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Sesssion 1102: Constitutional populism or new wave of constitutionalism. Socio-theoretical and comparative perspectives I

Constitutional moment theory in Polish reality - the consent, identity, and change of constitution

1. Introduction

The recent political and legal changes in some European countries, including Poland, raises some questions about contemporary constitutionalism and our current knowledge about the ideal demoliberal world. It also leads us to verify some existing theories and concepts, among others - the concept of constitutional moment, which is often referred to current situation in the public debate. This concept is invoked usually in a negative perspective - this is to indicate that "there is no constitutional moment": the constitution should not be changed at the time when power was taken over by a party with explicitly different views on the state and its principles. But it is too simplified picture: so the main aim of this text is to verify the judgments that are made about this theory in the light of changes and actions taken in Poland in 2016-2018.

The text consists of three parts; the first briefly reminds the theory of constitutional moment and its most important elements according to Bruce Ackerman. Next, it presents few examples of disputes and events of the last three years in Polish politics related to the change in the interpretation of the constitution - or its violation. In the last part of the text I will try to analyze the changes taking place in the context of elements of Ackerman's theory.

2. The constitutional moment concept - the truth and myths.

The concept authored by Bruce Ackerman assumes, in a nutshell, that the change of the constitution is connected with the existence of a special period in the history of the nation, when the conviction of the identity of the people - collective sovereign allows to reach agreement on the new content and form of the constitution. It has two important advantages. First of all, the theory draws attention to the historical context of the formation of the constitution, which is an expression

of the aspirations and will of the sovereign, the work of dynamic participation and deliberation, and the effects which must be taken into account - not only in the act of making, but also in interpretation of the constitution. The theory of the constitutional moment connects - according to Bruce Ackerman's term - "historical constitutional facts and ideas"[1]; it is competitive to foundationalism, meant as a set of doctrines and concepts that assume the existence of an ideal, ahistorical state of community or state. Ackerman emphasizes that the process of creating and interpreting the rules governing the community is always a process in historical contexts[2], with its specific features and phases which have been described and scrutinized; Ackerman also deals with moments that the constitutional changes have not brought[3].

The concept of the constitutional moment, however, concerns in fact a much more serious issue than - quite trivial - an indication of a particular historical condition that causes a formal change in the constitution (or, more broadly, a systemic change). Other authors also wrote a lot about the relationship between the revolutionary change of the system and its constitutionalization, among others Hannah Arendt, concluding that the constitution is an element of the revolution[4]. In this special time of transformation, when the community begins to trust in its identity, that it is able to autonomously decide about its shape and structure, reveals the need that R. Dahrendorf wrote about, indicating that the first stage of the road to freedom concerns the constitution[5]. It is also not controversial that agreeing on how to regulate and protect fundamental values for the basic political community should become an extremely important and constitutive element of the post-revolutionary order or, more broadly, post-transformation time.

However, the core of Ackerman's theory is - as he calls it - the dualism of democracy, that is, the thesis that decisions and actions usually taken by public authorities are sometimes taken directly by the People, the title collective sovereign in Ackerman's work. In the historically rare moments of huge political mobilization, Sovereign takes over the power and directly takes key decisions that get the shape of permanent constitutional and legal achievements[6].

Ackerman therefore indicates that in certain circumstances the People changes the literal content (by changing the constitution in the law-making process) or changes the interpretation (especially in

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[1] B. Ackerman, *We the People. Foundations,* Cambridge 1991, s. 5.

[2] *Ibidem*, s. 23.

[3] *Ibidem, s.* 161.

[4] H. Arendt, *O rewolucji,* Warszawa 2003, s. 177-178, por. też R. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, „The Yale Law Journal" 1996-1997, Vol. 106, s. 2054.

[5] R. Dahrendorf, *Rozważania nad rewolucją w Europie*, Warszawa 1991, s. 75.

[6] Te momenty Akcerman nazywa „historic moments of successful constitutional politics" (s. 17), zaś o procesie zmiany, kiedy Naród dokonuje „transfer moments of passionate sacrifice and excited mobilization into lasting legal achievements", *ibidem,* s. 22.

the process of constitutional review), therefore revives its power. It happens at a special moment of mobilization, while the Sovereign (People) does not entrust its power; as Ackerman writes, he is not represented by either the Court, nor the President, nor Parliament, nor public opinion polls who in the normal conditions of democracy play the role of "stand-in" sovereign[7].

