers is more of a demand than an effective constitutional mechanism? The way Article 10 is concretised in the following provisions of the Constitution indicates limited separation of powers, intersections of competencies, certain competencies being determined by others, and competencies overlapping and becoming mixed. Separation concerns courts to the greatest extent.[11]

The identification of elements guaranteeing the constitutional balance of powers and their influence on the operation of the highest authorities of the state has been the subject of many statements of the Constitutional Tribunal. The Tribunal has pointed out that, among other things, the requirement of maintaining a balance between the branches is an important element of Article 10 of the Constitution. It is guaranteed by: the conception whereby the essence of the competence is reserved for the authority of the given branch – reserved competencies cannot be transferred to an authority of a branch different in nature; the concept of presumptions as to competences, which enables resolving doubts in case of disputes about the exercise of certain competencies; the principle of compensating for competences, which strengthens the position of the authority that lost competencies to another authority of a different branch; making the actions of an authority from one branch conditional upon actions of the authority from another branch; exclusion of the dominance of one authority to the extent annulling the actions of the remaining branches.

The principles of separation of powers and checks and balances, expressed in Article 10, and the way they is concretised in the following provisions of the Constitution realise the basic objective of rationalisation of parliamentarism. It guarantees stability of the government or,

10 See A. Chorążewska, *Model prezydentury w praktyce politycznej po wejściu w życie Konstytucji RP z 1997 r.*, Warszawa 2008, p. 285.

11 See G. Kuca, *Zasada…*, p. 335 ff.

more broadly speaking, stability of the highest authorities.[12] The Constitution proved useful as the basis for resolving disputes between the highest authorities of the state.[13] At the same time, the Polish Constitution fits in with the general trend of weakening the separation of powers due to the need for them to cooperate. This trend calls into question the ability to maintain the balance of powers. To a limited extent, it can be reversed by the classical instruments designed to guarantee this balance. Their importance and the operative possibilities of application have already been analysed in Polish legal studies. The limitations of these instruments in achieving the axiological objective of the separation of powers are also well-known.[14] The party system and institutionalisation of political parties, the ever greater tasks of the state, growing expectations as to the state's efficiency, which currently is a constitutional principle, result in permanent restrictions in the balancing of powers. Consequently, it is worthwhile to take a broader look at other constitutional instruments and mechanisms fostering the systemic balance. They are also very diverse in nature and can hardly be arranged in the order of importance for balancing the powers. This is why they will be presented in the order of constitutional chronology.

In order to better express the principle of checks and balances we should, as suggested by P. Sarnecki, go back to the formula of Article 2 of the March Constitution and introduce a provision stipulating that supreme power in the Republic of Poland is vested in the Nation. The organs of the Nation in the domain of legislation are the Sejm and the Senate; in the domain of executive power – the President of the Republic and the relevant ministers; in the domain of the administration of justice – independent courts. This formula would provide a better basis for balancing the systemic positions of the individual branches of government, enable restricting the Sejm's preponderance, harmonise with the President's functions specified in Article 126(1) and better guarantee the separateness of the judiciary.

12 See H. Suchocka, *Koncepcja rządu w systemie racjonalnego podziału władzy*, in: *Zmieniać Konstytucję Rzeczypospolitej czy jej nie zmieniać?*, red. D. Dudek, Lublin 2017, p. 85.

13 Decision of the CT of 20 May 2009, Kpt 2/08, OTK ZU 2009, series A, No. 5, item 78.

14 See R. Piotrowski, *Zasada podziału władzy w Konstytucji RP*, "Przegląd Sejmowy" 2007, nr 4, p. 113 ff.

It would be desirable to introduce a so-called integration clause into the first chapter of the Constitution, whose consequence would be adding a European chapter. There are many arguments in favour of introducing this clause.[15] Some of them are connected with the problem of separation of powers and the checks and balances. Firstly, separation of and balance between powers is becoming a multi-constitutional problem. Without setting the constitutional objectives and manner of functioning of supreme authorities of the state within the European Union we can hardly speak about maintaining a balance between them at all. Secondly, EU law affects the relationships between supreme authorities of the state. Examples include the relationships between the government and the parliament or the influence of EU law on the shape of Polish bicameralism.[16]

What should be considered is modification of the principle of exclusivity of statutes towards broadening the scope of formal autonomy of supreme authorities of the state and extending the legislative freedom of local authorities. Extension of the scope of formal autonomy should involve granting more of it to the Supreme Court, the Supreme Administrative Court, the Constitutional Tribunal and the authorities of control and protection of rights, referred to in Chapter IX of the Constitution. The basis on which any of them should function should be a provision similar to Article 112 of the Constitution. This way the Constitution would eliminate the possibility of excessive interference of the legislature in the activity of state authorities which should be independent. The existing possibility of instrumental interference by means of statutes with the manner and aims of operation of independent authorities undermines the balance of powers. Upsetting the balance gives excessive strength to the parliament and the government, thus reducing the independence of courts and authorities that safeguard rights.

