STUDIA I ARTYKUŁY

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Working Assumptions and Statistical Analysis of the Constitutional Survey

1. Introduction

The Constitution is a normative act of utmost significance for the system of government; it formulates the basics for the state and law; it is a foundation of individual liberties and rights. Therefore, any amendments to its provisions should be subject to careful consideration; they should be introduced with restraint and prudence. In the debate on the need to change the Constitution it is worth listening also to representatives of the academic community who are involved in constitutional research and have expert knowledge in this respect. A form of statement which allows for gathering and systematizing doctrinal positions and favours their clear presentation is a legal survey, which has a long and well established history in the Polish academic and political tradition.[1]

1 A model example of this type of project is the constitutional survey concerning the Constitution of 17 March 1921 carried out at the initiative of "Czasopisma Prawnicze i Ekonomiczne," the results of which were published in the brochure entitled *Ankieta o konstytucji z 17 marca 1921 r.*, red. W.L. Jaworski, Kraków 1924 (reprint of the 1924 edition was published by Wydawnictwo Sejmowe, Warsaw 2014). In the interwar period also political surveys were organized, e.g. the survey of the Non-Partisan Bloc for Cooperation with the Government (BBWR) in 1928 or the constitutional survey organized under the patronage of the Marshal of the Sejm in 1931. Under the 1997 Constitution so far two surveys have been organized. The first one, in 2011, was carried out by the Institute of Public Affairs in Warsaw, while the other was organized by the Law and Justice party in 2018.

There were several reasons justifying the timing of the survey in 2017. Firstly, the round anniversary of the coming into force of the 1997 Constitution[2] induced recapitulations and reflections. The celebrations of the anniversary were accompanied by a quite unexpectedly animated discussion in the course of which doubts were raised as to the topicality and merits of some constitutional solutions, while the political parties represented in the parliament and the incumbent President of the Republic of Poland even put forward postulates of concrete legislative amendments to the basic law. All that had become a background for questionnaire surveys. Secondly, within their own group, the originators of the survey shared a conviction that representatives of science should once and again, in an orderly and comprehensive manner, diagnose the condition of the constitutional law and take a stance in this respect. Therefore, it seemed desirable to have the constitutionalists comment on how they assess the current Constitution and whether they perceive any need for its modification, and if so, in what direction and to what extent. Thirdly, notwithstanding the social and political condition of the latter half of 2017, when one could already have an established view as to the bases and consequences of changes in the organization and procedures of the Constitutional Tribunal, and the transformations of the system of common courts and the Supreme Court gained momentum, facing the challenge of preparing a constitutional survey was also of importance for the development of the science of Polish constitutional law. Questionnaire interviews were so conceived so as to – on one hand – meet the criteria of scientific research, i.e. provide reliable and consistent results which could be subject to subsequent studies and analyses, and on the other to remain free from party affiliations and political goals. Such a methodological approach and its anticipated results were a novelty in Polish legal literature of recent years.

2. Respondent selection criteria

The group of respondents included a large group of constitutional lawyers institutionally involved in their field of interest. Personal invitations

2 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."

were received by professors, habilitated doctors and doctors of law employed at research institutes or who were members of the largest association of Polish constitutionalists, namely the Polish Constitutional Law Society. It was the key criterion for selecting the group of respondents.

Such a selection of respondents decidedly does not correspond with the popular views as to who is today considered – also because of the mass media – to be a constitutionalist. Left out were *inter alia* retired judges (e.g. judges of the Constitutional Tribunal), representatives of the branches of law other than constitutional law, political scientists and researchers representing other social sciences, as well as journalists specializing in legal issues of constitutionalism.

The relatively narrow personal scope of the survey had its justification, however. First, the aim was to select a group of respondents according to intersubjectively verifiable criteria, which could defend themselves as adequate and significant on their own. Secondly, the limitation of the target group of the survey was dictated by its expert profile, which gave preference to people with formal legal education who contribute to the development of the science of constitutional law. Thirdly, the initiators of the survey finally recognized that the entitlement to act, that is legitimization to organize and carry out the entire project, as well as the expectation that respondents would offer necessary confidence to the interviewers, are inseparably linked with the fact that the initiators themselves are members of the same community that was to be surveyed.

In the selection of respondents all additional criteria such as age, gender or place of residence were rejected. It was also assumed that because of the nature of the survey, its dominating legal and professional profile, those criteria are of a secondary importance and do not have to be taken into account when establishing representativeness of the sample. It was assumed that answers to the survey questions depend primarily on the knowledge in the field of constitutional law and research experience in that area. On the other hand, of importance was the academic status of respondents, that is whether they were junior or senior research staff. Although providing a lot of valuable information on the survey and its participants, the criteria of age, gender or place of residence of respondents were irrelevant with respect to the objectives and the very nature of the constitutional survey.

3. Character of the survey

The selection of the panel was also affected by the idea to carry out a survey of a specific character. Generally, two main types of surveys may be distinguished. Surveys which are part of a more or less formalized process of amending or drafting a constitution, and surveys which neither constitute an element nor underlie any legislative initiative.

The former survey formula is a specialist consultation, a form of an expert support; it is usually given a more practical framework, while the criteria for the selection of respondents may take into account also their additional features – in particular, not only lawyers may participate in a survey. The latter formula is neither connected with nor announces any specific lawmaking process; its objectives are exclusively cognitive and it is a measure of awareness of a given academic community *hic et nunc*. Such a survey is organized to learn about the current state of development of the constitutional thought and the views of scholars researching the issues included in the questionnaire.