Bruce Ackerman reconstructs the conditions and stages that must take place in order for the Sovereign to be able to take over his supreme power - in particular the power to change the constitution. This process is described by Ackerman as consisting of four phases[8]. In the first one, there is broad and serious support among citizens to make a constitutional change. It is a signaling phase, so there must be actors communicating on the political agenda to seek a change in the constitution. Change is therefore articulated and there is an indication of popular support for this kind of transformation[9]. The second phase is a proposition - the movement is directed at making political actors generate proposals of changes, more or less operationalized. Then the third phase is launched - universal deliberation, in which proposals are subjected to discussions, taking place in the world of actors of the political scene and beyond. This phase, as Ackerman writes, may turn out disappointing for the supporters, because the defenders of the old regime can defend the constitutional status quo quite vigorously; if they win, the constitutional moment will not bring a change, and Suweren's mobilization will be replaced by the rule of ordinary democratic actors. At this stage, often violent forms of public will may be expressed, such as marches, demonstrations, and others[10]. However, if in this phase of deliberation it turns out that the articulated need for change overcomes, in the last stage of this particular process, the content of constitutional norms will change either in the law-making process or through a change in interpretation in the process of application of law. The change signaled in the first phase, articulated in the second and discussed or pushed through in the third - in the fourth is "codified", formally becoming part of the normative order of the highest rank.

This theory, often recently recalled, as it can be even said - fashionable, however, is often greatly simplified. The constitutional moment was supposed to become apparent, according to Ackerman,

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[7] *Ibidem* s. 263.

[8] *Ibidem*, s. 266-267.

[9] M. W. McConnell, *The Forgotten Constitutional Moment*, „Constitutional Commentary" 1994, Vol. 11, No 1, s. 121.

[10] *Ibidem*, s. 127.

in the countries of Central and Eastern Europe after the collapse of the communist system[11]. Romantic vision reflected by the image of people chanting "we are the Nation", the idea of a massive and unanimous denial of the current order and the state's system is usually associated with a revolutionary change. The mere presentation of the concept itself in a historical context raises at least two doubts. First of all, the tracing of this "constitutional moment", the moment of breakthrough in Central European reality of the 1990s, indicates that the post-authoritarian transformation had been conducted in a much less romantic way. The soft and consensual collapse of the old regime brought quite surprising results in the first period of the political transformation. There was no clear moment to express Sovereign's will, and the change was, in most countries, quite gentle and gradual. In quite a long period after symbolic dates of reaching agreements on the systemic transformations or spectacular gestures of devotion to power, constitutional changes took place slowly and in a controlled manner, and often sanctioned the agreement reached, becoming "self-limiting revolutions"[12]. The civic participation in constitution-making process and broader - in transition, which often had been negotiated with old communist elites - was in fact very limited. There was no constitution of "winners", but rather constitutions of dialogue[13]. We must also agree with the observation of András Sajó that the constitutions of the former communist states, the constitutions of often new quite states have not been the effect of the reborn national identity, the result of a great national debate about the values and principles governing a political community that regained sovereignty, but rather a record of the existing the time of political reality, the best, ias it was deemed, operating *modus vivendi* in Europe[14].

The Polish constitution, established as the last in post-communist countries, is to a large extent an image of such political and social reality, and also an effect of pragmatism and compromise (which of course does not diminish its value), but it did not have much in common with the constitutional moment. What's more, in post-communist countries, there has not been wide

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[11] B. Ackerman, *Przyszłość rewolucji liberalnej*, Warszawa 1996, s. 18-21.

[12] J. Staniszkis, *Poland: Self-Limiting Revolution*, Princeton, 1986 [za:] A. Czarnota, M. Krygier, *Po postkomunizmie - następny etap? Rozważania nad rolą i miejscem prawa*, „Studia Socjologiczne" 2007, nr 2, s. 150.

[13] Por. m.in. A. Czarnota, *Is there Rule of Law after Communism? Some Reflections on Conditions and Prospects*, [w:] (red.)*Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*, Warszawa 2003, s. 23-24.

[14] A. Sajó, *Constitution without the constitutional moment: A view from the new member states*, „International Journal of Constitutional Law", Vol. 3, No 2-3, s. 245, 252-253.

public discussions on the new regimes prior to the adoption of final texts[15] - and even if such discussions took place, they did not play significant role in creating the systemic order. There were no alternatives or variants of constitutional regulation presented to the broad public debate, there were no (with exceptions) referenda choosing among variants of constitutional design for further works.

Therefore, a romantic vision of active participation in state designing has not yet occured in this part of Europe - the People in the constitution-making process only fulfilled the role of a „notary public", approving a document prepared by the legislature, quite opposite to the Acekrman's projection[16].

However, perceiving the constitutional moment theory does refer to the fact that the constitutional moment occurs when the text of the constitution changes or the new one is adopted, but it can also be reflected by changing the constitutional interpretation, it means: changing the constitution without change its text, according to a change in political or social conditions. In fact, the value of the theory of constitutional moment does not consist in pointing out when the amendments or the amendment to the constitution is occurring or may take place, because the moment is clearly obvious. A great advantage and inspiration of Ackerman's theory is the observation that this special reevaluation time may cause a diametric change in the interpretation of the constitution, a reform of normally unacknowledged principles, i.e. a non-literal, but semantic change. Let's look at whether this change is currently taking place in Poland.