Another problem arises in the context of Article 94 of the Constitution, which specifies the grounds for the law-making activity of local authorities. Article 3 of the Constitution provides that the Republic of Poland is a unitary State. The principle of unitary state excludes a federative state, thus limiting the possibility of vertical balance of powers.

15 See *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac Zespołu Naukowego powołanego przez Marszałka Sejmu*, Warszawa 2010, p. 31 ff.

16 See *Zmiany…*, p. 39.

A unitary structure of the state is, however, based on its decentralisation, the basic element of which is the local authorities. According to paragraphs 1 and 2 of Article 16, the basic unit of territorial division of the country is, by operation of law, a self-governing community that participates in the exercise of public power. The framework of this participation is determined by statutes. The guarantees of the constitutional position of local authorities include the principles enshrined in the seventh chapter of the Constitution: autonomy, court protection, participation in public revenue, granting legal personality and property rights to units of local self-government. Communes (municipalities) and other units of local self-government are vested with public power, whose scope is specified in the Constitution. Thus the Constitution guarantees self-government units discretionary power. The scope of this power is determined by the aforementioned constitutional principles and the statutes that concretise them. They provide, among other things, the basis for the law-making activity of units of local self-government. But Article 94 of the Constitution, which specifies the grounds for the law-making activity of local self-government, is inconsistent with this basis. The fact that both authorities of local self-government and local authorities of government administration are authorised to enact instruments of local law in exactly the same way is wrong. This solution does not take into account the different systemic positions of both kinds of authorities. With respect to government administration, the formula used in Article 94 does not give rise to any doubts. Bearing in mind the government's subordination to the parliament, we should consider that the Constitution permits far-reaching restrictions upon local enactments by the local authorities of government administration. Yet such restrictions should not be permitted in case of authorities of local self-government. By enacting local laws, they exercise the discretionary authority based on constitutionally guaranteed autonomy. Therefore it should be considered wrong that both types of authorities are listed together and the same formula is used to authorise them to enact local laws. Although it is possible to interpret the constitutional authorisation more broadly with respect to authorities of self-government, the constitutional practice took a different direction. In the case law of administrative courts there has emerged a strict interpretation of the phrase 'on the basis of and within limits

specified by statute.'[17] The consequence is a considerable narrowing down of the scope of discretionary power of self-government to make laws.

Article 101 of the Constitution needs to be amended. Currently this provision does not specify either the grounds on whose basis the Supreme Court determines the validity of an election or the grounds for an electoral protest against their validity. Naturally, the Constitution cannot regulate this kind of matters in detail. Yet it should indicate the aim of statutory concretisation so that the statute-maker has a duty to create an effective mechanism guaranteeing the holding of free elections and true protection of the right to stand for election and to vote in elections.[18]

Excessive concentration of power might be weakened by modifications of the referendum. The solution adopted in Article 125 of the Constitution assumes that a decision of the Sejm or the Senate is needed for each referendum. A new solution should make it possible to hold a referendum if there is sufficiently high public support for it. Referenda should remain exceptional events, but in case of widespread support for holding them, the decision should not rest with the representative bodies. If introduced, the proposed solution might also increase the participation of citizens in various processes of exercising power. First of all, it may give more actual importance to the consultations held at the stage of making laws. The current small practical importance of various kinds of consultations results from the fact that where a standpoint broadly supported among the general public is ignored, there are no consequences whatsoever. In particular, there are no mechanisms that require taking such a standpoint into account in the process of enacting laws. The possibility of holding a referendum concerning requests rejected in the legislative process would be such a mechanism.

