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PREVENTIVE CONTROL OF THE CONSTITUTIONALITY OF LAWS FROM 1997 TO 2020 – A COMPARATIVE ANALYSIS

Abstract

The President of the Republic of Poland, by virtue of Article 122(3) of the Constitution of the Republic of Poland of 2 April 1997, has the exclusive competence to initiate preventive control of regulations before the Constitutional Tribunal aimed at examining their constitutionality. The essence of this action is to seek to check those regulations that raise doubts in the President's mind as to their compatibility with the Constitution. Legal regulations concerning the procedure for removing inconsistencies are set out both in the Constitution of the Republic of Poland and in the Regulations of the Sejm. This article will present an analysis of practice within the framework of the examined issue.

Keywords: Sejm and Senate, Speaker of the Sejm, Constitutional Court, non-compliance, rules of procedure of the Sejm

Introduction

The empowerment of the President, regulated by Article 122 Paragraph 3[1] of the Constitution, to submit an application to the Constitutional Tribunal concerning the compliance of such an act with the Constitution, prior to signing it, is the first step initiating one of the two types of preventive control of the constitutionality of law indicated in the Basic Law. The second type of control, enshrined in Article 133 of the Consti-

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[1] The Constitution of the Republic of Poland of April 2, 1997 (Dz.U. 1997, No. 78, item. 483).

tution, is directed at the control of international agreements prior to their ratification. In both cases, the President is the only body with the right to initiate proceedings before the Constitutional Tribunal. At this point it is worth noting two meanings of granting the head of state the right to initiate preventive control of the constitutionality of laws. These will be the systemic significance and the political significance[2]. With regard to the former, representatives of the doctrine have stressed that the granting of this type of competence to the head of state is closely related to the task of this organ expressed by the legislator in Article 126(2) of the Constitution, consisting in ensuring the observance of the Constitution[3]. Some authors, however, place more emphasis on the second – political significance of initiating preventive control of the constitutionality of laws. For example, one may present here the position expressed by J. Ciemieniewski, who indicates that the initiation of preventive control by the President "always evokes (...) a state of certain tension in relations between the Parliament and the government and the parliamentary majority"[4].

Views of doctrine representatives on the removal of incompatibilities

As for the scrutiny, which is carried out by the body of the legislative power - the parliament, it is generally carried out during the parliamentary work on the bill. It is worth emphasising that in practice, the assessment of the constitutionality of the created law also takes place at the stage that precedes the of official submission of the bill in the form of various instruments that occur as part of the drafting procedure. Parliamentary scrutiny in the case of states with a bicameral parliamentary structure may also take place after the law has been passed – during the work carried out by members of the Second Chamber[5].

[2] P. Chybalski, *Komentarz do art. 122*, [in:] *Konstytucja RP. Komentarz*, *Tom II. Komentarz. Art. 87-243*, eds. M. Safjan, L. Bosek, Warszawa 2016, p. 527.

[3] B. Opaliński, *Rola Prezydenta Rzeczypospolitej Polskiej w procesie stanowienia ustaw na tle praktyki ustrojowej Konstytucji III RP*, Warszawa 2014, p. 232; P. Sarnecki, *Prezydent Rzeczypospolitej Polskiej*, Kraków 2000, p. 86.

[4] J. Ciemniewski, *Badanie zgodności ustaw z konstytucją w procesie legislacyjnym*, [in:] *Tryb ustawodawczy a jakość prawa,* ed. J. Wawrzyniak, Warszawa 2005, pp. 227–231. This position is also supported by other representatives of the doctrine see for example. W. Brzozowski, *Prawne relacje Prezydenta RP z Trybunałem Konstytucyjnym*, [in:] *Instytucja prezydenta. Zagadnienia teorii i praktyki na tle doświadczeń polskich oraz wybranych państw obcych*, eds. T. Mołdawa, J. Szymanek, Warszawa 2010, p. 22.