2. Polish constitutional practice

1) constitutional adjudication and (counter)majoritarian dilemma

During the last three years, many conflicts which have been going on in Poland went far beyond the boundaries of normal disputes between political parties - there has been a real war between both sides: defenders of the old political and legal regime and supporters of the so-called ‚Good Change' (electoral slogan under which Law and Justice won the presidential and parliamentary elections in 2015). Among many other conflicts (and in fact there are currently no public matters in Poland that are not the subject of conflict), three can be distinguished on purely constitutional issues.

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[15] A. Czarnota, *Is there Rule of Law after Communism? Some Reflections on Conditions and Prospects*, [w:] Z. Tobor, I. Bogucka (red.), *Prawo a wartości...*, s. 29.

[16] B. Ackerman, *Przyszłość rewolucji…*, s. 18-21.

One of the first steps of the PiS after taking the parliamentary majority was to conduct a revolution in the Constitutional Tribunal, which began - like a classic revolution - from the interruption of the succession of power. In the case of the Polish Tribunal, it consisted in questioning the choice of five constitutional judges, made by the previous parliament at the turn of the term and appointing successors in this place. The constitutional crisis caused by these events had a turbulent course[17] and was associated by instrumental changes to the Constitutional Tribunal Acts[18], as well as the non-recognition of the rulings of the Constitutional Tribunal by the Polish government[19], and legal acts established by parliament by the Tribunal[20]. He also found echoes in European bodies[21]. Meanwhile, in 2016 and 2017 another five constitutional judges were elected. The majority in the Court therefore received judges from the new election made by the Sejm. At the end of 2016, new laws regulating the political system of the Tribunal[22] and the status of its judges[23] were also passed. The first of them introduced new rules for the election of the President of the Tribunal (Art. 11) and also explicitly excluded the contested 'judges elected by the Sejm at the end of the previous term from participation in the work of the Constitutional Tribunal and in the General Assembly (selecting candidates for the President), stating that the right to participate in it, there are judges who have taken an oath before the President of the Republic of Poland (Art. 6)[24].

The Act on the Status of Judges sanctioned the situation of the judges elected in December 2015. The next act containing provisions introducing them[25] opened the way for judges who no longer wanted to fulfill their duties under new statutory conditions and in such a constituted state, to

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17 See: A. Mlynarska-Sobaczewska, Polish Constitutional Crisis: Political Dispute of Halling Kelsenian Dogma of Constitutional Review, European Public Law 2017 vol. 3.

18 Ustawa z 22 grudnia 2015 o zmianie ustawy o TK, DzU 2015, poz. 2217, ustawa z 22 lipca 2016 r. o Trybunale Konstytucyjnym, DzU 2016, poz. 1157.

19 Prime Minister Office - as a bodu in charge of publishing legal acts and Constitutional Tribunal decisions (Dziennik Ustaw) refused to publish CT judgments as illegaly delivered and unbounded.

20 Polish CT in at least two judgments refused to apply legal acts (as acts towards crippling its works) – see: TK decisions of January 7th 2016, U 8/15, TK of March 9th 2016, K 47/15.

21 Resolution of European Parliament of April 13th 2016 concerning situation in Poland (2015/3031(RSP), Commission Recommendation regarding the Rule of Law in Poland of 27 July 2016, Opinion of the Venice Commission on the laws on the Supreme Court, Ordinary Courts and National Council of Judiciary, Commission Recommendation regarding the Rule of Law in Poland of 21 December 2016, third Rule of Law Recommendation, 26 July 2017

22 ustawa z 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym DzU 2016, poz. 2072.

23 ustawa z 30 listopada 2016 r. o statusie sędziów Tryubnału Konstytucyjnego DzU 2016, poz. 2073.

24 President of Poland did not take an oath from judges elected in previous term of office.

25 ustawa z 13 grudnia 2016 DzU 2016, poz. Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego

retire (Article 10), and liquidated the Court's organizational units on 1 January 2018. , and the employment relationship of their existing employees has expired. At the end of 2016, the term of office of judge Andrzej Rzepliński, the President of the Tribunal and December 21, 2016, Julia Przyłębska, one of the so-called 'December Judges', became the new president of the Constitutional Tribunal.

Some regulations of these laws have been challenged by the Ombudsman to the Constitutional Tribunal, who accused these solutions of non-compliance with the principle of labor protection (regulations concerning the liquidation of organizational units and termination of employment - Article 13 of the introductory provisions), as well as regulation regarding specific persons and one-off situation in the act, which would violate the principle of the division of powers and the independence of the courts and tribunal. However, the Tribunal in its judgment of 24 October 2017 (K 1/17) recognized the challenged provisions as being in conformity with the Constitution.

