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The Development of Relations between the President of the Republic of Poland and the Council of Ministers under the Rule of the Constitution of the Polish Republic of 1997

1. Introduction: the normative approach and its axiology

1.1

The Constitution of the Republic of Poland, enacted by the National Assembly on 2 April 1997 and approved in a nationwide referendum on 25 May 1997, entered into force on 17 October 1997. Over the 25 years of its implementation - with only marginal and minor amendments - it has shaped and consolidated the systemic practice, with a considerable amplitude of changes in political and party preferences of the electorate and in the composition of political groupings represented in the Sejm and Senate. There were systemic transformations of the systemic and geopolitical conditions for the functioning of the institutions of the President of the Republic as well as the Council of Ministers. The collapse of the Soviet empire, the rebirth of independent Lithuania, Latvia and Estonia and the formation of a state-independent Ukraine as the eastern neighbours of the Republic of Poland took place. Poland's accession to the North Atlantic Treaty Organisation (12 March 1999) set new defence policy azimuths. Poland's accession to the European Union, on 1 May 2004, brought about momentous systemic, legal and economic consequences.

The departure from the command economy and the domination of its state sector with the simultaneous formation of the foundations of a market economy

with the privatisation of the vast majority of state enterprises redefined the functions of the Council of Ministers with regard to the economy. It led to the separation in this respect of the administrative and management functions of the Council of Ministers (and ministers in charge of branches of state administration) and the ownership functions performed by the government and government administration. On the other hand, it broadened the scope of regulatory and indirect influences of state bodies: the government and government administration bodies on the economy.

These changes, occurring successively, determined a quarter-century (1997-2022) of transformations in the activities of both the President of the Republic of Poland and the Council of Ministers. They continue to have a bearing on the shaping of relations between the supreme bodies of executive power indicated here, which determine the actions of the state in external relations and control internal policy and matters of state defence.

1.2

The systemic relations between the supreme bodies of the executive power, i.e. the President of the Republic and the Council of Ministers, have been normalised in Article 10(2) of the Constitution and the provisions of its two chapters: V ('The President of the Republic') and VI ('The Council of Ministers and Government Administration'). The articles: 133(3), 134(2-5), 136, 141(1) and (2), l44(2) and (3) (in Chapter V) and 146 - 155, 157(1) and (2) and 158-162 (in Chapter VI) are of key importance.

Article 10(2) established the principle of dualism of the chief executive bodies[1]. This power was divided between the President of the Republic of Poland (a body elected by universal and direct suffrage) and the Council of Ministers, whose political profile, composition, policy directions and priorities are determined - as a rule - by the majority in the Sejm of the Republic of Poland (elected in separate elections: by universal and direct suffrage). In practice, it is determined by the programmes of government coalition groupings, political decisions of their leaders, proportions of influence and intra coalition agreements.

The separate electoral legitimacy of the person holding the office of President of the Republic of Poland in relation to the "parliamentary" legitimacy of

[1] M. Kruk, *System rządów w Konstytucji RP*, (in:) *Ustrój polityczny Rzeczypospolitej Polskiej w nowej Konstytucji z 2 kwietnia 1997 r.* (edited by W. Skrzydło i R. Mojaka), Lublin 1998; B. Opaliński, *Rozdzielenie kompetencji władzy wykonawczej między Prezydenta RP oraz Radę Ministrów. Na tle Konstytucji Rzeczypospolitej Polskiej z 1997 roku*, Wolters Kluwer Warszawa 2012. It is debatable whether the popularised constitutional designation of this segment of state power as 'executive power' is semantically adequate to the nature of a number of activities of both the President of the Republic of Poland and the Council of Ministers. I write more extensively about these doubts in the article *Władza wykonawcza w Konstytucji RP z 1997 r. (w kręgu wątpień natury semantycznej)*, „Państwo i Prawo" 2018, No. 9, pp. 3-21.

the Council of Ministers means that the assumptions of the system of government describe the likelihood of cohabitation, i.e. parallel functioning of the President of the Republic of Poland and the Council of Ministers with different. or even: clearly competing political orientations. Such a situation had already occurred in Poland earlier, i.e. in the years 1993-1995 [with the "Solidarity" President L. Wałęsa in office and the functioning of the centre-left SLD-PSL(+UP) coalition government].It occurred again in the years 1997-2001 (when J. Buzek's government was in office under the presidency of A. Kwasniewski) and in the years 2007 - 2010 (during the presidency of L. Kaczyński and the first government of the PO/PSL coalition), as well as during the period of several initial months of the government of K. Marcinkiewicz (until 23 December 2005) and in the final months of the government of Prime Minister E. Kopacz (August-November 2015).

The principle of parliamentary system of government adopted in the 1997 Constitution necessitates adjustment of the political profile and composition of the government to the preferences of the parliamentary majority (in the first instance: absolute majority, and in the absence thereof - simple majority). In the latter situation, the political position of the government is weakened and the fate of specific legislative initiatives of the government depends on *ad hoc* majorities created for specific government submissions. This gives rise to the temptation to take measures that have no basis in the form of laws. In addition, it leads to the initiation of undertakings to create extra-budgetary funds and other forms of financing government activities undertaken without a reflection in the budget[2].

The procedure adopted - as exclusive - in Article 158(1) of the Constitution for the declaration of a vote of no confidence in the entire government by the deputies, i.e. the requirement to use a constructive formula for this motion (with the nomination of a new prime minister) excluded the possibility of deconstructing the government without the new - elected by an absolute majority - prime minister undertaking the mission. The requirement to support a motion of censure by an absolute majority of the statutory number of MPs while tying it to the support (in the same vote and with the same majority) of the candidacy of the new prime minister makes it impossible to stop at the mere overthrow of the government. The concept, adopted from 'rationalised' parliamentary systems and from the chancellor system, has proven its effectiveness under the still limited stability of the Polish party system. It served as an effective barrier against easy overthrow of the government under conditions of non-existence of conditions for the formation of a stable governmental alternative. It proved effective in preventing cabinet crises during the entire period of the 1997 Constitution's validity, regardless of which of the political groupings represented in the Sejm formed a parliamentary majority, and which remained in opposition.

