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SOME REMARKS ABOUT THE CONCEPTION OF EXECUTIVE POWER IN THE 1997 POLISH CONSTITUTION*

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The Polish Constitution, adopted in April 1997, has been in force for five years now, but still some of its provisions, specific institutions or even systemic conceptions require interpretations, theoretical analyses, doctrinal assimilation. The more so that it does not express a direct continuation of the previous constitutional system or a simple evolution of systemic traditions. It grew out of political transformations, with old traditions and contemporary conditions, local and borrowed patterns, fixed habits and new aspirations, as well as a number of other circumstances, all influencing the adopted systemic solutions. Therefore the ongoing process of assimilation of the new constitution justifies all kinds of reflections which may contribute to the creation, against its background, of an up-to-date constitutional doctrine. One of the problems which - as it seems - is worth such reflections is the construction of the executive power. It reflects the whole complexity of the multitude of factors which influenced its constitutional conception.

In the first place, the character of this conception was shaped by the tendency to base the system of government in the 1997 Polish Constitution on a parliamentary model. This tendency originated from the tradition of the 1921 Polish Constitution, the first Polish constitution after more than 120 years of non-existence of the Polish State, which not only was a symbol of renaissance of the State, but also belonged to the generation of democratic European constitutions after WWI.

Although it eventually proved impossible and inexpedient to reproduce this model precisely, there is no doubt that the spirit of this traditional parliamentary system was constantly present during the formation of the constitution. In spite of a number of modifications having been introduced - sometimes of such crucial nature to prompt some to speak of a completely new system - one way or another it did influence the shape of the system of government and of its elements.

The executive power in the Polish Constitution has a dualist structure, i.e. it consists of two basic elements: the Head of State, that is the President, and the Govern-

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ment, that is the Council of Ministers. Even though the executive power is vested in other entities as well, which is why some authors formulate the thesis of dispersed executive power, the President and the Government have the character of executive organs with general competence and superior position, each within its scope of competence.

In the course of the systemic discussion that accompanied the birth of the Constitution, and lasted even longer, conceptions appeared to exclude the President from this dualist structure of the executive and to put him as an arbiter, outside the system of the three main segments of the division of powers (legislature, executive, judiciary). But finally a more classical and traditional - from the point of view of the parliamentary system - conception was adopted in the Constitution. An argument in favour of this solution is the fact that the President participates in the mechanism of checks and balances and that his sphere of activity is substantively identical to that of the executive.

The adoption of such a conception meant that it was necessary to resolve the problems connected with mutual relations between the two parts of the executive. What made it even more difficult was the fact that the Polish President is not elected by Parliament (the National Assembly), unlike in a classical parliamentary system, but by universal election, which gives him a different kind of legitimacy and justifies the wider scope and more independent character of competencies - which are executive by the nature of things. This, potentially, involves the risk of conflict-producing competition with the government.

This situation determines the second element of the constitutional conception of executive power. Another problem was creating such mutual relations between these two organs so as to use the mechanism of balance and mutual checking, offered by the parliamentary system in the field of relations between the legislature and the two parts of the executive, but also to avoid competition within the executive itself, which would weaken the Government. Such apprehension was not ungrounded if we look at the tough and difficult practice of functioning of the executive, and particularly at the relations between the president and the government under the 1992 Constitutional Law (Interim Constitution).

Thus the authors of the 1997 Constitution did not spare any efforts to prevent such conflicts by precisely defining and separating the spheres of activity of both parts of the executive.

Thus, in general, the positions of the President and of the Government are determined by basic formulae defining their tasks. The President is the supreme representative of the State, the guarantor of the continuity of State authority, ensures the observance of the Constitution, safeguards the sovereignty and security of the State as well as the inviolability and integrity of its territory (Article 126.1). The Council of Ministers conducts the internal affairs and foreign policy of the State and manages the government administration (Article 146.1 and 3). A juxtaposition of these formulae, delineating in general terms the areas of competence of each of the organs in question, shows vividly this fundamental line of division of tasks between the two main parts of the executive power, thereby differentiating the systemic roles they are to play.