Polish legal scholars have long debated about the president's position in the system of government. They have pointed out to the unusual solutions, whereby the president is elected in a general election and considered an authority of the executive power, even though the country has a parliamentary system of government. Another particularity of the Polish Constitution is the President's functions and tasks listed

17 D. Dąbek, in: *Konstytucja RP. Tom II. Komentarz do art. 87–243*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 215.

18 Judgment of the CT of 6 April 2016, P 5/14, OTK ZU 2016, series A, item 15.

in paragraphs 1 and 2 of Article 126 of the Constitution.[19] The above particularity does not resemble any of the classical systems of government and makes it difficult to classify the Polish system from the point of view of the separation of powers. Hence the requests for changing the systemic position of the president by either giving the president the classical functions like in the parliamentary system or switching to a presidential system.[20] The issue of the president's position is a complex one and many aspects need to be analysed.[21] One of these aspects is how the existing solutions and political practice so far have influenced the separation of powers and checks and balances. Considering the weakened classical instruments that guarantee balance between the government and the parliament, a stronger systemic position of the president might strengthen this balance. A president elected in a general election, with the power of legislative veto and the possibility of making motions to the Constitutional Tribunal might provide real counterbalance to the policy of the government and the parliament, as well as play an important role in the formation of the state's European policy. Giving an unequivocal assessment in this regard would require examining the practice of discharging the president's duties, in particular determining to what extent the president was able to balance the political decisions of the government, to what extent he pursued particular interests, for which he bore no political responsibility, and to what extent his actions helped protect constitutional values? *Prima facie* this assessment is ambivalent and far from obvious. The solutions adopted in the Constitution are not consistent with the classical solutions found in parliamentary system, nevertheless they have the potential to contribute to a balance between powers.

The above objections concerning Article 94 of the Constitution demonstrate the threat that authorities of local self-government may become just administrative authorities. The threat is that their authoritative functions that serve to implement local policy might be restricted. In the context

19 See A. Chorążewska, *Model…*, p. 13 ff.

20 See M. Florczak-Wątor, P. Radziewicz, M. Wiszowaty, *Ankieta o Konstytucji Rzeczypospolitej Polskiej. Wyniki badań przeprowadzonych wśród przedstawicieli nauki prawa konstytucyjnego w 2017 r.* [eng. *Survey on the Constitution of the Republic of Poland. The results of research conducted in 2017 among Polish constitutional law scholars*], "Państwo i Prawo" 2018, nr 6, p. 26.

21 See B. Opaliński, *Rozdzielenie kompetencji władzy wykonawczej między Prezydenta RP oraz Radę Ministrów*, Warszawa 2012, p. 52 ff.

of the principle of territorial unity of the state it would be difficult to introduce any solutions to strengthen the authoritative functions of self-government into the first and seventh chapters of the Constitution, especially ones that would foster a vertical division of power. But on the basis of the applicable provisions of the Constitution no statutory solutions have been developed to guarantee self-government authorities an appropriate amount of public power. This applies in particular to their sources of financing.[22] On the constitutional plane, strengthening the systemic position of local self-government requires limiting the scope of exclusivity of statutes and broadening the powers to enact local laws. In the remaining scope, strengthening of the local authorities requires statutory amendments.

The Constitution correctly implements the assumptions of separation of powers with regard to the judiciary. The wording of Article 45(1) and Article 77(2), where the right to a fair trial is expressed, clearly indicates that the basic function of courts is protecting human rights. What follows from the above is the principle of autonomy and independence of courts from other branches of government, expressed in Article 173 of the Constitution. Articles 179–181 of the Constitution correctly formulate the basic guarantees of independence of courts and judges.[23] However, the process of applying the Constitution has revealed problems which cannot be solved without legislative amendments. These amendments are necessary for guaranteeing autonomy of the judiciary and for correct functioning of separation of powers. The Constitution should unequivocally determine that it is prohibited for the Minister of Justice to exercise administrative supervision over general courts and entrust the First President of the Supreme Court with it.[24] Even though the Constitutional Tribunal specified the principles of such supervision,[25] the way it is exercised poses a threat to the independence of judges.[26] It is furthermore necessary to clarify the method of electing the National Council of the Judiciary.

22 Judgment of the CT of 31 January 2013, K 14/11, OTK ZU 2013, series A, No. 2, item 22.

23 See G. Kuca, *Zasada…*, p. 268.

24 The permissibility of administrative review was confirmed by the CT in its judgment of 15 January 2009, K 45/07, OTK ZU 2009, series A, No. 1, item 3.