On the other hand, it did not prevent the 'deconsolidation' of certain government coalitions, as exemplified by the disintegration of the SLD-PSL coalition

[2] G. Kuca, *Problem deprecjonowania budżetu państwa*, „Państwo i Prawo" 2022, No. 10, pp. 320 et seq.

in March 2003 during the term of L. Miller's cabinet, and recurrent perturbations in the coalition of PiS, Liga Polskich Rodzin and Samoobrona in the final months of the coalition's functioning in 2005-2007 (resulting from the aspirations of the parliamentarily weaker coalition partners). The exclusive application of the constructive vote to the entire Council of Ministers ruled out (and continues to rule out) the chances of a minority parliamentary (more accurately: of the Sejm) opposition taking the helm of government. This was evidenced by several attempts, each time unsuccessful, to force through a motion of no confidence in the Council of Ministers *in corpore* by the parliamentary opposition lacking an absolute majority of the total number of MPs.

On the other hand, the President of the Republic, as confirmed by constitutional practice, does not have the possibility to influence the process of changing the government on his own. He cannot stop the opposition (e.g. by threatening to shorten the terms of the Sejm and Senate, due to constitutional limitations on the use of this instrument) from submitting a motion of censure for the government (given the relatively low threshold of the number of MPs supporting such a motion – at $^{1}/_{10}$ of the total number of MPs). Nor can it refuse to appoint the Council of Ministers formed as a result of the passing of a constructive vote of no confidence in the previous government by an absolute majority of the Sejm, combined with the election of a new prime minister. Of no systemic significance in this context is the President's assessment of the new government's chances of functioning. Of no systemic significance are the President's political-personal preferences and his views on the risks of protecting the interests of the state, safeguarding its security or state sovereignty. The President of the Republic has no effective instruments of influence over the composition and profile of the government and the duration of its functioning that he could use to invoke his constitutional duty to uphold the sovereignty and security of the state, as enshrined in Article 126(2) of the Constitution. The role of the President, seen in terms of the competences conferred upon him, boils down *de facto* to the role of a *sui generis* notary, making an official (formal) registration of changes[3].

The systemic construction of the relations between the President of the Republic, the Council of Ministers and the Sejm as a whole, implemented during the period in which the 1997 Constitution was in force, did not result in an increase in the frequency of changes of government. Rather, these changes resulted from political disagreements between the groupings forming government coalitions, including - judged as excessive - aspirations of coalition partners towards the grouping forming the core of the government coalition. The institution of the constructive vote of no confidence itself fulfilled its stabilising role also in the indicated periods of "cohabitation". At the same time, it excluded any

[3] M. Kruk, *Zakres władzy Prezydenta*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, coll. 1, pp. 187-204.

creative influence of the President of the Republic on the formation of governmental teams and the maintenance of their stability, which was, at the same time, encapsulated in legal forms. A rare but unquestionable example of increased and effective influence of the President of the Republic, helpful in keeping a functioning cabinet *(nota bene* minority) in power, was the refusal of the then President A. Kwaśniewski to accept the resignation of the (second) Belka government submitted to him (of 5 May 2005). In this case, the President made use of his authorisation contained in Article 162(4) of the Constitution), not allowing for a threatening government crisis on the eve of the forthcoming parliamentary elections (in the absence of premises for the formation of another government coalition in the hitherto functioning Sejm)[4].

In doctrinal and constitutional terms, a doubt may be raised as to whether such a systemic positioning of the President and the shaping of his competences in the sphere of government formation and functioning may be deemed optimal in the conditions of potential crises and in a situation of continuing political disunity and inter-party conflicts. Furthermore, one may ask: does it correspond with the adopted mode of filling the office of President of the Republic by universal and direct election? The extension of the President's term of office by one year - as compared to the parliamentary term - was seen as one of the components of his role as a stabiliser of the system of government and political arbiter in the event of political disputes destabilising the position of the government. With the instruments of the President's influence on the formation and maintenance of the government's stability reduced to a minimum, the differentiation of the term of office of the President and the Sejm is of relatively modest significance. It is limited to preventing the inconvenience of the coincidence of the timing of presidential and parliamentary elections and the accumulation of uncertainty about their results at the same time. On the other hand, it is not one of the essential elements of the concept situating the President in the systemic role of a political arbiter and stabiliser of a comprehensively perceived system of government. This concept was abandoned by the legislature under the influence of unfavourable experiences from the presidency of L. Wałęsa, as well as concerns generated in the context of the political provenance of A. Kwaśniewski, after his election to the office of President of the Republic of Poland in 1995. In the present perspective, when the premises of the fears indicated here belong to the distant past, there are reasons to ask: what other considerations actualise and justify the reservation towards the future assignment to the President of the role of mediator and political arbiter in disputes between bodies of the state? It should be noted that such a role would require a different perception of the President's relations with political parties than has been exposed so far, of the mandates and procedure of nominating candidates for the office of the

[4] K. Leszczyńska, *Rządy Rzeczypospolitej Polskiej (1989 – 2005)*, Toruń 2007, pp. 97-109.

President, of the manner in which the election campaign is conducted, and also - of the candidates' personality traits.

1.3

It is worth recalling in this context that in the earlier period of the work of the Constitutional Commission of the National Assembly, the President of the Republic of Poland was not seen as one of the two bodies of the executive power. In the preliminary draft of the Constitution prepared and considered by this Commission, the office of the President of the Republic of Poland was positioned outside the framework of the 'tri-partition of power' formula. As the guarantor of the continuity of state power and the functioning of its constitutionally established structure (and thus the guardian of compliance with the Constitution), the President was to fulfil the role of an arbitrator and mediator in relations between the bodies of the individual (constitutionally separated) authorities. Such a position would give the holder of the office of the President the authority to frequently and fatefully intervene in the shaping of relations between the bodies of the various 'authorities'.