[5] A. Rytel-Warzocha, *Prewencyjna kontrola konstytucyjności prawa w Polsce na tle państw europejskich*, Gdańsk 2019, pp. 42-43.

With regard to the control exercised by the specialised constitutional court, it should be emphasised that the moments at which it is exercised may vary. The first case of exercising this type of control may take place prior to the enactment of a normative act, as part of the stage of parliamentary work. In this situation, the object of control is the draft of such a normative act. The second possibility is to control an act which has already been enacted by a body authorised to do so. As far as statutes are concerned, this body will obviously be the parliament, but this takes place before any action is taken by another legally authorised body. The actions in question are those that are necessary for the act to enter into force, such as promulgation or approval. Another case refers to the situation where the object of preventive control is an act that has been finally adopted and promulgated, but which has not yet entered into force, for example because it has not been properly promulgated[6].

This article seeks to answer the following research questions: 1) How does the problem of cohabitation affect the president's decision to direct requests to check the constitutionality of laws? 2) How often in constitutional practice do presidents make use of consequential review? The following research methods were used in this article: the method of analogy and the method of institutional-legal analysis. The first of the above-mentioned methods made it possible to make a comparison of the actions taken by individual presidents in terms of directing requests for examination of the constitutionalist of laws. The application of the second method, in turn, resulted from the need to interpret the existing regulations in terms of removing incompatibilities and clarifying the problem of preventive control of the constitutionalists of laws[7].

Regardless of whether scrutiny takes place during the stage of proceedings with a bill or takes place after its enactment, but before its promulgation, it is assumed that it takes place during the lawmaking (creation) process, broadly understood. Adopting such an approach thus implies that the process of lawmaking will not only be understood in its narrow sense, i.e. 'a set of consecutive conventional actions and only conventionally competent state bodies' [8]. The essence is that in the case of laws, this process starts with the submission of a draft law and ends with its adoption as a result of a vote on it. On the other hand, in broad

[6] L. Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej*, Warszawa 1987, p. 226.

[7] A. Pięta-Szawara, *Podstawowe metody i techniki w badaniach politologicznych*, [in:] *Podstawowe kategorie badawcze w nauce o polityce*, ed. P. Maj, Rzeszów 2013, pp. 145–146.

[8] A. Michalska, S. Wronkowska, *Zasady tworzenia prawa*, Poznań 1983, p. 19.

terms, the legislative process also includes the so-called preparatory works, i.e. the remaining activities that precede the formal submission of the bill, as well as those that take place after the formal enactment of the given law by the parliament, which are necessary for the law to become binding[9]. It is worth noting that, given this kind of framing, the parliamentary mechanisms of preventive control and those carried out by an extraparliamentary body prior to the entry into force of a law to control its constitutionality happen to be regarded as part of the legislative procedure framed in a broad way. At this point, it is worth recalling the position presented by J. Repel. This author emphasised that the prior control of the constitutionality of a law, which takes place at the stage of the bill or after its enactment, however before the promulgation stage, is characterised by the value of a 'separate stage of the legislative process'[10].

The moment at which preventive control of constitutionality of the law is exercised constitutes the fundamental criterion, which makes it possible to distinguish such control. In turn, the determination of the time framework in which control is exercised by an appropriate body authorised to exercise it, makes it possible to distinguish two forms of control over the constitutionality of the law. Preventive, prior control (*ex-ante, a priori*) and repressive, subsequent control (*ex post, a posteriori*) may thus be distinguished[11]. In order for this preventive control to achieve its objective, it is crucial that it is carried out prior to the entry into force of the normative act, i.e. prior to the moment when the legal norms contained therein become part of the legal system in force. Such a situation may occur at the moment of publication of this act (in the relevant official gazette), or at any other time that results from the provisions of the law in force or from this act[12].

As regards the issue of the subject of control initiated by the President, it needs to be mentioned that despite the fact that the legislator in Article 122 Paragraph 3 of the Constitution included the expression "a motion concerning the compliance of a law with the Constitution", similarly as in the case of control of a consequential nature, the President

[9] A. Rytel-Warzocha, *op.cit.*, p. 42.