This survey is an example of the latter. It was a proprietary initiative of a group of scholars from various academic centres, prepared and carried out pro bono, with no support and, all the more so, no affiliation to any political party or non-governmental organization.

4. Structure of the survey

The survey was made up of two topically interconnected parts. The participants could respond to both parts of the survey or choose only one. Respondents could also opt for anonymity of their participation in the survey which option – as it turned out later – was frequently used.

The first part of the survey included questions with proposed answers; with one exception they were single-choice questions (the so-called closed part of the survey). Subsequently, the responses were subject to a quantitative analysis and allowed to illustrate the views of the respondents graphically with the use of diagrams.

The second part of the survey was meant for free statements of the respondents, presentation of their own thoughts and views without any

limits as to the length of the text (the so-called open part of the survey).[3] The questions included in the open and closed parts of the survey were mutually correspondent and formed a functional whole.

5. Representativeness of survey results

Written invitations to take part in the survey were sent to 186 people (by post or e-mail), of whom 94 were senior (professors and habilitated doctors) and 92 junior academic staff members (doctors).

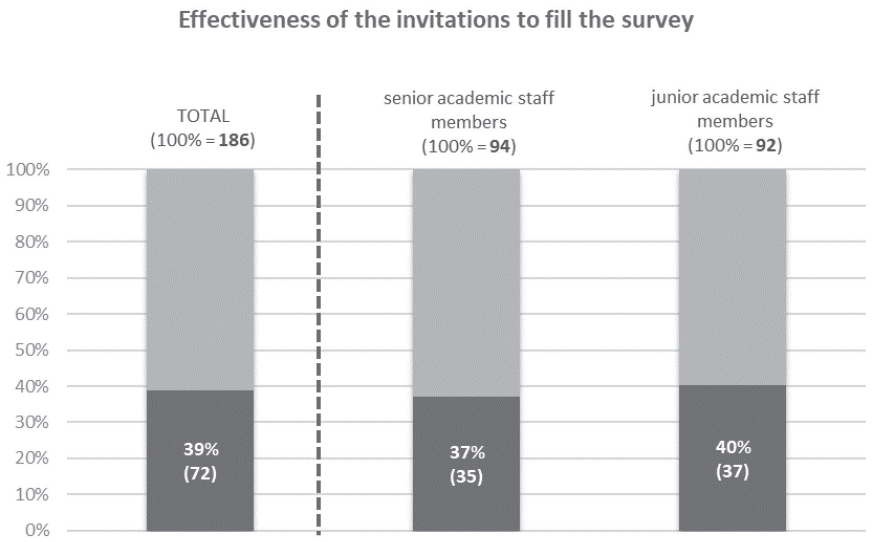
The questionnaire was filled by 72 respondents; the open part by 32 people, and the closed part – by 70 people (see figure no. 1). Therefore, the survey was conducted on a high research sample – all in all 39% of all invitees took part in the survey. Responses were sent back by 35 senior academic staff members (37% of invitees in this group) and 37 junior academic staff members (40% of invitees).

Out of the total number of 72 responses received, the most numerous group included junior academic staff members (37 questionnaires – 52% out of all responses received), then habilitated doctors

3 The open part of the survey included the following questions: 1. Does the current Constitution sufficiently protect individual rights and liberties, while taking into account the obligations arising from the international standards that are binding on Poland? Are institutional guarantees of protection of constitutional freedoms and legal measures for their exercise sufficient and effective? 2. Does the Constitution provide the Nation with a sufficient scope of power as the sovereign? Is it able to exercise power directly or indirectly through relevant legal institutions? 3. Does the Constitution correctly separate the branches of government or it needs to be changed? 4. Does the Constitution adequately prevent excessive concentration of power? 5. Does the Constitution adequately shape the mechanisms of enforcing responsibility of public officials for its violations? 6. Have the last two decades of the application of the Constitution, leaving aside two substantively restricted amendments of 2006 and 2009, revealed its shortcomings, gaps or dysfunctions which failed to be successfully resolved by legal practice, available legal measures or other institutions functioning within the Polish constitutional order? 7. What other advantages and disadvantages of the current constitution deserve to be pointed out? 8. Does the effective constitutional amendment procedure realize the postulate of stability (rigidity) of the constitution, well-established in the theory of constitutional law, the aim of which is to create conditions for the development of tradition and long-term shaping of the constitutional order? 9. Should the enhance substantive lastingness provisions be directly separated in the Constitution, i.e. unamendable provisions that would be excluded from the procedure of partial amendments to the Constitution? What matters should they embrace? 10. Do we now have a so-called constitutional moment, i.e. are there real and serious premises for amendment of the Constitution requiring a legislative response, necessary for the realization of certain social or systemic goals? 11. If the Constitution requires amendments, please describe them synthetically.