Not without the discernible influence of observations concerning the functioning of the office of the President of the Republic of Poland under the rule of the "Small Constitution": of 1992, and moreover - in view of the concerns of some groupings connected with the person of the holder of the office of President of the Republic of Poland elected in 1995, the Constitutional Committee withdrew from the concept of perceiving the President of the Republic of Poland as an arbitrator and mediator in relations between "authorities". With the intention of clearly narrowing the scope of his influence, it assigned to the President the status of one of the two bodies of the executive power. This new construction was upheld in the final version of the text of the Constitution adopted on 2 April 1997. It was also in this form that it was consolidated in the text passed by the National Assembly on 2 April 1997, and subsequently approved in the constitutional referendum of 25 May 1997.[5]

1.4

The functioning of the two supreme bodies of executive power required the demarcation of competences (scopes of action; types of matters) and powers between the office of the President of the Republic and the Council of Ministers. Article 146(1), (2) and (3) of the Constitution remains the critical norm in this regard. Pursuant to Article 146(1), 'the Council of Ministers conducts the foreign and domestic policy of the Republic of Poland'. The provision situates the Council of Ministers in the role of the body that sets the directions of the state policy

[5] Cf. R. Chruściak, *Prace konstytucyjne w latach 1997 – 2007*. Warszawa 2009, p. 17 et seq.

pursued, and at the same time - directs the implementation of such directed policy and implements this policy through the actions of the government administration subordinate to the Council of Ministers, including the following services: diplomatic and consular[6].

The constitutional legislator decided in Article 146(2) that the Council of Ministers includes "matters of state policy not reserved for other state bodies and local government." Thus, the demarcation of the sphere of jurisdiction of the Council of Ministers refers to the indication of matters assigned to the jurisdiction of the Council of Ministers. It was based on the criterion of subject matter, not - competence. Related to the demarcation of the spheres of affairs (not clear enough, by the way), the task of the constitutional legislator (and the legislature) - but at the same time a separate task - was to assign constitutionally defined competencies to the Council of Ministers. Moreover, the tasks and competencies serving their implementation may for the Council of Ministers arise from international agreements, as well as from agreements on the establishment of international organizations or on accession to such organizations, ratified by the President of the Republic of Poland or approved by way of a nationwide referendum (such as - the referendum on the accession of the Republic of Poland to the European Union).

The provision of Article.146(2) of the Polish Constitution establishes a presumption of jurisdiction in the sphere of executive power in favour of the Council of Ministers. As a consequence of this presumption, the jurisdiction of other bodies (both state and local government) in the sphere of public affairs must result from explicit norms of the applicable law. In cases where there is no attribution of a given category of matters to an authority other than the Council of Ministers, the question of jurisdiction is resolved - at the level of constitutional regulations - by Article 146(2) making the Council of Ministers the competent authority. With regard to the tasks it performs, the Council of Ministers may engage the government administration it directs (under Article 146(3) of the Constitution) to perform them, both at the national and regional (voivodeship) levels.

2. Formation of the system of relations: The President of the Republic - the Council of Ministers (legal-constitutional perspective vs. experience of political practice)

2.1

The abandonment of the role of the President of the Republic as an arbiter in the relations between the bodies of the legislative, executive and judiciary, as

[6] J. Jaskiernia, *Współdziałanie Prezydenta i Rady Ministrów w sferze polityki zagranicznej*, „Państwo i Prawo" 2010, No. 6, pp. 3-18.

well as the equipping of the President with the competencies appropriate to this role, occurred - to a large extent - under the influence of the concerns of a political and situational, and even - personal nature, raised in the course of work on the draft Constitution. Also not without significance were the parliamentary traditions of the Polish system of government and the circumstance that the work on shaping the text of the 1997 Constitution took place in a parliamentary forum (therefore closer to pro-parliamentary sympathies). The aforementioned concerns occurred during the work of the Constitutional Commission of the National Assembly. In the final stage of formulating the text of the Constitution of the Republic of Poland, they were expanded by a thread, related to the election of A. Kwaśniewski for the office of President of the Republic of Poland.

The effect of the rather paradoxical accumulation of the two axiologically and politically divergent concerns, revealed on the two sides of the political spectrum, was the "cramming" of the President of the Republic and the Council of Ministers (along with the government-led government administration) into the tight corset of the bodies of "executive power"[7].

In fact, the powers of both the President of the Republic and the Council of Ministers extend beyond the typical framework of executive power in the strict sense of the term. This is evidenced by the wording of Article 146(1), (3) and (4)(9) and (11) of the Constitution, where reference is made to "conducting foreign and domestic policy," "directing government administration," "exercising general leadership in relations with other states and international organizations," and "exercising general leadership in the field of national defence." The concept of "leadership" indicates unambiguously the decision-making and causal role of the body exercising leadership, and semantically does not correspond to the concept of "executive power."

2.2

While on the normative-competence level the separation of the sovereign powers of the President and the Council of Ministers remains a legislatively feasible task, in political practice the separate realization of the sovereign powers of the President and the government without their interconnection (and even the causal connection of certain initiatives) often becomes dysfunctional. As an example, we can use official actions taken by the President in the RP with a view to ensuring external security and internal security (e.g. appointments regarding the highest command posts in the Armed Forces, which are under the President's authority, made at the request of the Prime Minister and the Minister of National Defence, in another sphere - the introduction by the President of the RP - in the event of a threat to the constitutional system of the state, the

[7] Among other, it was written by J. Ciapała w swej monografii *Prezydent w systemie ustrojowym Polski (1989 – 1997)*, Warszawa 1999.

security of citizens or public order - a state of emergency, which can only occur at the request of the Council of Ministers). Thus, the activities of the Council of Ministers and the President constitute a substantive and functional continuum, with the division into individual activities carried out in accordance with the constitutional and statutory repartition of powers.

2.3

In the sphere of external relations, the function of the government is to conduct foreign policy. This implies the preponderance of the jurisdiction of the Council of Ministers to determine the hierarchy of objectives and to delineate the ways and tools of shaping external relations with other states, as well as - with international organizations. It remains the privilege and constitutional authorization of the President to fulfil the role of the supreme representative of the Republic in external relations (Article 126(1) of the Constitution), but also the guarantor of the sovereignty and security (external and internal) of the state and the inviolability of its territory (Article 126(2)). The functions listed here legitimize the active participation of the President in activities addressed "outside" the state. The President's role as guarantor of the continuity of state power (Article 126(1)) is not without significance. From it must be derived the guarantee of continuity of the basic principles and values that determine the internal policy of the state. This continuity is conditioned by the identity of the state and the Nation as the personal substrate of the state. In interstate relations, it forms the premise of stability and predictability of Polish foreign policy[8].