There was also an instrumental exclusion of three former judges - in January 2017, the Prosecutor General submitted an application to review the constitutionality of the Sejm's resolutions on the selection of three judges of November 26, 2010, accusing their joint choice by way of one resolution without individualizing the act of choice and the mandate (term) of each of them. This conclusion is surprising, because a year before the Tribunal stated that it can not control such acts, because they are not normative acts (the famous case U 8/15 about the selection of the so-called December Judges). The conclusion of this ruling should be then quite obvious in the light of earlier case-law[26] - according to the Constitution, it is important to distinguish between acts containing general and abstract norms, which may be the subject of the Tribunal's examination and individual norms, which are not regarded as normative acts within the meaning of the Constitution. A month later, on 27 February 2017, the Prosecutor General filed a motion to exclude these judges from adjudication[27], because their participation "may raise doubts as to their objectivity, when assessing the position of the Prosecutor General who is an obligatory participant in the proceedings". The Court admitted this request on 6 March 2017, sharing the arguments of the Prosecutor. The same (suspending judges) happened in other cases pending in Tribunal.

The case of unconstitutionality of the selection of judges from 2010 has not been recognized yet, although the allegation formulated there seems to be devoid of factual and legal grounds, and

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[26] CT rulings: November 17 1992 r., U 14/92, January 26 1993 r., U 10/92, September 22nd 2006 r., U 4/06, November 26th 2008 r., U 1/08.

[27] It was case of preventive adjudication, which requires full complement of CT.

above all - in the light of previous jurisprudence - its recognition goes beyond the jurisdiction of the Constitutional Tribunal. However, the lack of recognition of the application suspends the status of these judges; as long as their credibility is questioned, the judges are excluded from adjudication. This is an extremely dangerous action, allowing in fact to arbitrarily complete the constitutional court. Moreover, these provisions as well as other judgments of the Tribunal are issued in a composition inconsistent with art. 38 paragraph 1 of the Act, which establishes the rule of appointing members of the adjudicating TK in alphabetical order, which was to serve the purpose of excluding the arbitrary plea of "modeling" of compositions by the President of the Constitutional Tribunal.

There is no doubt that the Court has become an instrument of political - not constitutional control. It allows us to ask questions on the meaning of constitutional control in the current kelsenian model, that is based on three assumptions - political impartiality, abstractness of control and strictly substantive character of the adjudication. The previous dogma of the Constitutional Tribunal, as a keystone of the system and a almost mythical institution guaranteeing the rule of law and constitutionalism, fell - probably irreversibly, certainly for a long time. What is particularly interesting is that among opposition lawyers there are more and more bold voices about the scattered control of constitutionality - exercised by the courts. Such a possibility has not been so far unanimously approved by the courts and the doctrine of law, and there is no basis in the current constitution for that, because the court can only - in case of doubts as to the constitutionality of the provision to be applied - ask a legal question to the Constitutional Tribunal. The opposition, seeing, therefore, that the stronghold of constitutional control has fallen, wants to go beyond the constitutional framework in their current understanding.

2) common courts and their independence

The political conflict, and in consequence also the constitutional law regarding the judiciary, has been developing since March 2017, when the government submitted to the Sejm a draft of an amendment to the Act on the National Council of the Judiciary, which in a very short time, on July 12, 2017, was passed by the parliament[28]. The most important change introduced to the current regulation was to be the selection of judges to the The National Council of the Judiciary, which is in accordance with art. 186 of the Constitution „the guardian of the independence of the courts and the independence of the judges". The new statute introduced a choice of members not by the judges, but

[28] ustawa z 12 lipca 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw.

by the Sejm for a joint four-year term (Article 1 paragraph 1 point 1 of the Act). On the same day, a law amending the system of common courts was passed[29]. This law - in addition to minor changes rationalizing the operation of the justice system (regulation of the functioning of the court IT network, introduction of the procedure of apointing judges randomly - not arbitrarily by the president of the court) in a visible manner subordinates the common courts to the Minister of Justice to a much greater extent than before. The act also states that the judge retires on the day of graduating 60 (woman) and 65 (men) (Article 13 of the Act); the judge may turn to the Minister of Justice with a statement that he wants and may continue to perform the office - the Minister may agree to continue to take the post, no longer than up to 70 years of age.