At the same time it highlights their separation from the systemic function of the legislature. Enacting laws (statutes) is a domain of the legislature, while the executive functions - ranging from safeguarding State sovereignty to conducting current policies - constitute the domain of the executive.

The above juxtaposition of both these general constitutional formulae makes it clear that the Polish Constitution applies the modern understanding of the executive function. The executive is treated not in the narrow sense of enforcing laws, but in more general terms, identified with implementing the State function in the sphere of State policy: determining and conducting it on all planes, with law enforcement, in the narrow sense, being only one of its elements.

In fact, the Constitution does make a formal reference to the enforcement of laws by listing the implementation of statutes as one of special tasks of the Council of Ministers (Article 146.4.1). However, we have to remember that there is one more dependency involved. On the one hand, it is the statutes that determine in a general manner the substantive sphere of activity of the executive power, because they - directly or indirectly - lay down the foundations and general conditions of State policy. On the other hand, statutes are an instrument of implementation of the government's policy, which is why the government is most interested in initiating them or influencing their contents.

In conclusion, one has to say that several factors have determined the conception of executive power in the 1997 Polish Constitution: firstly, the fact that its structure is based on the traditional model of dualist executive within the parliamentary system and that the competence of the executive (both of the whole executive and of its individual parts) is used in the mechanism of checks and balances; secondly, that the President derives his legitimacy from universal election, which compels strengthening of his position and increasing individual competencies in comparison to the parliamentary model; thirdly, that the competencies of the President and of the Government are separated within the executive, which in turn - if we do not want to subordinate the Government to the President or create conflict-producing areas - requires limitation of presidential competencies in the field of conducting and determining State policy, and especially in the field of his participation in the implementation of current policy.

This is not as bad as squaring the circle yet, but it already is a system in which conflicting factors have to be reconciled, so one may expect from the start that no model can be implemented consistently.

Thus the first question that comes up is how much of the parliamentary system is retained in this conception of the executive. An answer would require, first of all, a definition of this system, and - as we know - there is no single definition if we consider the different variations of this system existing in "time and space," that is in various countries (doctrines) and at various stages of their constitutional development. Because this is not our main question to focus on, we shall adopt only the most important features as the criterion. These features are: a dualist executive, the Head of State being elected by both chambers of Parliament (or not elected in monarchies) and not being held accountable to Parliament, thus free from political dependencies but also deprived of strong influence on State policy. By contrast, the Government appears as an autono-

mous organ implementing the programme of the parliamentary majority and being held politically accountable to Parliament for this and additionally being made responsible for acts of the Head of State by countersigning them. What is also characteristic of the parliamentary system is the specific system of relations within the triangle Parliament - President - Government, such relations maintaining the relative balance between the legislative and the executive powers.

Dualism of the executive power - apart from the phenomenon of including both the Head of State and the Government in the executive - assumes also that these two organs are independent and autonomous as regards their structure and competencies. The Government is not an auxiliary or implementing body for the President as the head of the executive (administration), but a completely separate organ. It is a collective organ, headed by the Prime Minister (and not the President), who is integrally linked with it. The Head of State is also a separate and autonomous organ of State authority and not, for example, one elected from among the Government or Parliament. The relations between these organs, as envisaged in the Constitution, are made up of various links, which fill this structure with important contents.

The 1997 Polish Constitution bases the structure of the executive on such a general pattern. The President of the Republic and the Council of Ministers (that is the Government, because in Poland these terms, and even "cabinet" are synonyms), are separate organs, autonomous as regards their organization and functioning. Even the Constitution makes a formal separation between them by regulating them in different chapters. The Chairman of the Council of Ministers (Prime Minister) heads the work of the Council, represents it, sets the tasks of ministers and entrusts them with the management of specific sectors of the administration. This latter function reinforces the independence of the Government (and thereby that of the Prime Minister, which prompts certain authors to find some elements of the chancellor's system here), because it signifies departure from the conception present in the 1952 Constitution, according to which the Sejm determined the scope of activity of ministers.

Despite the structural autonomy of the President and of the Council of Ministers, these organs together constitute the executive power, as the Constitution clearly states in Article 10.2. This is of vital importance, because it logically links these two organs in their relation towards the legislative power, and in particular to the Sejm as the chamber that can hold the Government politically accountable. This is precisely where the whole complexity of relations between the Government and the President becomes manifest.