The years 1995-1997, i.e. the period of formulating the provisions of Chapters V and VI of the Constitution, were characterized by the convergence of the political profile of the presidency with the political profile of the three successive government teams. The need for juridical resolution of conflict situations between the position of the President of the Republic and the policies of the Council of Ministers did not arise during this period. This resulted in the lack of clarification in the text of the 1997 Constitution of the rules for resolving such conflicts. This was one of the reasons why the relationship of the President of the Republic of Poland with the Prime Minister and the Minister of Foreign Affairs was regulated succinctly and only fragmentarily.

In this context, the constitutional norm of Article 133(3), obliging the President of the Republic of Poland to cooperate with the Chairman of the Council of Ministers and "the minister responsible for foreign policy," must be considered general and ambiguous. A doubt arises here: does the constitutionally verbalized obligation refer only to the President's actions that he takes within the framework of the constitutionally enumerated competencies in the sphere of

[8] The issue of the correlation between the predictability of Polish foreign policy and the stability of governments was emphasised by R. Balicki. Cf R. Balicki, *Konstytucyjne uwarunkowania stabilności Rady Ministrów*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny”2018, coll. 1, p. 207.

the state's external relations (assuming that in the remaining sphere the conduct of foreign policy is the responsibility of the Council of Ministers)? Does it refer to all actions of the President of the Republic in external relations, including - to all actions taken in the role of the "highest representative of the Republic", serving - in the opinion of the President - to protect the sovereignty, external security and inviolability of the national territory?

The controversy over the reaction of the Council of Ministers to some of President L. Kaczyński's decisions, such as his organizing the presidents' trip to Georgia during the period of armed conflict with the Russian Federation, or the competence dispute initiated by the Prime Minister (and resolved in 2008 by the CT) over the President's participation in meetings of the European Council) proves the considerable likelihood of divergence between the positions of the two executive bodies.

The scope of the President's discretionary power when ratifying, and especially - when denouncing international agreements, concluded by the government as part of its foreign policy, is not entirely clear. In cases of negative assessment by the President of agreements concluded by the government, the question arises: whether and in what mode the President of the Republic has the right to terminate such an agreement, invoking his constitutional function of protecting the security of the state or protecting the sovereignty of the Republic? The literal wording of Article 133(1)(1) of the Constitution seems to create opportunities for the President of the Republic to make an independent assessment of the effects of a concluded agreement, differing from the position of the Council of Ministers. The President, representing a different point of view, may accept as necessary the termination of an agreement, for example, ratified by a predecessor with a different political pedigree. On the other hand - international agreements serve a specific foreign policy, and the role of the body conducting this policy is assigned by the Constitution to the Council of Ministers. This opens the field for divergent positions and the need for a final decision. The constitutional legislator, regulating quite precisely the procedure and competencies for the conclusion and ratification of international agreements, should have, to avoid competence disputes, clarify the competence and mode of denunciation of previously ratified agreements [9].

2.4

Also, with regard to defence policy, there have been - at the level of constitutional norms - several important doubts. Article 134(1) made the President of the Republic of Poland "the supreme head of the Armed Forces." Parallel to this regulation, Article 146(4)(11) assigned to the Council of Ministers "general lead-

[9] R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warszawa 2000, p. 115 et seq.

ership in the field of national defence." In turn, Article 134(2) stipulates that "in peacetime, the President of the Republic exercises authority over the Armed Forces through the Minister of Defence."

Leaving aside, as a point of order, a certain inconsistency in the constitutional terms for ministers entering into direct relations with the President (evident when juxtaposing the wording of Article 133(3) in fine with the wording of Article 134(2) in fine), two significant interpretive doubts arise when interpreting Article 134, which deals with the President's powers in the defence sphere.

The first of these relates to the relationship between the constitutional concept of "supreme authority" of the President of the Republic of Poland in Article 134(1) and the concept of "general direction" ascribed to the Council of Ministers in Article 146(4)(11). In a situation where it is possible to differentiate the positions of these bodies in the sphere of the defence policy of the Republic of Poland (especially during periods of cohabitation), the demand for cooperation can only remain a "wishful thinking" postulate, albeit unrealistic in the conditions of a dispute over the scope of powers. In this situation, the relationship of the concepts of the "supreme authority" of the President of the Republic of Poland to the "general leadership" of the Council of Ministers in the field of defence, grows to be fundamental. It would be difficult to assume that within the framework of the general leadership of defence matters, exercised by the Council of Ministers, binding instructions would be issued that determine the content of the acts of the President of the Republic of Poland, issued in the exercise of "supreme authority" over the Armed Forces. It is also impossible in the periods of cohabitation to exclude incoherence of government directives. formulated within the framework of "general leadership" in the field of defence with the acts of the President of the Republic for the exercise of "supreme authority" over the Armed Forces. The text of the Constitution does not accommodate rules for resolving potential disputes or specifying a mechanism for harmonizing positions. Meanwhile, the peculiarities of the Armed Forces and the defence sphere require unambiguous yet quick decisions.

The second concern raised relates to the President of the Republic's exercise of "sovereignty over the Armed Forces" in peacetime. The provision of Article 134(2) implies the exercise of this supremacy through the Minister of Defence. This way of realizing the President's supremacy may carry the danger of a conflict between the requirement of loyalty of the Minister of National Defence to the Council of Ministers, of which he is a member, and its "base" in the Polish Parliament, and the Minister's respect for the acts of the President's supremacy. During periods of cohabitation, reconciling political loyalty to the formation that forms the government's base with the minister's loyalty to the President as "supreme head of the Armed Forces" can be a difficult challenge to meet. The constitutional legislator, it seems, has underestimated this difficulty.