On July 20, the Sejm passed a law on the Supreme Court[30]. It introduced a completely new structure of this most important court in Poland. It was also intended to allow arbitrary formation of the composition of the Court by the Minister of Justice (he was to decide which of the judges could still perform his function). The laws were passed by the parliament in an extraordinary precipitation and atmosphere of a huge discord between the opposition and the ruling majority. For example, the Law on the Supreme Court as a draft of the deputies was submitted on July 12, and already on July 22, adopted by both houses of parliament.[31]. The adoption of these acts was accompanied by large social protests throughout Poland.

Two of the three adopted laws: on the Supreme Court and on the National Court Register were vetoed by President Andrzej Duda, who assaulted them subordinating the Supreme Court to the discretionary power of the Minister of Justice. The president submitted his own bills reforming the judiciary in September 2016 - however, work on them in parliament began only when the President introduced into them amendments elaborated during negotiations with the PiS. In December 2017, both acts were adopted in versions only slightly differing from the laws which had been originally adopted by parliament - what soon led to the escalation of the political crisis and profound differences as to the interpretation of constitutional provisions. Article 187 of the Constitution stipulates that National Council of Judiciary consists of 1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and a person appointed by the President of the Republic, and "fifteen members elected from among the Supreme Court judges, common courts, administrative courts and military courts" as well as four

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[29] ustawa z 12 lipca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw

[30] ustawa z 20 lipca 2017 r. o Sądzie Najwyższym

[31] http://search.sejm.gov.pl/SejmSearch/ADDL.aspx?SelectResult (accessed July 21st 2017).

members elected by the Sejm from the deputies and two members elected by the Senate from the senators. The new law provides that 15 members - judges of the Council are appointed by the parliament, which is contrary to the existing regulation and practice. Literally, the content of the constitution does not prejudge that judges should choose judges from the Council - it was, however, evident in the previous tradition of this body, so also regulated by the current law. There has therefore been a radical change in the interpretation of this constitutional provision - without a formal change in its content.

The second major crisis, which developed this summer (2018), is related to the position of the First President of the Supreme Court. According to art. 183 par. 3 of the Constitution The Polish President appoints the First President of the Supreme Court for a six-year term from among the candidates presented by the General Assembly of this Court. The President of the Supreme Court was appointed in this way in 2014, so her term would expire in 2020. However, the new law on the Supreme Court predicted the termination of the profession for judges at the age of 65 (only by decision of the President, the motivated request of the judge may be extended to 70 years). The President of SC did not file such an application, therefore, according to the new law, she lost the right to practice as a judge - and, at the same time, to perform the function of the First President of the Supreme Court. Meanwhile, the SC President and the judges' associations supporting her, recognize that the term of office is in force, in accordance with the constitutional norm that guarantees this. However, the President Duda informed the judges of the Supreme Court who are the 65 age old and did not submit a request for prolong their term, that their term of office had ended and the procedure for electing a new president has begun (to do this, the Act on SC had to be amended once more).

The dispute concerns therefore strictly the understanding of the constitutional norm - when the term of office of the president of the Supreme Court can end and whether the act can shorten the constitutional six-year term. Without prejudging who is right in this dispute, it must be said that the authorities (parliament and president) certainly take the position that the constitutional norm can change its meaning, and the constitutional guarantee of the office of the most important judge in the state can be abolished by law under the same constitutional norm.

3. right of pardon

The third example of the change in the significance of constitutional norms in the process of their application is the action of the President of the Republic of Poland, who in 2015 applied the law of pardon to Mariusz Kamiński, current coordinator for security services in the government,

who had been convicted by a court ruling for violation of powers during tracing corruption crimes in government in 2007. There was a doubt whether the act of grace, defined laconically in the Constitution[32], may refer also to invalid judgments, as was interpreted by the President, or only to valid judgments. The previous long-standing practice of presidents' acts of pardon concerned only persons validly convicted - this practice had been shaped in the interwar period, when the regulation was much more precise[33]) - however, in the study of constitutional and procedural law, there were presented views that acts of grace may also apply to invalid judgments and were strongly divided. This legal issue was decided by the Supreme Court in the ruling of May 31, 2017, stating that the act of grace only applies to persons who have been finally and validly convicted. At the same time, the Prosecutor General (who is also the Minister of Justice) appealed to the Constitutional Tribunal the provisions of criminal procedure as unconstitutional since they do not provide for an act of grace as a procedural ground that would make the further proceedings inadmissible.

A year later, on July 17 2018, the Constitutional Tribunal followed this stance[34], using two arguments: first: that the previous constitutions used a more precise limitation of the right of grace, limiting it only to valid sentences and, therefore, the lack of such a provision means that the current constitution does not contain such a limitation. Secondly, according to the Tribunal, it is necessary to distinguish between the procedure indicated in criminal proceedings as a pardon (regulated in detail by the provisions of the procedure and only valid judgments) from the constitutional act of grace, which is one of the presidential prerogatives.