The President nominates the Prime Minister and appoints the Council of Ministers, accepts resignation of the Council, changes—upon the Prime Minister's motion — persons on the posts of ministers, accepts the oath of members of the Government. While the Sejm is the political "creator" of the Government (government of the parliamentary majority), the President appoints it formally. The Government is then formed within the executive and receives political acceptance for its composition and programme from the Sejm, as expressed by a vote of confidence. This is slightly different in the alternative method of appointment of the Council of Ministers according to Article 154.3 (if the Government appointed by the President does not obtain a vote of confidence, the Sejm chooses the

Prime Minister and the Government), resulting not so much from an exchange of systemic roles between the President and the Sejm but from the need to prevent political crisis (non-appointment of the Government, dissolution of Parliament), but even in this method it is the President who finally appoints the Government formally.

The *sui generis* unity of the executive power becomes even more evident when we remember the President's right to dissolve the Parliament (the current Constitution uses the term "shorten the term of office"). So the President is obliged to shorten the term of office of the Sejm and also of the Senate when the Sejm fails for the second time to grant a vote of confidence in the new Government (Article 155.2). The President also has the discretion to do so if the Sejm fails to present to the President a budgetary statute for signature within four months of submission of a draft thereof. It is clear that the intention behind dissolving the Parliament was to give the President a possibility to act for the benefit of the Government. In the first case the threat of dissolution forces the creation of a positive majority in the Sejm to support the Government, in the second case it prevents the Sejm from paralysing the actions of the Government by not adopting the budgetary statute. These actions serve to support the stability and effectiveness of the Government, and are a kind of means of "providing succour." But — unlike in some other constitutional systems - the Head of State does not act upon a motion from the Head of Government. The institution of dissolving the parliament is also one of the instruments of reaching balance between powers, such balance being inherent in the division of powers, and being stated *expressis verbis* in Article 10.1 of the Polish Constitution.

However, in the 1997 Polish Constitution there is no subordination of the Government to the President, either direct or indirect, e.g. through reporting. In this way the Government is not accountable twice, before the Sejm and the President, but has only the classical parliamentary responsibility, realised in the typical forms of parliamentary control over the Government and the governmental administration. Additionally in the 1997 Constitution lire institution of the vote of confidence and of the vote of no confidence is at the top of the list, but with the vote of censure being modified to a constructive form (following the German example), which manifests a rationalization of parliamentarism and is a yet another form of protecting the Government's stability.

As we can see, the basis traits of executive power in the current Polish Constitution correspond to the general features of executive structure in the parliamentary model.

The situation is different as regards presidential elections. In 1989, when the institution of the President was introduced (or restored after 47 years) to replace the Council of State (a collective presidential organ in the 1952 Constitution), the National Assembly was entrusted with the choice of the President, like in the 1921 Constitution. This reinforced the tradition of Polish constitutionalism in this field. In 1989, this Constitution was a kind of point of reference for shaping parliamentary democracy in the period of transformations and was probably the only possible form in the reality of 1989, after the Round Table.

However, as early as in 1991, this method of electing the President was replaced with universal ballot, that is by election by the Nation. Both the 1992 Constitutional Law and

the 1997 Constitution maintained this state of affairs, departing from the classical parliamentary system. Although this departure was introduced in several European constitutions, especially in that of the Fifth French Republic (where some part of the constitutional doctrine does not consider it a departure from the parliamentary system), this could not have remained without influence on the general conception of the executive.

What fundamental value of the parliamentary system is infringed when the President is elected by universal ballot? It seems that, first of all, there is a potential threat to a certain synergy of the executive policy. The President, elected in universal election, takes part in an election campaign, which means political fight with other candidates, presenting and promoting his own political programme, including promises - typical for the language of election campaigns - to achieve specific political and social objectives. An attempt to fulfil such promises may be inconsistent with the programme implemented by the Government, particularly when the President and the Government represent different political options. And this may cause conflicts within the executive. Instead of supporting the Government with the help of his competencies (the right of legislative initiative, refusal to sign a statute, dissolution of Parliament, etc.), the President may be a hindrance to it.