[10] J. Repel, *Kontrola zgodności ustaw z Konstytucją*, [in:] *Kontrola legalności ustawy w Sejmie*, ed. P. Radziewicz, Warszawa 2015, p. 297.

[11] Control of a preventive nature is applied to acts not yet in force. This is the element that distinguishes this type of control from control of a repressive nature, where the object of control is the normative act in force. The object of repressive control may also be a normative act that has been enacted and duly promulgated, but is still in the period of *vacatio legis*.

[12] A. Rytel-Warzocha, *op.cit.*, pp. 41-42.

is competent to challenge the constitutionality of the entire law, but is also authorised to challenge in his motion only selected provisions of such a law. In addition, representatives of the doctrine unanimously indicate as inadmissible the submission by the President to the Constitutional Tribunal of so-called affirmative motions, i.e. motions aimed at confirming by the constitutional court the constitutionality of a given law[13].

In Article 122(3) and (4) of the Constitution, the legislator has regulated in detail the issue of the effects of judgements of the Constitutional Tribunal, which the body has issued in the framework of preventive control. This state of affairs increases the likelihood of interpretation problems arising. Pursuant to Article 122 Paragraph 3, if the Constitutional Tribunal recognises a statute as being in compliance with the Constitution then the President may not refuse to sign that statute. At the same time, this situation excludes the possibility of exercising the power to veto a law. In turn, in Paragraph 4 of Article 122, the legislator prohibits the President from signing a statute which has been deemed unconstitutional in accordance with a decision of the Tribunal. However, the second sentence of this provision defines special cases. It is thus about situations when it is possible to sign such a law, which, as the practice so far shows, are predominant. Namely, the President may sign a law in which the unconstitutionality concerns only selected provisions of the law[14]. As R. Kierończyk points out, when introducing such a regulation, the legislator intended to prevent a situation in which a passed law would be "wasted"[15]. Pursuant to Article 122(4), what will happen to a law negatively assessed by the Constitutional Tribunal depends on whether it finds that the challenged provisions are 'inextricably linked to the whole law'. If the Court finds that they are inextricably linked to the whole law the effect will be the demise of such a law. If the opposite is the case, it results in the President being entitled to choose between two possible procedural solutions. These are: (1) signing the law with disregard and (2) referring the law to the Sejm to remove the inconsistency. The provision under scrutiny requires the President to consult the Speaker of the Sejm on the matter. This obviously refers to the choice of one of the above-mentioned options, it being undisputed that this opinion is a non-binding opinion. The Rules of Procedure of the Sejm, and strictly speaking Article 57, contain a detailed procedure concerning the preparation

[13] P. Chybalski, *op.cit.*, p. 529; See also: M. Mistygacz, *Prewencyjna kontrola*, „Kontrola Państwowa", 2011, No. 3, p. 30.

[14] P. Chybalski, *op.cit.*, p. 531.

[15] R. Kierończyk, *Regulacja instytucji Prezydenta w nowej Konstytucji RP*, [in:] *Wybrane zagadnienia nowej Konstytucji*, ed. A. Szmyt, „Gdańskie Studia Prawnicze", 1998, t. III, pp. 180-181.

of this opinion by the Speaker of the Sejm. The basis in this case is the position of the committees which dealt with consideration of the bill in question at the stage preceding its adoption by the first chamber of the Parliament. Nevertheless, it is indisputable that the Speaker of the Sejm is not obliged to share the position presented by the committees on this issue. The reason for this is indicated in Article 122(4), namely that the issuance of an opinion by the Speaker of the Sejm is a constitutional, independent competence granted to that body[16].