(24 questionnaires – 33% out of all responses) and professors (11 questionnaires – 15% out of all responses).[4]

Figure no. 1

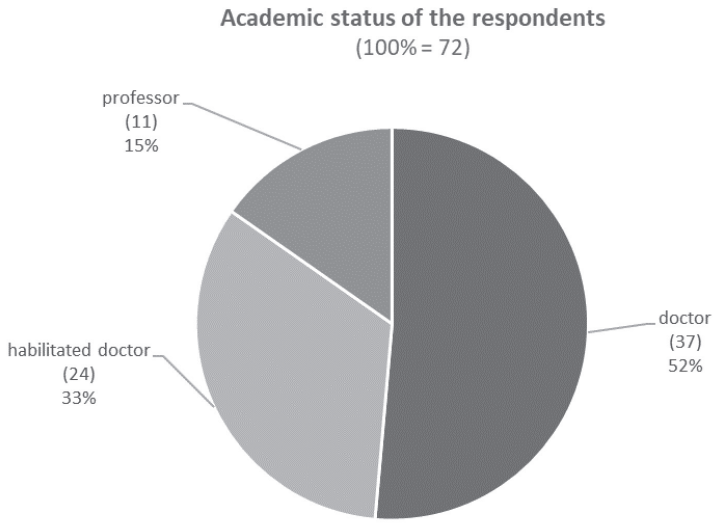


The questionnaire was filled by representatives of all Polish academic centres which have law departments. Therefore, as regards a kind of a geographical aspect it might be said that the survey was of a nationwide dimension.

Because the survey was addressed to a specific part of the legal community its results are representative only for this community. Representativeness of the survey is in this case relativised to a population which was singled out and described in the survey assumptions. Therefore, the results must not be generalized or extrapolated, and in particular they should not be compared with statements, evaluations and views expressed in other surveys or debates which nominally concern the same problems but usually have a specific context and a different methodological basis.

4 See Figure no. 2.

Figure no. 2



6. Statistical analysis

The results of the closed part of the survey (i.e. the part containing multiple choice questions) were aggregated in the data base and were used for working out the statistic presenting the quantitative distribution of responses to individual questions.

6.1. Effectiveness of human rights guarantees

Figure no. 3 represents the views of the respondents concerning institutional guarantees of protection of constitutional rights and liberties, that is formal safeguards of the fundamental rights of individuals in the form of the functioning of appropriate legal measures or appointment of specialized state authorities.

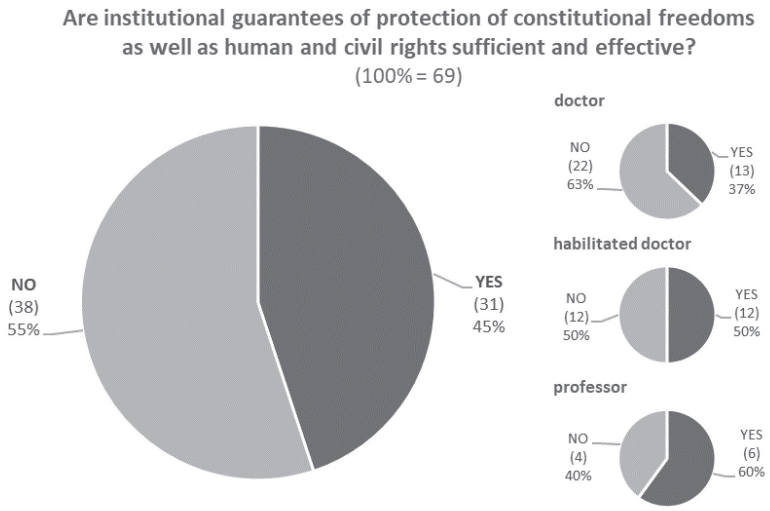
The majority of the respondents indicated that those guarantees are neither sufficient nor effective; they need to be expanded or made more precise (55%).[5] The difference of opinions was in this case insignificant – the opposite view was represented by 45% of the respondents. Responses to the ques-

5 This questions was answered by 69 people (not all of the respondents answered the full set of questions posed; this concerns also other questions of the survey).

tions corresponded with other fractional results of the survey which suggest that the respondents explicitly noted the need for rethinking and modifying the constitutional provisions concerning *inter alia* the catalogue of human rights, the system of control and law protection authorities, and directly – the guarantees of human rights (see Figure no. 11).

In turn, responses to the above questions in the individual groups of respondents, i.e. separately in the group of doctors, habilitated doctors and professors show that the higher the academic status of a respondent the greater the number of positive assessments of the currently binding constitutional norms.

Figure no. 3



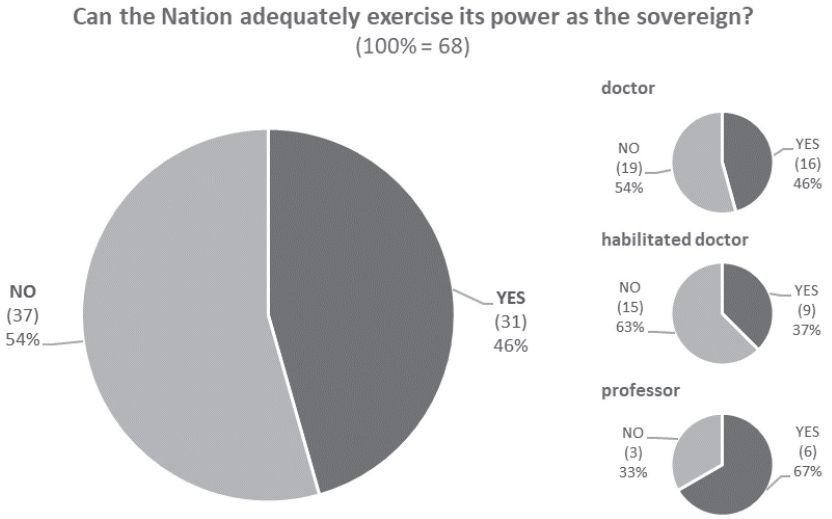
6.2. Exercise of power by the sovereign

Figure no. 4 concerns the issue connected with the possibility of the effective exercise of power by the Nation (the sovereign). As in the case of the earlier question, the results of the survey turned out to be significantly polarized and the responses were split almost 50/50. 54% of the respondents[6] recognized that *de lege lata* no sufficient legal instruments were provided for the sovereign to exercise power in an adequate manner. An opposite