On the other hand, the President's competencies are not strong enough for him to implement his own policy. The practice of recent years in Poland does provide examples of such conflicts, but — what is more - it demonstrates clearly that Polish politicians now realise the existence of this trap. The first President elected by the nation often explained that he was unable to fulfil his election promises through lack of competencies. During the last presidential election campaign, objections were raised against the candidates for their failure to present programmes and to discuss problems. But this - regardless of any other reasons - was quite a healthy reaction against making empty gestures and proposing unreal programmes.

A public campaign has one more aspect, which is not noticed and maybe does not have much importance. It submits the President — as a candidate — to harsh and often unsophisticated evaluation in the course of political electoral fights, which weakens the authority of the later representative of the State. It is not by accident that in the tradition of the National Assembly electing the President, no debates on the candidates were conducted in the course of the election act.

However, the lack of executive competencies of the Head of State to implement his own programme of State policy is inconsistent with the position of a President coming from universal election. The famous French saying that the nation does not elect the President directly in order for him to open exhibitions of chrysanthemums well explains the core of the problem. Therefore in the Constitution of the Fifth Republic the position of the President is clearly stronger, e.g. by the fact that the President heads the sittings of the Government. Recently, one more amendment was made in the Constitution equalling the duration of the terms of office of the Head of State and of the Parliament in order to increase the chances for the President and the parliamentary majority to represent a uniform political option. This further reinforces the President's political power.

The Polish Constitution does not follow the French example in this respect, although such a model was favoured by President Wałęsa. On the one hand, the more traditional option of parliamentarism prevailed, on the other, the Polish system of political parties did not guarantee reproducing the French mechanisms. On the contrary, a decision was made to separate the President from the Government even more strongly than in the period of validity of the 1992 Interim Constitution.

One of the most important manifestations of the reinforced position of the President was to be the wide catalogue of his prerogatives, that is official acts which did not require governmental counter-signature (of the Prime Minister), which e.g. in the 1921 Constitution was necessary for all acts of the Head of State. As for many of these prerogatives this is more of an illusion of power than real independence in decision-making, because a number of these acts either do not involve more important political decisions or are made upon a ministerial motion or — finally - are politically determined, leaving a narrow margin of independence of authority. But we have to admit that in a country where acute political conflicts may occur between the President and the Government, the wide scope of prerogatives makes it impossible for the Government to paralyse the President's decision. But in some cases such as a refusal to sign a statute, legislative initiative, appointing or proposing candidates for certain posts, the initiative of constitutional amendments or a request to conduct a referendum regarding such amendments, complaint to the Constitutional Tribunal - the lack of a required countersignature indeed strengthens the President's powers.

In a vast majority of countries with parliamentary systems, even in modified versions, the right of legislative initiative is vested in only one part of the executive, usually in the Government. Giving this power to both parts of the executive may be another way to disunite the executive and create room for conflict within it. The Polish Constitution gives this right to both the Government and to the President (in order to increase his powers), but so far in the Polish practice any serious reasons for concern have occurred (even though there were cases when conflicting presidential and governmental drafts met in the Sejm) because the Presidents have been rather reticent in submitting drafts of statutes. Actually, this was sometimes criticized. However, reversing this trend would not necessarily have positive effects.

There is an institution which is becoming a strong instrument in the President's hands: the right of refusal to sign a statute. Not long ago the press usually informed about new legal instruments as soon as they were adopted by the Sejm, but nowadays it is more and more frequent to come across the reservation "if the President signs it." It has become a custom for various fractions of public opinion to approach the President to sign or not to sign a given statute. Because usually matters that arise such public or political interest concern important programmatic governmental decisions (it was the case of the tax reform in 1999 or of public enfranchisement in 2000), the President's decision may encroach upon the political and economic actions of the Government and effectively counteract its policies in this respect. Of course, this is not so much an objective instrument of the President's power but rather a weakness of the parliamentary majority, which is not strong enough to re-submit the adopted statute to the Sejm or

which does not base its legislative decisions on a wider consensus, as it happened in the minority Government during the previous term of office.