The circumstance of deriving the powers of the President of the Republic of Poland from the authority granted to him by the majority of citizen-electors by an act of universal and direct election is not without significance. It would be difficult - without question - to accept the interpretation that the President, so legitimized, is in the exercise of his authority over the Armed Forces absolutely bound by the preferences of the minister through whom he exercises his superior functions. Contradictory to such a position is the constitutional construction under which the constitutional competence of the President of the Republic of Poland is the appointment of the Chief of the General Staff and commanders of the types of troops, as well as the conferral, at the request of the Minister of Defence, of military ranks specified in laws. The inconsistency of the constitutional legislator is the lack of reference, in matters of defence, to the principle of interaction between the President of the Republic of Poland and the Council of Ministers (its President) and the Minister of National Defence (in analogy to the normalization of Article 133(3) with regard to foreign policy)[10].

2.5

The constitutional construction of the repartition of powers and responsibilities for ensuring internal security is not clear enough. The primary role in this regard falls to the Council of Ministers. This follows from Article 146(4)(7) of the Constitution, obliging the Council of Ministers to ensure internal security and public order. The Council of Ministers, directing the government administration and its subordinate services, has an instrumentality capable of protecting public security. In this context, the question arises about the causal capacity of the President of the Republic of Poland to carry out his constitutional function of "upholding state security" (indicated in Article 126(2)).

This question and the doubts that arise in its context are actualized in the context of Article 135 of the Constitution, according to which "the advisory body of the President of the Republic in the field of internal and external security of the Republic is the National Security Council." The principle of a "rational legislature" dictates that the location of this body in the system of constitutional authorities of the state should be treated as an institutional confirmation of the President of the Republic of Poland's performance of real (substantively significant) activities for ensuring security. It is with respect to these that the Security Council performs its advisory functions. The Constitution does not distinguish between the tasks of the President and the Council of Ministers in the sphere of ensuring internal security. It does not specify the instrumentality for fulfilling the President's tasks indicated here and his sovereign powers in this regard. This underdetermination makes it difficult to assess the President's activity and the possible enforcement of his constitutional responsibility.

[10] Cf. A. Bień-Kacała, T. Kacała, *Zwierzchnictwo, kierowanie i dowodzenie w Siłach Zbrojnych na tle regulacji konstytucyjnej*, „Przegląd Sejmowy" 2015, No. 5.

2.6

This question and the doubts that arise from it are actualized in the context of Article 135 of the Constitution, according to which "the advisory body of the President of the Republic of Poland on the internal and external security of the Republic is the National Security Council." The principle of the "rational legislator" dictates that the location of this body in the system of constitutional organs of the state should be treated as an institutional confirmation of the President of the Republic of Poland's performance of real (substantively relevant) security activities. It is with respect to these that the Security Council performs its advisory functions. The Constitution does not differentiate between the tasks of the President and the Council of Ministers in the sphere of ensuring internal security. It does not specify the instrumentality of implementing the President's tasks indicated here and his sovereign powers in this regard. This underdetermination makes it difficult to assess the President's activity and possible enforcement of his constitutional responsibility.

2.7

Constitutional norms in the field of foreign policy are characterized by the already mentioned inconsistency in the norms of competence regarding ratification and denunciation of international agreements. The power to conclude international agreements is an instrument for the government to conduct foreign policy. The competence to ratify international agreements (serving to introduce their provisions into the legal system of the Republic of Poland) was assigned by the legislature to the President of the Republic - the highest representative of the Republic personifying the state. The manner in which the President exercises his authority to ratify and denounce international agreements impinges on the determinants of the government's foreign policy. Indirectly, though significantly, it determines the legal conditions of the policy pursued.

The Constitution differentiates the ratification procedure depending on the matter and rank of the international agreements concluded and proposed for ratification. The five categories of agreements listed in Article 89, paragraph 1, items 1-5 require for their ratification as well as termination by the President of the Republic of Poland the consent of the Sejm and the Senate, expressed in the authorizing law. The intention to submit the other categories of international agreements for ratification is decided by the Council of Ministers. The duty of the Prime Minister is only to notify the Sejm of the intention to submit the agreement for ratification[11].

The Constitution is silent on the subject of requesting the denunciation of both categories of agreements. This generates doubt about the President's de-

[11] A. Jackiewicz, *Miejsce umów międzynarodowych w polskim porządku prawnym*, Repozytorium Uniwersytetu w Białymstoku, pp. 258-260.

cision-making autonomy with regard to the denunciation of ratified international agreements. The questions relate to the issue of: does the denunciation take place each time at the request of the Council of Ministers (on whose behalf the agreement was concluded and covered by a request to the Sejm and Senate for permission to ratify it)? What is the role and forms of action of the Prime Minister in this regard? Should the government's request to terminate the ratified agreement be viewed as a discretionary resignation by the Council of Ministers from using the agreement relevant here as an instrument for implementing the government's foreign policy? In this context, would it be justified to grant the President of the Republic of Poland the right to a discretionary decision to terminate the agreement?

The President's termination of the agreement confirms his willingness to release himself from the obligations contained in the agreement. It signifies a resignation from treating the agreement as useful in the external relations of the Republic of Poland. Therefore, it seems reasonable that the termination of the agreement by the President should occur at the request of the Council of Ministers as the body constitutionally authorized to conduct foreign policy, including: to conclude international agreements. Referring this issue by the provision of Article 89(3) to statutory regulation maintains the dependence of the systemic solution on the position of the Sejm and the Senate, which gives the solutions the value of flexibility (higher than in the case of constitutional regulations), but sacrifices for flexibility the stability of the adopted constructions.

2.8

In the context of the controversy against the background of the consequences of transferring the powers of state authorities "in certain matters" to an international organization or international body, the issue on which the constitutional legislator lacks a full statement is to resolve the doubt: with the requirements of an increased quorum (at least half of the statutory number of members) and a qualified majority in the Sejm and the Senate, would it be permissible to transfer the constitutional powers ("in certain matters") of the President of the Republic of Poland or also the Council of Ministers?