25 Judgment of the CT of 7 November 2013, K 31/12, OTK ZU 2013, series A, No. 8, item 121.

26 See K. Grajewski, *Założenia i rzeczywistość władzy sądowniczej – uwagi w dwudziestą rocznicę wejścia w życie Konstytucji III Rzeczypospolitej*, "Przegląd Konstytucyjny" 2018, nr 1, p. 57.

Without delving into details of the Council's functioning so far or the crisis that began with the unconstitutional shortening of its members' term of office, a constitutional amendment should give the Council a stronger legitimacy. And if it is to be stronger, there must be guarantees that Council members will be elected by judges. It would also be desirable to grant the right to elect Council members to the professional self-government bodies and public organisations whose activities concern human rights protection. The Constitution should also give the National Council of the Judiciary broader powers. It should be the body responsible for training judges and candidates for judges. If the ministry of justice supervises the training of judges, the model of judges' education resembles that of civil servants. And this model does not correspond with the constitutional functions of the administration of justice.

The current method of appointing judges shone light on the disputes between the National Council of the Judiciary and the President. They concerned in particular whether and in what cases the President could ignore the Council's application for a judge to be appointed.[27] Yet this problem can be solved without amending the Constitution: it is enough to correctly understand the presidential prerogatives.[28]

In order to prevent excessive concentration of power, we should also reflect on the way it is divided within the judiciary. The basic problem boils down to the question whether there should be a single court or tribunal by whose judgments all other courts should be bound or whether the adjudicating power should be divided between several independent bodies of the judiciary. The first solution promotes uniformity of case law and creates an effective human rights protection system.[29] Yet it has the disadvantage of excessive concentration of power of a single body and the possibility that it will undermine the balance of powers vis-a-vis the legislature and the judiciary. The balance can be upset, first of all, by a constitutional court that reviews the constitutionality of legal instruments issued by authorities of all branches of government. The pros and cons of the de-concentrated model are just the opposite. It is more

27 See J. Sułkowski, *Uprawnienia Prezydenta RP do powoływania sędziów*, "Przegląd Sejmowy" 2008, nr 4, p. 47.

28 Judgment of the CT of 13 November 2013, P 25/12, OTK ZU 2013, series A, No. 8, item 122.

29 In particular when citizens are guaranteed broader access to the supreme body of the judiciary.

difficult to protect human rights within this model, but it poses less of a threat to the balance of powers. During the work on the Polish Constitution the above dilemma was not given too much thought. It seems, however, that at the time of the current constitutional crisis it is impossible to suggest a change of the model adopted in the Constitution.

Division of powers and checks and balances require strengthening the independence of state protection and law enforcement bodies. This applies in particular to the National Radio and Television Council, which is unable to guarantee independence of public media. This strengthening should mainly involve strengthening the constitutional guarantees of the Council's independence, without which the Council cannot remain apolitical. It is necessary to constitutionalise the prosecution services and the State Electoral Commission. This will help define the limits of the legislature's permissible interference with the activities of these bodies.

The Polish Constitution provides the basis for a stable system of government. The principle of sovereignty of the Nation, democracy and the rule of law, division of powers, and the principle of protection of human dignity as the source of human rights create full legitimacy for the legal system. The choice of the parliamentary system as the system of government is consistent with the Polish constitutional tradition. All the overarching constitutional principles help achieve the fundamental objective of separation and balance of powers, i.e. prevent excessive concentration of public power. The very way the principle of separation is expressed in paragraphs 1 and 2 of Article 10 and concretised in the following provisions of the Constitution requires modification. According to the aforementioned suggestion of P. Sarnecki one should return to the formula of separation from Article 2 of the March Constitution, according to which all three organs of power are organs of the Nation. The constitutional practice shows that in Poland there are factors at play which weaken the separation of powers, known from other states. With the departure from strict separation, introduction of elements of cooperation of powers, the balance between them was weakened. Like in other states, the main factors that upset the balance of powers is the party system and its institutionalisation, as well as the process of rationalisation of parliamentarism, aimed to guarantee efficient public power. The Polish rationalised parliamentary system requires cooperation between the government and the parliament.