As we have already mentioned, the authors of the 1997 Constitution were aware of the fact that the powers of a President elected by the nation should correspond to his legitimacy. At the same time, the shape of his powers was influenced by the awareness that if competencies and fields of activity of the President and of the Government in the executive sphere are "mixed," this may potentially bring about conflicts, weaken the Government and, consequently, the stability and effectiveness of the whole executive and not favour its homogeneity. In the previous periods (1992-1997) even such constitutional guarantees of cooperation between the Government and the President as the requirement of presidential approval for persons nominated for the posts of Ministers of Defence, Foreign Affairs and Home Affairs turned out to be rather a plane of conflict than of accord (Prime Ministers had to leave the personal decisions in this respect to the President to avoid bringing matters to a head).

However, since the executive, as the executive function of the State, is in a way indivisible, no efforts were spared in the course of constitutional work to determine the competencies of these organs as precisely as possible. As we have already mentioned, the general line of this division is based on granting the Government an exclusive right to determine and conduct State policy, with the assumption of governmental competencies wherever such competencies were reserved for other State organs. This is very similar, *toutes proportions gardées*, to the formula that the government governs and the king rules. What should help achieve this goal is a list of competencies and interpretation guidelines, especially in areas where the powers of the President and of the Government converge (particularly defence, foreign policy, State security). The Constitution itself is somewhat useless here and uses vague wording (such as "through" in Article 134.2, "cooperate" in Article 133.5). In such a case either a statute determines the further separation of competencies (the very adoption thereof may provoke disputes between the concerned parties, as it happened in connection with the right to dispose of the army in the course of adopting the 1998 Act on the Deployment or Stay of the Armed Forces Abroad - the problem was which organ is to take the decision and which should make a relevant motion) or this is transferred onto the practical plane (here a competence dispute has already arisen with respect to nominating ambassadors).

As early as in the 1992 Constitutional Law, the institution of the Cabinet Council was introduced into the system of State organs (earlier present in the 1947 Interim Constitution). It is composed of the Council of Ministers presided over by the President, who also convenes it. Although it did not play an important systemic role before, the authors of the current Constitution thought it a useful institution for communication between the President and the Government, providing the President with an opportunity to obtain information and give the Government his opinions about the most important matters of State policy, and also serving as a kind of neutral and yet formal plane of possible cooperation between both parts of the executive. But to prevent transforming the Cabinet Council into an instrument "dispossessing" the Government of its independence in determining and conducting State policy and, this way, allowing the Presi-

dent to take over the Government's functions or simply to subordinate or steer it, the Constitution stipulates that the Cabinet Council does not possess the same competence as the Council of Ministers, which means that it cannot perform the constitutional tasks of the Government.

The beginning of the term of office of the Government of Jerzy Buzek saw an almost perfect occasion for this constitutional idea to materialize. At that time the Council of Ministers decided that a representative of the President would not be invited to regularly participate in meetings of the Government (which traditionally was the case). Breaking this form of working contacts prompted President Kwaśniewski to convene the Cabinet Council. This was not the beginning of a regular practice, but the President has convened the Cabinet Council several times, also during the term of office of a leftist Government (not in opposition to the President), which demonstrates that it is not a completely redundant institution.

It seems obvious that the relations between the President and the Government will be - on the ground of the constitutional conception - different, depending on the political options of the President and the Government (the actual political disengagement of the President, particularly one coming from universal election, depends on non-legal factors). The relatively short constitutional practice in this respect does not yet allow us to discover any regularities today. More experience is probably necessary, especially as regards the function of the Prime Minister, in order to determine how much the system created by the current Polish Constitution can evolve towards the chancellor's system. And how much need for such evolution will the political system show.

The remarks presented here do not exhaust the issue stated in the title and do not deal with all the questions which should complement the reflections about the constitutional conception of executive power, such as the position and competence of the Prime Minister or instruments of the so-called rationalization of parliamentarism, which modify - in comparison to the traditional parliamentary system - the relations between the Government and the Sejm.

But even this brief analysis allows us to state, in conclusion, that the current Polish Constitution, even with its complicated approach to executive power, is prepared for coexistence, within the dualist executive, of various political options, thanks to which it will not lose its regulatory capability even in a situation of the strongest opposition between these two.