6 68 people took part in the survey.

view was presented by 46% of the respondents. This issue should be tied with a high percentage of responses indicating the need to change the constitutional norms concerning the forms of the so-called direct democracy and the principles of election law (see Figure no. 11). It may also be assumed that some of the respondents negatively assessed practical application of those constitutional norms which were intended to consolidate the civic society and direct social participation in the exercise of public power.

Figure no. 4

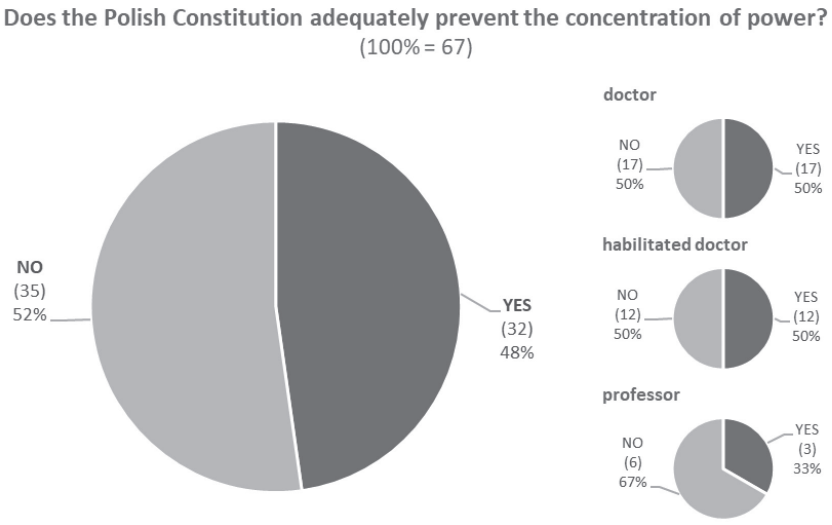


6.3. Concentration of power

The proportion of responses to the question whether the Constitution sufficiently prevents overconcentration of power or whether its regulations are inadequate in this respect was relatively balanced (Figure no. 5). Proponents of the thesis that the basic law insufficiently protects the principle of the separation of powers and does not guarantee its inner equilibrium constituted a small majority among the respondents (52%). The remaining respondents (48%) recognized that the normative solutions were correct, while any potential manifestations of impermissible concentration

of power were a consequence of other factors, e.g. non-observance of the constitutional norms by public authorities.[7]

Figure no. 5



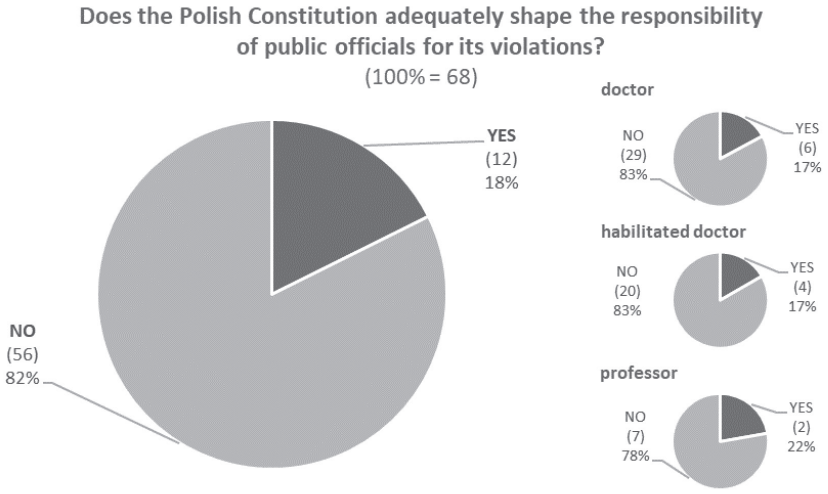
6.4. Constitutional responsibility of public officials

A considerable group of the respondents expressed a conviction that the legal mechanisms of enforcing responsibility of public officials for violating the Constitution need to be modified as they fail to fulfil their systemic functions, as in particular they are ineffective (Figure no. 6). Such a view was shared by 82% of the respondents, while 18% was of the opposite opinion.[8] The distribution of responses is indirectly confirmed by responses to other questions of the survey in which the postulate to modify the bases for functioning of the tribunals, including the Tribunal of State was very explicitly voiced (see Figure no. 11).

7 This question was answered by 67 people.

8 This question was answered by 68 people.

Figure no. 6



6.5. Gaps or dysfunctions of the Constitution justifying its amendment

The next point of the survey required a response to the question whether the last two decades of the application of the Constitution, leaving aside two substantively restricted amendments of 2006 and 2009, revealed its shortcomings, gaps or dysfunctions which failed to be successfully resolved by legal practice, available legal measures or other institutions functioning within the Polish constitutional order (Figure no. 7).