At the heart of the concern raised is whether such a transfer would not destroy or overturn the principals of the constitutional relationship between the President of the Republic of Poland and the Council of Ministers by diminishing or significantly modifying the set of competencies constitutionally assigned to each of these bodies. Although the increased thresholds for the required quorum and qualified majority are intended to prevent the adoption of easy-to-vote but hasty solutions, the fundamental value for preserving the foundations of the system is to maintain the constitutional equilibrium of the competencies of the two bodies of executive power. This issue requires taking into account the fact that the decision-making bodies of the European Union (especially the

Council of the Union) are constructed - predominantly - on the basis of representation of the governments of the member states. The rate of "absorption" of competencies belonging to the Council of Ministers and the likelihood of their assumption by the bodies of the Union seems to prevail over the possibility of transfer (and absorption by the bodies of the Union) of the powers of the President of the Republic of Poland.

Jurisprudential doubts arise: a) to what limits could the Sejm and Senate (by a law enacted under a special procedure) consent to the transfer of the competencies of the Council of Ministers in "certain matters" to an international organization, i.e. cause a limitation to that organization (e.g. the EU) on the scope of the Council of Ministers' conduct of the Republic's foreign and domestic policy? (b) within what limits could the powers of the President of the Republic "in certain matters" to perform his constitutional functions be so transferred? (c) could the President's suspensive veto be applied to laws transferring powers, and is it possible to "overcome" it by a resolution of the Sejm? To sum up: is it possible to modify the framework of the constitutional model of the relations of these bodies, determined by the provisions of an act approved in a national referendum, by means of transferring the powers of the President or the Council of Ministers?

2.9

The political experience of a quarter century (1997-2022) of application of the 1997 Constitution of the Republic of Poland confirms that the predominant political formula of the Council of Ministers has been and remains the coalition formula. In this context, questions will arise: does the constitutional duty of interaction "in the field of foreign policy" of the President of the Republic of Poland with the Prime Minister and the relevant minister apply to the Prime Minister in his role as the body representing the Council of Ministers (directing the work of the Council and determining the means of its implementation of its policies under Article 148 points1,2 and 4 ix *fine*)? Including on the part of the Prime Minister, is it necessary to consult and take into account the position of the entire Council of Ministers as a collegial body, and this in view of the assignment of the function of conducting foreign policy to the Council of Ministers, as such" (Article 146(1) of the Polish Constitution)? Does the duty to "cooperate in the field of foreign policy" (established in Article 133(3)) apply only to the minister in charge of the "foreign policy" department of state administration, or does it also apply to other ministers, insofar as the field of foreign policy includes matters affecting the administrative departments they head (for example, issues of external economic or cultural cooperation)?

2.10

The framing of the responsibilities of both the President and the Council of Ministers for ensuring the security of the state turns out to be not entirely clear.

This concerns, among other things, the regulation of the composition and mode of appointment of the National Security Council (NSC). In view of the assignment to this body of the status of an advisory body to the President and the inclusion in the scope of the advisory function of matters of both internal and external security, leaving open the question of the mode of appointment of the composition of the Council, including: the presence in its composition of government administration bodies responsible for the management of bodies relevant to the indicated ranges of state security must be considered excessive regulatory restraint by the legislator. Unlike with regard to other constitutional bodies of the state (and the NSC is such a body), Article 135 lacks a constitutional reference to the law.

2.11

In the practice of forming coalition governments, which were almost all the cabinets of the period of the 1997 Constitution of the Republic of Poland (with the exception of the government of J. Buzek after the exit of Unia Wolności coalition and the SLD-PSL government after the resignations of its members representing the PSL), the issues of filling the position of Prime Minister and the other members of the composition of this Council are determined by coalition arrangements of the parties (political formations) forming the parliamentary base of the government.

Nevertheless, it is worth pointing out the controversy over the interpretation of the constitutional provisions relating to the procedures for forming a government and the stages of the proceedings for doing so. The provision of Article 154(1), which regulates the so-called basic procedure for appointing the composition of the Council of Ministers, stipulates that the person of the Prime Minister is designated by the President of the Republic of Poland. This regulation does not set any preconditions for such designation. e.g. in the form of a requirement to consult the chairmen of parliamentary clubs functioning in the Sejm or to hold consultations with the Speaker of the Sejm (the body representing the Sejm). Thus, the legislature treated the act of designating the Prime Minister as a classic prerogative of the President of the Republic. It is only at a later stage that the parliamentary formula of government manifests itself in the requirement to obtain a vote of confidence of the Sejm majority.

By obliging the President to appoint within a certain period of time ("within 14 days from the date of the first session of the Sejm or acceptance of the resignation of the previous Council of Ministers") to appoint the Prime Minister along with the other members of the Council of Ministers, the legislator (however tacitly) assumed that the filling of the positions of the other members of the Council of Ministers takes place in accordance with the political-personal proposals of the Prime Minister-designate. There is no juridical requirement for any agreements or even - consultations both with the President of the Republic

of Poland and with the Speaker of the Sejm, who represents the Sejm, or with the chairmen of parliamentary clubs. The formal discretionary nature of the actions of the Prime Minister-designate raises his constitutional status, but at the same time the importance of the act of presidential designation. This act leads directly to the appointment of a person to the position of Prime Minister, moreover, and automatically becomes an authorization for the designee to propose the full composition of the government. With the inability of the President-designate to modify this proposal.

2.12

The practice of coalition agreements between political groupings aspiring to form the Council of Ministers and act as its parliamentary backbone remains outside constitutional and statutory regulation. In this regard, the entire twenty-five-year period of application of the Constitution has remained uniform. The well-established practice of coalition agreements was to agree on a person who was the coalition's candidate for the post of Prime Minister. This practice was abandoned only with regard to the designation of Prime Minister M. Belka in 2004, after the actual cessation of the SLD-PSL coalition and with the appointment of the second government of M. Belka. After the Sejm failed to undertake the procedure for the election of the prime minister and the government, the designation of the person of the prime minister and at the same time his designation for the post was then decided by the President. After the split in the coalition of PIS, LPR and Samoobrona, concluded in 2005, the issue of changes in the composition of the government and the staffing of the positions of deputy prime ministers was not so much the subject of continued agreements, as of an ad hoc compromise forced by situational parliamentary arithmetic. This solution was marked by impermanence. It soon led to an intra-governmental crisis and to an initiative to end the term of the Sejm early.