Both arguments are based on the art. 139 of the Constitution and placing the right of pardon among the personal competencies of the president. The counter argument, in turn, is based on the practice and reading of constitutional norms based on statutory norms; the latter is in fact an impemissible interpretative practice within the constitutional interpretation of the constitution. In turn, no reference was made to the function of this president's competence and the possible consequences of such a ruling, as well as the logic of the institution itself (whose sense is to free a convicted person from punishment, not to exclude himself from prosecution).

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[32] Art. 139 of the Constitution: The President of the Republic shall have the power of pardon. The power of pardon may not be extended to individuals convicted by the Tribunal of State.

[33] The Constitution of the Republic of Poland 1935, art. 69
(1) The President of the Republic is empowered to grant a pardon by an act of mercy or to modify a punishment imposed by a final court decision and to annul the effects of a sentence.
(2) An amnesty requires a legislative act.

[34] K 9/17

In addition, there is another pending case, in which the Tribunal is to decide whether the act of grace is carried out by the president without the participation of other entities, in particular the Supreme Court, and whether the Supreme Court may make an assessment as to whether the president he has effectively exercised the right of grace.

Thus, the incidental problem became the source of serious disputes regarding the scope of the President's competences as defined in the Constitution and the administration of justice in the framework defined by the procedural law. The formulation of the constitution in this scope left a lot of space for different interpretations and leads to deep divisions - as in previous examples - among politicians, lawyers and citizens.

4) failed referendum initiative

The disagreements over the interpretation and application of the constitution were dominated by political life in Poland. However, on the fringes of these conflicts the president expressed a need to conduct constitutional referendum. This idea was reported by President Andrzej Duda in May 2017, after quite a slow presidential campaign around this idea for a year, finally in July 2018, the President announced proposals that he would like to ask in a constitutional referendum. According to art. 128 of the Constitution of the referendum may take place at the request of the president with the consent expressed by the Senate. However, the Senate did not give such consent and the initiative ended with a complete fiasco (only 10 of the senators voted for the initiative, almost all PiS senators abstained).

There were several reasons for the failure. Firstly, the proposed questions concerned mostly minor issues or those which were already ruled by the constitution[35]. It raised the obvious question of the ratio of conducting an expensive referendum procedure. Secondly, the ruling party feared a low turnout and the failure of the entire initiative, given by the President's name from this party. Third finally, neither the ruling or opposition politicians were interested in serious constitutional debate. The proposal of such debate was accused of "lack of a constitutional moment" and - what is particularly interesting from the point of view of constitutional law and the sociology of law - the lack of the constitutional ground to ask questions about changing the constitution in the referendum. According to that point of view (a significant part of the Polish constitutionalists), the nation can not speak at all on issues regulated by the constitution, which is to be decided by art. 235 of the Constitution, regulating the mode of amending the constitution, because it does not provide for a consultative referendum, but only a referendum on the approval of constitutional changes. Therfore,

[35] 1. Are you in favor of adopting a new Constitution, adopting amendments to the Constitution of 1997 or leaving it unchanged.
2. Are you in favor of regulating in the Constitution the obligation to hold a nationwide referendum at the request of one million citizens, and that the result be binding when it participates in it 30%. authorized.
3. Are you in favor of:
- the presidential system,
- a cabinet system and the election of the president by the national assembly,
- maintaining the current model of executive power?
4. Are you in favor of a constitutional normalization of the election of deputies to the Sejm of the Republic of Poland in one-mandate electoral districts, multi-mandate electoral districts or with the combination of both methods?
5. Are you for underlining the importance of the Christian sources of Polish statehood and the culture and identity of the Polish Nation in the Constitution of the Republic of Poland?
6. Are you in favor of a constitutional normalization of Poland's membership in the European Union and NATO, respecting the principles of state sovereignty and the supremacy of the Constitution of the Republic of Poland as an overriding legal act?
7. Are you in favor of guaranteeing the protection of Polish agriculture and Poland's food security in the Constitution?
8. Are you under constitutional protection for protection of the family, motherhood and paternity, inviolability of family rights acquired (such as benefits from the 500+ program) and entitlements to special healthcare for pregnant women, children, the disabled and the elderly?
9. Are you under constitutional protection for special protection: work as the foundation of a market economy and the right to a pension, acquired under a statutory age (60 years for women and 65 years for men)?
10. Are you in favor of regulating the division of local government units into communes, poviats and voivodships in the Constitution of the Republic of Poland?

constituional matters are excluded from „important issues" predicted as a matter of referendum in Polish constituional law[36].