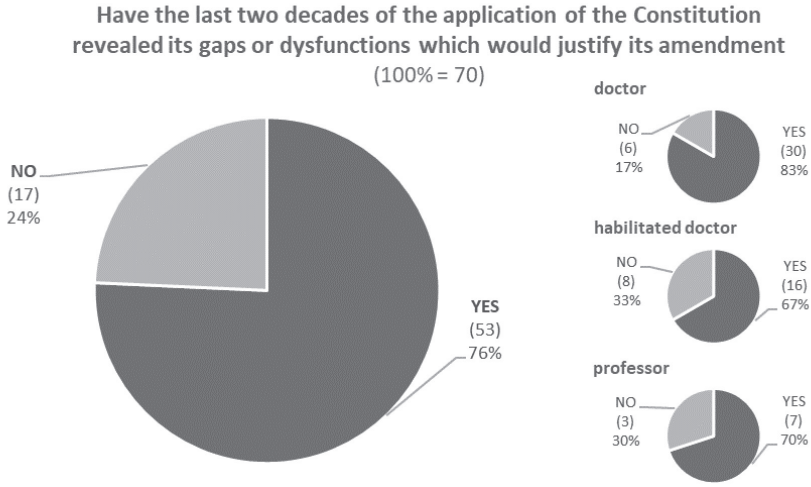
76% of the respondents said that the constitutional norms failed to meet all challenges and trials they were submitted to in the course of various political events of recent years. The question referred not only to the application of the Constitution at the time of the so-called constitutional crisis triggered at the end of 2015 by the refusal of the President to swear in three judges of the Constitutional Tribunal elected by the Sejm of the 7th term, but required evaluation of the entire period of its application.

The response to the question is boiled down to whether the Constitution – despite unquestionable systemic and incidental crises, unsatisfactory

solutions in public affairs that certainly occurred under its rule – had an ability to adapt and adjust the irregularities *pro futuro* without changing its wording. Therefore, was it a sufficiently flexible ("living") act or did it absolutely require an intervention by the lawmaker? Over three-fourth of the respondents recognized that the revealed dysfunctions and gaps were serious enough so that the nuancing of the interpretation or adoption of a different systemic practice under this Constitution would not be a sufficient solution.

The opposite view was defended by 24% of the respondents. In their view the normative layer of the Constitution had been designed correctly and does not differ from regulations adopted by the states within our cultural circle. The shortcoming of the constitutional practice are connected with other phenomena and a formal change of the law may prevent them only to a limited degree.[9]

Figure no. 7



The critical assessment of the basic law by the respondents was not unequivocally linked with the need to introduce adequate constitutional amendments, or at least did not lead to a conclusion that those amendments should be implemented immediately. In the above context, the results of the survey which refer to the question about the possible need

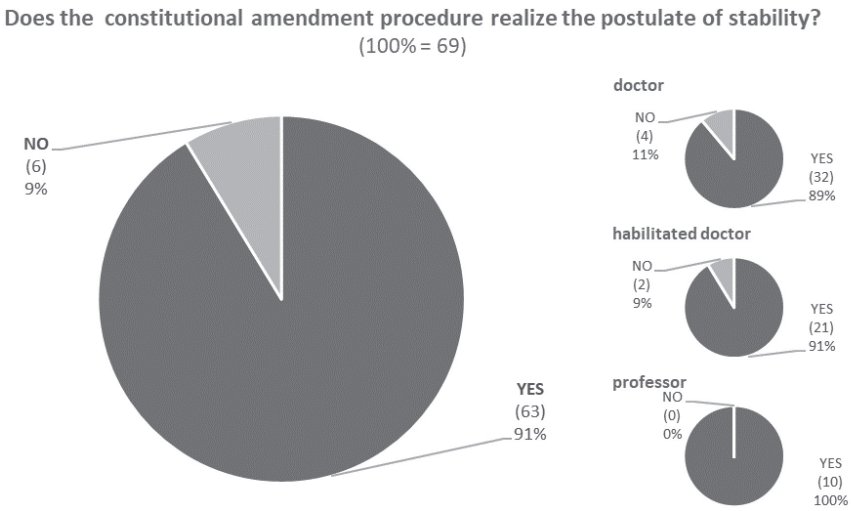
9 This question was answered by 70 people.

to change the Constitution and in what form are noteworthy (Figure no. 10) and the question about the timing of a possible amendment (Figure no. 12).

6.6. Stability of the constitutional amendment procedure

Relatively unequivocal results were obtained with respect to the question whether the effective constitutional amendment procedure realizes the postulate of stability (rigidity) of the constitution, well-established in the theory of constitutional law, the aim of which is to create conditions for the development of tradition and long-term shaping of the constitutional order (Figure no. 8).

Figure no. 8



The respondents fairly agreed (in the group of professors they were even unanimous) that the formal aspect of consolidating lastingness of the norms of the basic law fulfils its function and properly petrifies constitutional matter (91%). Nevertheless, also in this case there were dissenting opinions (9%), which, from the position of opponents of excessively restricting the lawmaker's freedom or advocates of making formal requirements for the constitutional amendment stricter, stressed the need for revising the existing solutions.[10]