The President's designation of the Chairman of the Council of Ministers, carried out under the principal procedure for forming the government (under Article 154(1) of the Constitution) and the second reserve procedure (under Article 155(1)), is practically the implementation of coalition arrangements of the groups forming the government, and not - a substantive (and political) decision of the President. Analogous in nature is the selection of the Prime Minister and his proposed members of the Council of Ministers under the first reserve procedure (under Article 155(1) of the Constitution). Thus, the provisions of Articles 154 and 155(1) function as procedural regulations of the mode of appointment of the Council of Ministers; they have a procedural-competitive dimension, not a political-personal one[12].

[12] A. Kulig, *Struktura i kompetencje rządu*, (in:) *Zarys ustroju państwowego Polski* (ed. P. Sarnecki), Kraków 1993, p. 70 et seq.; idem: *Zagadnienia podstawowe formowania rządu*, „Państwo i Prawo" 1994, coll. 1, pp. 54-55.

2.13

With regard to the norms of Article 157, it is reasonable to observe that the Council of Ministers is jointly and severally politically accountable to the Sejm (and thus: not to the Senate). The other members of the Council of Ministers, i.e. the deputy presidents of the Council (deputy prime ministers), ministers and (if appointed in a given composition of the government) the chairmen of statutorily defined committees, are also politically accountable to the Sejm on an individual basis. Article 157(2) of the Constitution establishes the individual responsibility of members of the Council of Ministers for "matters within their competence." Without absorbing too much attention with terminological inaccuracies (Article 149, paragraph 1, sentence 2 refers to "the minister's scope of action"), a semantic doubt can be raised: is this responsibility a "responsibility for matters" or for the implementation of the competencies (acts or omissions) of the members of the government? In addition, the question of the responsibility of deputy prime ministers for actions not assigned to them as corresponding to their own competence and when they act in their stead (under the individual authorization of the Prime Minister) and within the scope of action assigned to the Prime Minister is not clear enough. The charge of understatement can also be brought against the normalization of the individual political responsibility of the chairmen of statutorily defined committees (who by virtue of the relevant may become members of the government). A range of matters is assigned to committees (as collegial bodies). The role (and powers) of their chairmen is not identical in scope to the full spectrum of committee decisions and decisions made. They essentially boil down to chairing the work of the committee and making only certain decisions on matters within the committee's jurisdiction. In these circumstances, it would be inappropriate to hold the committee chairman politically responsible for the entirety of the committee's actions and omissions.

3. Conclusions

3.1.

An analysis of 25 years of practice in applying the provisions of the Constitution of the Republic of 2 April 1997, relating to the President of the Republic of Poland and the Council of Ministers and their mutual relations, allows us to formulate an opinion confirming the functionality of most of the norms. In favour of this assessment is the absence of government crises, resulting directly from the shortcomings of the regulations, and consisting in the inability to form a new government after elections to the Sejm, or in cases of splits in the government coalition. The frequency of government resignations unrelated to the end of the

previous term of the Sejm and the beginning of the new term (updating the constitutional obligation of the government to resign) was relatively low. The President of the Republic of Poland and the Council of Ministers performed their constitutional functions without significant legal impediments both under conditions of coherence of the political profile of the government and the political camp that supported the election of a given President of the Republic, and under conditions of cohabitation.

In the period under review, cohabitation occurred four times. It occurred on a long-term basis in 1997-2001, 2007-2010, while it occurred "occasionally" and temporarily during periods of "diverging" dates for the start of the presidential term and the start or end of the mission of a government with a different party-political pedigree from the presidency. This concerned the periods: a) from 31 October to 23 December 2005 (the final phase of the presidency of A. Kwaśniewski and the first months of K. Marcinkiewicz's government); b) from 6 August to 16 November 2015 (from the assumption of the presidency by A. Duda to the end of the government of E. Kopacz and the swearing-in of the government of B. Szydło).

The functioning of the two bodies subjected to the characterization did not suffer any serious disruptions after the decomposition of the previously concluded government coalitions and after the reaching out to the minority government formula forced by inter-party relations (the government of J. Buzek after Unia Wolności left the coalition, the first and second governments of M. Belka). The constitutional model was preserved and fulfilled the basic rigors of its functionality also after the Smolensk tragedy, i.e. under the conditions of the temporary performance of the functions of the President of the Republic of Poland by the Speaker of the Sejm (until April after 6 August 2010).

3.2.

The positive, in principle, assessment of the functionality of the model of relations between the President of the Republic and the Council of Ministers, adopted on 2 April 1997, does not prevent the indication of significant systemic doubts as to the accuracy of the systemic solutions or as to the jurisprudential quality of the formulation of norms in detailed issues.

These doubts will be ranked according to the gradation of their significance and scope adopted in the study.

3.2.1

The most serious doubt relates to the inconsistency between the political (electoral) legitimacy of the person holding the office of President of the Republic and the President's ability to influence the appointment process and the permanence of the composition of the Council of Ministers. An analogous disproportion applies to the President's influence on the functioning of the Council in

the spheres covered by the joint responsibility of both bodies. Both in the basic procedure of appointing the government and during the application of reserve procedures (Article 154(3); Article 155 of the Constitution), the President's actions are de facto formal. What is also puzzling is the absence of a requirement (used effectively in a number of other countries) for the President to hold consultations with the leaders (representatives) of the political groups represented in the Sejm, held prior to the decision to appoint the Prime Minister and entrust him with the mission of forming a government. The absence of such consultations indirectly undermines the importance of the citizens' vote in parliamentary elections. It fosters the surrender of decisions on the issue of government formation to the narrow leadership of the political parties that have gained representation in the Sejm. It entrenches the conviction, unfavourable from the point of view of democratic standards, that the influence of voters ends at the stage of casting a vote in parliamentary elections.

The legislature - following the unfavourable experience of the period of application of the 1992 Little Constitution - also neglected to require consultations between the President-designate of the Council of Ministers and the President of the Republic on the subject of staffing the heads of administrative departments that "correspond" to the functions of the President of the Republic of Poland (foreign affairs, issues of external and internal security of the state, defence and organization of the Armed Forces). The lack of consultations in the process of forming the Council of Ministers, especially with differences in the political profile of the presidency and the government, may in the future make it difficult for the President to interact with the Prime Minister and with ministers covered by the constitutional procedures for interaction, but representing political options different from the President's.