It leads to strengthening the executive and disturbs the balance between the latter and the legislature. There are only limited chances of restoring the balance using classical constitutional instruments, such as vote of confidence, vote of no confidence, legislative veto or counter-signature. It is also hard to believe that introduction of a presidential system could strengthen the principle of separation of powers and checks and balances. If the system is to function, there must be appropriate legal mechanisms and high political culture. Otherwise presidential systems lead to concentration of power, rather than balance of powers. Strengthening the checks and balances and preventing excessive concentration of power depends also on other instruments identified above, the most important of which concern the judiciary.

Summarising, we should state that amending the Constitution to strengthen the balance of powers must be seen as *ultima ratio*. More often than not it is not the wording of constitutional provisions, but their certain interpretation and constitutional practice that determines the correct implementation of constitutional values. Change is necessary in just two areas. The first one is greater formal autonomy of supreme independent authorities of the state, the second one is constitutionalisation of prosecution services and the State Electoral Commission. There are no arguments that would conclusively prove the need to radically change the position of the president. Other proposed amendments may prevent excessive concentration of power.

If the Constitution is to prevent excessive concentration of power, two relatively new issues have to be considered. The first one is the influence of globalisation processes on constitutions. Because of these processes, states cannot independently achieve many of the objectives identified in their constitutions. This has a major impact on the constitutional system. It changes the relationships between the supreme authorities of the state, thus changing the way separation of powers or checks and balances work. Globalisation requires the creation of supranational public law structures. Their functioning and their relationships with the states change the foundations of public law, modifying the basic constitutional categories, such as: sovereignty, democracy, representation. New ways and instruments of exercising public power emerge, with new technologies having a major influence on their implementation. This is both

a threat and a chance for the separation of powers. At the same time, this shifts the reflection to a higher level. This makes it necessary to add to the Constitution a so-called European chapter, which should at least partially respond to the enumerated systemic challenges.[30]

The second process which is important for the problem of balance of powers is referred to as 'abusive institutionalism.' This process consists in constitutional amendments emptying the constitution of its fundamental principles and values. The collection of formal constitutional guarantees becomes a 'parchment barrier' for protecting the rule of law. One of the features of abusive constitutionalism is the use of the legislature and the executive against independent bodies. Control over courts or bodies safeguarding media independence is taken over. The opposition is erased from the public life, the media are controlled. Consequently, the link between constitutionalism and democracy is severed. The exercise of power is no longer based on constitutional principles, but on informal principles and connections recognised by those in power. Separation of powers or checks and balances are just façades. At the same time, constitutionalism is an important element of the political strategy. Constitutional principles are still invoked in a selective manner to legitimise the exercise of power and specific political decisions. Thus transformed constitutionalism does not directly negate the fundamental principles of a democratic rule-of-law state based on separation of powers, but treats them purely instrumentally. The law completely loses its autonomy vis-a-vis practice. Exercise of power is based on informal norms and connections, it is permissible to solve social problems in a 'criminal' manner. The classical instruments for the defence of democracy are inefficient against such processes.[31] In Poland, abusive constitutionalism took a different form. It marks a return to 19th-century constitutional categories and to the patterns of exercising power known from the Polish People's Republic – ones based on the unity of state power and supremacy of statutes over the Constitution. The question arises whether the constitutional guarantees of counteracting excessive concentration of power can counteract abusive constitutionalism? The answer is they

30 See *Zmiany…*, p. 6.

31 See D. Landau, *Abusive Constitutionalism*, "University of California Davis Law Review" 2013, vol. 47, p. 195 ff.

cannot. Where constitutional principles are violated and separation of powers is in practice removed, the legal instruments of its protection cease to work. The functioning of the Constitution as the legal basis for the political community is possible when the community can agree on the fundamental values on which the constitution should be based. Lack of such agreement excludes the idea of constitutionalism completely. One of the reasons why in Poland the such agreement cannot be reached is the way constitutional disputes are conducted. The answer to political controversies or difficulties resulting from globalisation processes is an attempt to revive 19th-century constitutional categories. This renders it difficult to recognise the real systemic problems or suggest rational solutions. All constitutional amendments suggested above are based on the assumption that consensus on the basic constitutional values will be restored one day.

Summary

The Polish Constitution introduces the principle of division and balancing of the authorities. In Poland, we have a parlamentary system of government with a strengthened position of the president. The Constitution introduces tools for balancing of the authorities. They guarantee the deconcentration of power. We are currently dealing with abusive constitutionalism, which, contrary to the constitution, undermines the division of power.

Keywords: Constitution, division of power, deconcentration of power, abusive constitutionalism

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