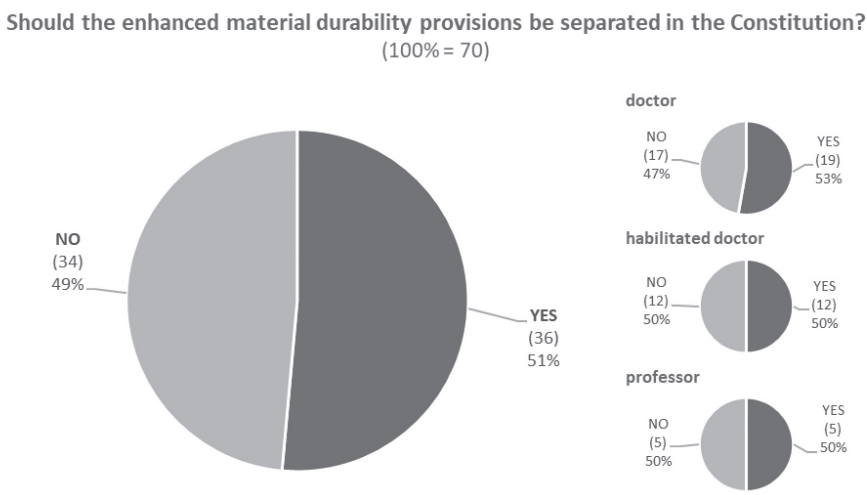
10 This question was answered by 69 people.

6.7. Separation of enhanced lastingness constitutional provisions

The responses to the question whether the enhanced substantive lastingness provisions should be directly separated in the Constitution, i.e. unamendable provisions that would be excluded from the procedure of partial amendments to the Constitution, were distributed almost 50/50, also in individual respondent groups (Figure no. 9).[11]

A considerable support was given to the stance assuming introduction of an internal hierarchy of constitutional norms and exclusion of the constitutional principia from amendment under the procedure laid down in Art. 235 of the Constitution[12] ("unamendable provisions"). Over one half of the respondents (51%) was also convinced that those issues should be explicitly reflected in the contents of the Constitution so as to create an additional basis for the stability of the system of government this way. Such a need was not perceived by 49% of the respondents.

Figure no. 9



11 This question was answered by 70 people.

12 This provision regulates the constitutional basis for passing the act amending the Constitution, *de lege lata* the only admissible legal form for introducing constitutional amendments.

Given the results of responses to an earlier question (see Figure no. 8), it may be assumed that a large group of the respondents reached a conclusion that although so-called formal rigidity of the Constitution realizes the protective function in accordance with its nature, it does not constitute a sufficient safeguard for the constitutional principles and values which require additional guarantees of a material nature. In this sense there is no discrepancy between the responses to the above questions. They concern different aspects of the postulate of stability of the basic law.

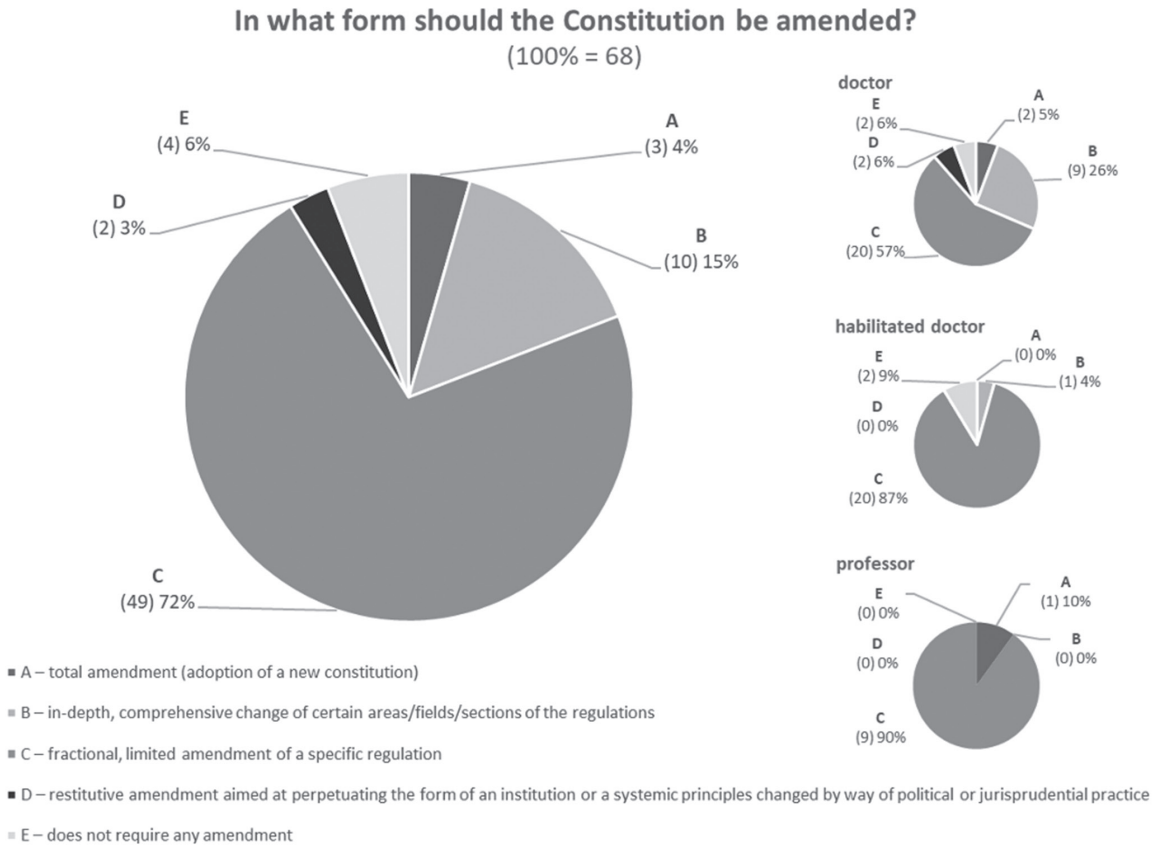
6.8. Form of the potential amendment to the Constitution

A typology of constitutional amendments was elaborated for the survey which distinguished five different forms thereof. It was also possible to tick the response that the Constitution does not currently require any amendment (Figure no. 10).