3.2.2

The way in which the analysed provisions of the Constitution of the Republic of Poland are worded does not allow for a precise demarcation of the scope of responsibility of the President of the Republic of Poland and the scope of responsibility of the Council of Ministers, concerning the sphere of external and internal security of the state. Apart from the general reference to "cooperation of authorities" in the Preamble to the Constitution, there is no order for the President of the Republic of Poland and the Council of Ministers to cooperate in matters of state security and defence (even in the form of a general clause similar to the norm of Article 133(3), referring to the "scope of foreign policy").

3.2.3

A certain shortcoming of the constitutional regulation is also the underdetermination of the procedure and the extent of the discretionary (or lack thereof) actions of the President of the Republic of Poland and the required ac-

tions of the Council of Ministers and its President with regard to the denunciation of ratified international agreements. Denunciation of a ratified international agreement is a directionally opposite (but systemically equivalent) action to the ratification of the agreement. It nullifies the forward-looking effects of its conclusion and ratification. The legal consequences of the termination of an agreement are, by virtue of its application, broader than the direct consequences of ratification. They concern many of the legal and factual consequences of its, in many cases, multi-year existence. Termination of an agreement by the President of the Republic also raises significant repercussions for the government's conduct of policy in the area to which the terminated agreement applied and in its relations with the parties to the terminated agreement. For this reason, the mode of denunciation of international agreements, taking into account their diversity and the differences in the mode of ratification, the conclusion on the issue of denunciation, and the role of the Council of Ministers and its powers in this regard, needs to be clarified.

3.2.4

Noteworthy is the total dependence of the government's permanence on the balance of political forces in the Sejm, and during the operation of a given government - on the outcome of the vote on a constructive vote of no confidence. In this regard, the constitutional legislator accepted the assumption of a reactive role for the President. The President was not equipped with any instrument of formal preventive influence that would effectively serve to preserve the cohesion of the government team and survive periodic disputes within the ranks of the government coalition or within the government itself. This is not served by the adopted formula of the Cabinet Council, which is limited - in principle - to the mutual exchange of information, without any repercussions on the functioning of the government.

The centre of gravity in protecting the sustainability of government teams therefore lies in the requirements:

a) that a vote of no confidence in the government be formulated as a constructive vote only;
b) approval of the motion for a constructive vote by an absolute majority of deputies.

3.2.5

The constitutional practice of 1997-2022 did not provide examples of the enforcement of individual constitutional responsibility of members of the Council of Ministers. For this reason, it is not possible to make an empirically verified assessment of the potential role of the President in enforcing the constitutional responsibility of members of the Council of Ministers, including: initiating proceedings before the State Tribunal. The intensity of the involvement of the Pres-

ident's authority, the type and scope of the allegations raised and the consistency in supporting them during the course of the proceedings could, potentially, specify the relationship between the President and individual members of the Council of Ministers.

3.2.6

Wider consideration should be given to the interpretation and evaluation of the constitutional regulations on the countersigning by the Prime Minister of the official acts of the President of the Republic of Poland in terms of Article 144 (especially: paragraph 2) of the Constitution of the Republic of 1997. This issue deserves a separate and extensive study using an overview of practice and the achievements of the existing literature[13]. In this regard, a comparative consideration of the different solutions in countries with similar (but not identical) regulations of the dualistic model of executive power and different practice is also justified. Particularly interesting and useful seem to be the studies devoted to the countersignature of the acts of the President of the Czech Republic and the Slovak Republic; reflected in valuable and instructive system studies, including in the Polish literature.[14]. Thus, the comparative approach remains all the more useful, especially in the context of research on the Polish, Czech and Slovak constitutional and political systems.

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Kształtowanie się relacji pomiędzy Prezydentem a Radą Ministrów pod rządami Konstytucji RP z 1997 r.

Streszczenie

Ustanowiona w Konstytucji RP z 1997 r. zasada dualizmu władzy wykonawczej, tj. podzielenia właściwości oraz kompetencji w obrębie egzekutywy pomiędzy Prezydenta Rzeczypospolitej a Radę Ministrów, została uzupełniona o domniemanie właściwości Rady Ministrów w sprawach niezastrzeżonych na rzecz innych organów. Konstytucja zastrzegła na rzecz Rady Ministrów prowadzenie polityki wewnętrznej i zagranicznej państwa, ogólne kierownictwo w sferze stosunków zewnętrznych i obronności kraju oraz kierowanie administracją rządową. Kompetencje Prezydenta w sferze stosunków zewnętrznych zostały ograniczone postanowieniami Konstytucji i ustaw, a nadto wymogiem współdziałania z Prezesem Rady Ministrów i ministrem właściwym ds. zagranicznych. Przysługujące mu prawo legacji czynnej zostało uzależnione od inicjatywy Prezesa Rady Ministrów (nadto kontrasygnującego akty urzędowe Prezydenta). O ile w odniesieniu do ratyfikowania umów międzynarodowych rozgraniczenie kompetencji organów jest dość czytelne, to na tle kompetencji do wypowiadania umów ratyfikowanych pojawia się szereg wątpliwości. Dotyczą one także relacji pomiędzy rolą Prezydenta jako najwyższego zwierzchnika Sił Zbrojnych a sprawowaniem przez rząd ogólnego kierownictwa Rady Ministrów w dziedzinie obronności kraju, uprawnień w zakresie zapewniania bezpieczeństwa wewnętrznego oraz obsady stanowiska Naczelnego Dowódcy Sił Zbrojnych i składu Rady Bezpieczeństwa Narodowego.

Słowa kluczowe: bezpieczeństwo wewnętrzne, bezpieczeństwo zewnętrzne, domniemanie właściwości, dualizm egzekutywy, kompetencje, kontrasygnata, obrona narodowa, Prezydent Rzeczypospolitej, Rada Ministrów, ratyfikacja umowy, Siły Zbrojne, sprawy zagraniczne, wypowiedzenie umowy.