Lech Garlicki points out that the return of a law to the Sejm by the President is, according to Article 122(4) of the Constitution, only to 'remove inconsistencies' with the Constitution that have been found by the Constitutional Court. The author explains that in the procedure we are analysing, 'no other amendments may be made to the law'. Amendments made to the law, must be within the existing subject scope of the law, in other words, they cannot go beyond the existing subject scope. Nevertheless, at this point it is worth noting that the removal of inconsistencies may also include other provisions of the Act, with the condition that they are in direct relation to the provision that the Constitutional Tribunal found to be inconsistent with the Constitution (at the same time these provisions were not subject to challenge by the President in his motion), it is also permissible to make necessary amendments of an editorial nature[17].

The provisions contained in the Rules of Procedure of the Sejm – Article 58 and subsequent articles are a concretisation of Article 122 of the Constitution, or more precisely the second sentence of this provision, which entitles the President to return a bill to the First Chamber of Parliament in order to remove the inconsistency with the Constitution previously found by the Constitutional Tribunal (additionally in a situation where this body has not ruled that these provisions are ‘inseparable from the entire law'). The Constitutional legislator used a rather laconic formulation in Art. 122, 'in order to remove inconsistencies’, without specifying the regulations which would indicate the scope of regulatory discretion at this stage of the proceedings or those which would standardise parliamentary procedure. Pursuant to the wording of Art. 58 of the Rules of Procedure of the Sejm, the notion of removing inconsistencies when a bill is returned to the Sejm by the President is the enactment of appro-

[16] P. Chybalski, *op.cit.*, pp. 531-532; See also: R. Piotrowski, *Opinia w sprawie usunięcia niezgodności z Konstytucją RP w ustawie z dnia 5 listopada 2009r. o spółdzielczych kasach oszczędnościowo – kredytowych* (druk senacki nr 129), 2012, p. 3 and next.

[17] L. Garlicki, *Uwagi do art. 122 Konstytucji*, [in:] *Konstytucja RP. Komentarz*, t. II, ed. L. Garlicki, Warszawa 2001, p. 27.

priate amendments to provisions deemed unconstitutional by the Tribunal, while retaining their existing subject matter[18].

The President of the Republic of Poland, acting pursuant to Article 122 clause 4 of the Constitution, returns a statute to the Sejm with a view to removing the inconsistency. This action may not manifest itself in making a preventive derogation (resulting from a ruling issued by the Constitutional Tribunal) effective, in other words in the repeal of unconstitutional provisions. It should only consist in introducing amendments to the law in the area specified in the judgment of the Constitutional Tribunal. As mentioned earlier, the President consults with the Speaker of the Sejm before returning a law to the First Chamber of Parliament. The action of the head of state is aimed at determining whether it is possible to remove the inconsistency, the essence of which is to amend the law, not to cause the repeal of unconstitutional but not yet binding (non-binding) provisions[19].

Systemic practice

The possibility for the President to refer legislation to the Constitutional Tribunal is less frequently used in Polish constitutional practice than the use of the legislative veto, as indicated by available statistics[20].

The decision to refer a law to the Constitutional Court also has a different effect than the decision to veto a law. The timing of the President's decision to examine the constitutionality of legislation is also important. Referring a law to the Constitutional Court before signing it delays its entry into force, which has political consequences. The situation is different in the case of consequential scrutiny, where the conformity of regulations is already examined while they are already in force.

The data presented in the table shows that the highest number of applications for the examination of the constitutionality of laws was submitted by Lech Kaczyński, who held the office of the President of the Republic of Poland in the years 2005–2010. The President has the exclusive competence to conduct preventive control, which is stipulated in Article 122(3) of the Constitution of the Republic of Poland and results

[18] K. Wojtyczek, *Komentarz do art. 58*, [in:] *Komentarz do Regulaminu Sejmu Rzeczypospolitej Polskiej*, Warszawa 2018, p. 356 and next.

[19] R. Piotrowski, *op.cit.*, p. 5.

[20] *Udział prezydenta w procesie legislacyjnym w latach 1989-2020*, Oficjalna strona Prezydenta Rzeczypospolitej Polskiej, https://www.prezydent.pl (01.07.2022).

from the tasks set before him, which is manifested by "ensuring compliance with the Constitution"[21].