The majority of the respondents indicated that a fractional, limited amendment of a specific constitutional regulation would be – potentially – desirable (72%). This position was especially clearly visible in the responses of professors and habilitated doctors. The second most popular response was that of the advocates of an in-depth (comprehensive) amendment of certain areas, fields or sections of the Constitution (15%). Such changes were primarily advocated by junior academic staff members (doctors). The restitutive amendment, that is the amendment aimed at perpetuating the form of an institution or a systemic principles changed by way of political or jurisprudential practice was propounded by 3% of the respondents. In turn, 6% of the respondents were against any changes in the Constitution, while 4% voted for the adoption of a totally new constitution.[13]

13 This question was answered by 68 people.

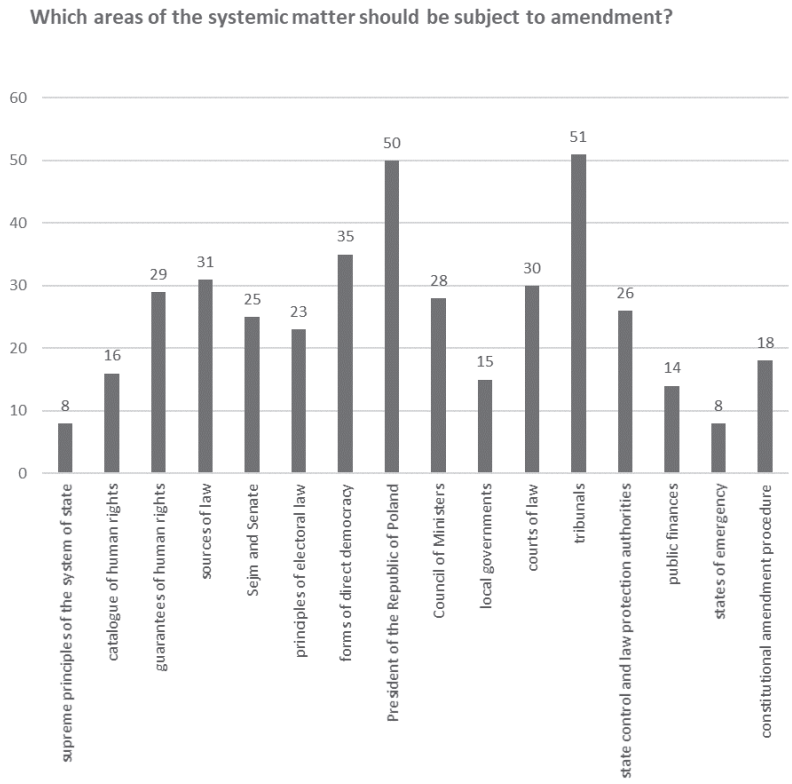
Figure no. 10


In what form should the Constitution be amended?
(100% = 68)
E (4) 6%
A (3) 4%
D (2) 3%
B (10) 15%
C (49) 72%
doctor
E (2) 6%
A (2) 5%
D (2) 6%
B (9) 26%
C (20) 57%
habilitated doctor
A (0) 0%
E (2) 9%
B (1) 4%
D (0) 0%
C (20) 87%
professor
A (1) 10%
E (0) 0%
B (0) 0%
D (0) 0%
C (9) 90%
A – total amendment (adoption of a new constitution)
B – in-depth, comprehensive change of certain areas/fields/sections of the regulations
C – fractional, limited amendment of a specific regulation
D – restitutive amendment aimed at perpetuating the form of an institution or a systemic principles changed by way of political or jurisprudential practice
E – does not require any amendment

6.9. Amendable constitutional issues

Responses to the questions concerning the constitutional matter the respondents would like to be amended were very differentiated (Figure no. 11).

Figure no. 11



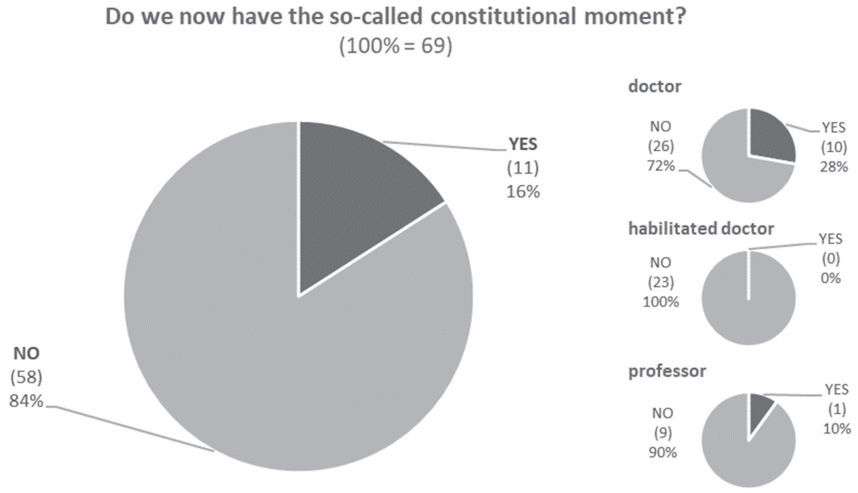
The question was answered by 70 people; any number of responses could be ticked. Most frequently mentioned were constitutional regulations referring to the Constitutional Tribunal and the Tribunal of State (51 people) and President of the Republic of Poland (50 people). Relatively frequent responses were in favour of the constitutional regulations concerning the forms of direct democracy (35 people), guarantees of human rights (29 people), as well as the control and protection of law authorities (26 people) were consistent with responses to other questions of the survey (see Figures no. 1–5). A strong representation of advocates