4. conclusion - few remarks on the constitutional moment theory and practice

But, the main aim of this text is not to analyze or evaluate the Polish policy of the last three years - this task has already been achieved in countless texts, written by journalists, publicists, lawyers and politicians (sometimes these roles have been mixed up). The assessment is always very critical and ascribes to the Polish policy 2015-2018 the characteristics of authoritarianism, formulates allegations of a „creeping coup d'etat" - by taking power in aa unconstitutional manner, violation of the rules of political life and the whole legal system. Which is interesting, the actions of the ruling party (PiS) are aimed at taking control over the judiciary, the only branch of power that does not come from democratic elections, and thus was out of the reach of the primacy of the majority. In this respect, the most serious allegations of violation of the constitution, division of power and an independent judiciary, free from political influence, are formulated. But this rather sad and unfinished yet story let us ask other questions, relevant to the theory of constitutional moment, much more interesting than the rather trivial formulation of obvious objections.

Ackerman's theory brings our attention to the significance of constitutional norms and the distribution of the process of their interpretation. Concept of constitutional moment points out that the real and genuine roots of meaning and interpretation must be sought in a system of principles accepted by citizens, that is, a sovereign in this extraordinary moment of intense participation and

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[36]Article 125
1 A nationwide referendum may be held in respect of matters of particular importance to the State.
2 The right to order a nationwide referendum shall be vested in the Sejm, to be taken by an absolute majority of votes in the presence of at least half of the statutory number of Deputies, or in the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators.
3 A result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it.
4 The validity of a nationwide referendum and the referendum referred to in Article 235, para. 6, shall be determined by the Supreme Court.
5 The principles of and procedures for the holding of a referendum shall be specified by statute.
Article 235
1 A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.
(…)
6 If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

deliberation, in the time of a change in the constitution[37]. The conditions and phases described by Ackerman concern precisely such an amendment, adopted by the authorities interpreting and applying constitutional norms[38]. And here comes the controversy of this theory in the very essence - all the trouble lies in the fact that constitutional stability is a myth more often than us, constitutionalists, used to reckon. Accustomed to thinking in terms of rigid, unchangeable constitutional norms and the right of constitutional courts to determine the permanent and certain significance of norms, we often lose sight of small, seemingly trivial changes that may in some way have an evolutionary effect on the content of the constitution.

Of course, these changes do not take place in a social vacuum; they are usually associated with a kind of permission, usually given in an electoral act, gaining a significant advantage over political competitors. Such changes include minor extensions of the competences of executive organs, subtile changes in relations between authorities, or establishment of new agencies of public authority outside the existing structures. They ultimately determine the content of the current constitution[39]. This is - as Cass R. Sunstein writes - a certain continuum of changes, practices, and ways of thinking which - if it is accepted in society - only in the long run changes the system and rules governing relations in the state visibly and significantly.

Obviously, in such a perspective it is much more difficult to talk about a specific period of Sovereign's power, which leads to a system change, but it is also difficult not to notice (also in the Polish reality of AD 2017 and 2018) that this is the way to change constitutional rules - at least their meaning we used to consider. In recent years, there are many examples of this type, they lead to questioning regulations that have not yet raised major controversies and have had established practice and regulation. However, the verification of constitutional norms painfully reminds about shortcomings and constitutional deficiencies. Polish politics is nowadays full of events and statements which question the hitherto prevailing interpretation and issue constitutional provisions for the sort of test - which is often failed. It is reminding quote of Montesquieu that mathematical theorems are considered to be true, because in no one's interest is to consider them false.

Ackerman's theory may have much in common with the last remark. Although it is best known as the theory of constitutional development, however, as commentators point out, it is also,

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[37] M.W. McConnell, *op. cit.*, s. 116.

[38] B. Ackerman, *We the People…*, s. 3–5.

[39] C. R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before*, Princeton 2009, s. 15.

and perhaps above all, the theory of a constitutional crisis[40]. This is no longer a romantic vision of a change in the political system, but a concept much closer to the truth, because the constitutional moment phase which was presented by Ackerman is in fact a description of the constitutional crisis. A constitutional crisis is not the same as a political crisis. Conflicts between the public authorities and also between the ruling majority and the opposition are natural and intrinsic for the functioning of democracy, as an immanent part of the political reality of any democratic state - it can even be said that their absence in the public agenda is a manifestation of aberration or the dulling of real conflicts, which can be caused by many factors. It is also not a symptom of a constitutional crisis, that the subject of power abuses it or behaves contrary to the rules, or even when the political conflict can not be overcome by normal methods and by the means provided for in the constitution.

The constitutional crisis does not concern the realities of political life, neither disputes over power or even disagreement with the actions of the authorities. The constitutional crisis is an expression of the questioning if the constitutional rules are operational, that is, whether the constitution provides operational system, efficient for the state. It is a crisis of power *par excellence:* the sources of power and its legitimacy, contesting the foundations of its existence , efficacy and efficiency of this constitutional order, concerns the lack of coherence of constitutional regulations - not actions.

This kind of crisis can occur in several situations: for example, when extraordinary circumstances, events cause that constitutional norms are not sufficient or - according to political actors - their application does not allow for resolving the conflict or resolving the problem. They are therefore contested by the public authority, or, on the contrary, their application leads to the development of a conflict. A constitutional crisis may also arise when citizens manifestly disagree with the use of constitutional norms. Such a crisis undermines the normative basis, and not only questions the way in which prerogatives are exercised or violates constitutional norms. Thus, the constitutional crisis exposes the deficits and shortcomings of the constitutional design itself, and not only the behavior of the authorities. The more these deficiencies become visible, the greater is the chance of success of the actors of constitutional change and the completion of the fourth phase of the constitutional moment. It can be forgiven that someone infringes the constitution, but it cannot be forgiven that it does not provide protection against such action, and also does not contain enough or convincing arguments to stop violations and mitigate (if not remove) the effects of such actions.

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[40] S. Choudhry, *Ackerman's higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?,* „International Journal of Constitutional Law" 2008, Vol. 6, No 2, s. 193-230.

The constitutional moment then does not require an universal consent or unanimity in this respect; on the contrary, Ackerman draws attention in his theory to the polarization of attitudes towards the current and planned content of the constitutional rule.

However, the most troublesome question remains in Ackerman's theory, that is the role of the Sovereign - the People. The constituional moment concept assumes that the sovereignty of the Nation is not only a convenient rhetorical figure to justify the power of representatives or a myth - according to this theory, the power of the Nation sometimes becomes reality and in the most important, fundamental matters[41]. In Ackerman's theory, pivotal is not the time to establish formal changes or changes in the interpretation of the constitution, but to express the universal will (will of the People) in this matter. Ackerman's constitutional moment restores the power of the people - the collective sovereign to these rare moments when it comes to expressing the will to change in a sufficiently clear way. This regained power of the collective subject of sovereignty is made under conditions, which are not very precise, which means that it is impossible to unambiguously assess whether the constitutional moment has existed, that is whether the ruling authority has returned to the Nation and was implemented by him - for example, the expression of will through a particularly electoral result, or mass support, or the opposite - mass protests against the actions of the authorities, then transformed into decisions of other actors of change. The problem with the theory of the constitutional moment therefore also consists in the fact that this "moment" - the time of crisis and reevaluation, clash of constitutional ideas, and above all the time of universal deliberation about the constitution, time to express the will to create new principles and rules of the community, can be properly recognized only from outside and post factum.

This idea concerns the attitude of citizens and the political community to the constitution, the rules governing this community. The point is not to justify any changes or justify their content (or to reverse a specific operation - to refuse specific changes in the right of existence). It is not a theory to design or make assessment of the validity or legitimacy of a change in this sense[42]. This can be followed by other normative conceptions regarding changes and creation of constitutions, assuming in such a process its openness, consensus, self-limitation of creators, abstracting - if possible - from the current policy and its goals[43].

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[41] R. E. Barnett, *We the People: Each and Every One*, „The Yale Law Journal", 2014, Vol. 123, No 8, s. 29.

[42] M.W. McConnell, *op. cit.*, s. 143; B. Ackerman, *We the People…*, s. 134.

[43] Tak m.in. A. Arato, *Forms of constitution making and theories of democracy,* „Cardozo Law Review" 1995-1996, Vol. 17, *passim*.

Ackerman's concept is rooted in the idea of reevaluation in the social consciousness, which suddenly turns to thinking about the constitution - in the categories of rules and principles governing the state. At the constitutional moment, citizens articulate the need to change - or conversely - the need to leave the current meaning of constitutional norms.

Constitutions - apart from their legal function - are a symbolic act defining the political community and its goals. The Constitution acts as a tool that indicates the legitimacy of the state, constitutes the source of power in the state and regulates its borders. It provides the operating system of the subordinated community - not only the technical framework of the authorities, but the system of ideas, attitudes and patterns of behavior determining the status of citizens and power, expresses relations between them and their mutual expectations.

Such function of the constitution is occured when the constitutional defenders are widely protesting in demonstrations, posters, T-shirts, and - when on the other side of the political scene, there are voices about the need to change or even pass a new constitution to restore the state and design a new axiological, social and political structure of the community. The constitution is, therefore, an argument used by all those participating in political life, a final and almost transcendental argument (which remains without evidence and references to other reasons). What is the most fascinating - it is an argument used as *ultima ratio*, irrevocably and definitively. Although it is the same act, with closed structure and specific content, created to give a sense of unity and identity, and to create an inviolable framework - at least in the assumption - order. In the famous sentence George Bernard Shaw said that Americans and British are two nations divided by the common language. Our Constitution of 1997 divides Polish citizens - without much hope for compromise or even kind of dialogue.