of the amendment of the constitutional catalogue of the sources of law (31), systemic foundations of the courts (30) and the Council of Ministers (28) is noteworthy. The respondents least frequently indicated the need to amend the Constitution with respect to the supreme principles of the system of state (8 people), states of emergency (8 people), public finances (14 people), and local governments (15 people).

6.10. Constitutional moment

The questionnaire also included a question about the so-called constitutional moment, which for the needs of the survey was defined specifically as "a real and serious premise for amendment of the Constitution requiring a legislative response, necessary for the realization of certain social or systemic goals." Therefore, the respondents were asked to indicate whether there is a need for initiating legislative efforts in order to amend the Constitution (or to replace it with a new one) in real time, in concrete socio-political circumstances of the Polish state (Figure no. 12). 84% of the respondents answered that at present there are no reasons for changing the Constitution. 16% were of opposite opinion.[14]

Figure no. 12



14 This question was answered by 69 people.

It should be noted that such an unequivocal position of representative of the institutional science of constitutional law as regards the need to amend the Constitution coincided with numerous views indicating substantive appropriateness of correcting certain shortcomings of that act. This meant that the respondents made a clear distinction between the postulates of making changes to the Constitution, including their scope and justification, and the issue of setting an appropriate moment for initiating the legislative work and the timing for the constitutional amendments coming into force. As a matter of fact, these are two separate problems which should not be equated. There are also different arguments and a need to evaluate completely different premises that underlie them.

7. Final comments

The results of the closed part of the constitutional survey inspire several reflections. Firstly, the survey revealed the complexity and diversity of responses to the questions posed, including also those which would seem to constitute *communis opinio doctorum*. The dissonance between the respondents in many cases divided them almost into two equally numerous groups and revealed serious substantive differences. Against this background, a question may be asked whether the thesis of the community of views in the milieu of constitutional lawyers and their considering of fundamental principles and ideas governing this field of law as indisputable is still standing? It seems that negating the existence of such community, which suggests itself *prima facie*, would be an oversimplification. It is worth remembering that the constitutional survey concerned also the systemic issues which were innately disputable and there was no single ready-made or exclusively correct answer. The respondents were guided in such cases not only by their knowledge of constitutional law, but formulated opinions and assessments basing on their own world outlook beliefs, life experience, axiological preferences or political philosophy of state. The overall picture of the survey could not remain unaffected by all of this. Despite their expertise in constitutional matters the respondents expressed their views – even if unaware – also from the internal

perspective,[15] as involved participants in public life. Their legal expertise was not of decisive importance in that case.

Secondly, the analysis of responses to the closed part of the constitutional survey does not provide a clear answer as to what impact on the substantive positions of the respondents was exerted by the socio-political situation in Poland in mid-2017 defined primarily by the attitude towards the dispute concerning the Constitutional Tribunal and the reforms of the system of courts. This is an extremely interesting and important thread of the survey, which, for now, has to remain without any conclusion. In this context, one of the working hypothesis of the survey was a conviction that the evaluation of the Constitution by representative of the science of constitutional law does not have to be determined by current political events, while the emotions raised by those events do not have to obscure the specific topics of the survey. A possible confirmation that the tenor of a situationality of responses nevertheless dominated the way they answered the questions concerning the shape of constitutional regulations would undoubtedly enrich the analysis of the survey and opened up its new directions. Special "popularity" of certain constitutional issues and the dynamics of changes in the respondents' interest in them in the longer run could be verified by comparing the results of the survey with a similar one repeated in a few years' time in the same respondent group.

Thirdly, looking at the entirety of work on the constitutional survey and being aware of the complexity of its results it may be stated that ultimately the survey provided not only the knowledge on the actual state of the Constitution twenty years after it had been adopted, but also a lot of interesting information on the condition of the science of constitutional law, the representatives of which presented their views on constitutional matters.

Summary

The article presents the working assumptions and methodology of carrying out a constitutional survey. The survey concerned legal assessment of the norms

15 On differentiation between the internal and external point of view in legal argumentation, see e.g. H.L.A. Hart, *The Concept of Law*, Oxford 1961, p. 55–56, 86–88, 96–107; N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford 1978, p. 276–292.

of the current Constitution and its practical application. Some questions also referred to the need to amend the Constitution and possible directions of the substantive adjustment of its provisions. The survey covered representatives of the science of constitutional law from all over Poland and had exclusively scientific objectives, in particular was not aimed at supporting any political legislative initiatives or pending legislative efforts. The article presents statistics of responses to individual questions of the survey commented briefly by the authors. It discusses *inter alia* the adequacy and effectiveness of the principle of separation and balancing of powers, regulations concerning constitutional responsibility, advantages and disadvantages of the current Constitution as well as the purposefulness of introducing unamendable provisions therein.

Keywords: Constitution, constitutional questionnaire, revision of the Constitution, constitutional law

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