Table 1. Requests to the Constitutional Court to control the constitutionality of legislation by the Presidents of the Republic of Poland

Name of President	Years	Number of cases referred to TK	Number of requests for follow-up audits
Aleksander Kwaśniewski	1997–2000	10	0
Aleksander Kwaśniewski	2000–2005	12	0
Lech Kaczyński	2005–2010	19	2
Bronisław Komorowski	2010–2015	14	7
Andrzej Duda	2015–2020	10	3

Source: Own compilation based on: https://www.prezydent.pl.

The list of laws referred to the TK includes both requests for preventive and follow-up control, but it should be emphasised that presidents more often turn to preventive control of legislation. Characteristic in this respect was the presidency of Bronisław Komorowski, who addressed 7 applications for follow-up control. The issue of requesting an examination of the constitutionality of legislation under the various modes is an interesting one, in relation to which the TK has expressed its position in the past. In the judgment of 20th November 2002, ref. K 41/02, it was emphasised: "Well, when assessing the constitutionality of a law already in force, the Court has at its disposal not only its text, but also information on its functioning in practice; often it is only the practice of application of a normative act that reveals its inconsistency with the Constitution, especially when, as a result of the ambiguity of a provision, there are significant discrepancies in its interpretation. In exercising preventive control, the Court has no knowledge of the effects of the application of the law"[22].

Relevant to the study of the problem is the political context, where coalition conditions, the political environment of the president and the relationship between the legislature and the executive must be taken into account. The presidency of L. Kaczyński is an example of the impact of these determinants. During the first two years of L. Kaczyński's presidency, Poland was governed by a coalition of Law and Justice (PiS), League of Polish Families (LPR) and Self-Defence. The then president came from the Law

[21] P. Chybalski, *op. cit*., p. 527.

[22] Wyrok z dnia 20 listopada 2002 r. sygn. akt K 41/02.

and Justice (PiS) milieu; remarkably, during the rule of this party and its coalition partners (2005-2007), he did not refer any legislation to the Constitutional Tribunal. After the early elections in 2007, a change took place, the elections were won by the Civic Platform (PO), which, together with the Polish People's Party (PSL), formed a joint government[23].

Since then, a breakthrough in the approach of L. Kaczyński, who after the change of power submitted 19 motions to the TC to examine the constitutionality of legislation. On the basis of the available information and the analysis conducted, it can be seen that in the conditions of cohabitation, the activity of the president in submitting motions to the TK is greater, as exemplified by the presidency of L. Kaczyński. It should also be noted that other presidents included in this list also submitted such motions, despite the fact that they came from the same environment as those in power[24].

Significant for this analysis is the presidency of B. Komorowski, who came from the same PO political environment that formed the government with the PSL in 2011-2015. The then president referred 14 motions to the Constitutional Court, but importantly, some of the provisions were already examined by the Constitutional Court after B. Komorowski signed the laws, as exemplified by the provisions of the Act of 19 April 2013 amending the Act on cooperative savings and credit unions and some other acts as well as the Act of 28 June 2012 on repayment of certain unsatisfied receivables of entrepreneurs resulting from the implementation of awarded public contracts[25].

In the face of such an approach, divergences arise, as evidenced for example by the position of the Constitutional Tribunal presented earlier, but also of researchers of the problem who perceive a dissonance towards treating the president as a guardian of the constitutionality of the law as expressed by Piotr Chybalski. The problem of such an approach stems from the acceptance of the validity of laws that at the same time become subject to doubt, which changes the role of the President, who is supposed to watch over the observance of the Constitution. In the Third Republic, such an attitude did not become the norm, it was only a characteristic element of B. Komorowski's presidency[26].

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[23] P. Borowiec, *Uwarunkowania, przebieg i wyniki wyborów parlamentarnych w 2007 roku*, [in:] *Wybory parlamentarne 2007: media w kampanii wyborczej*, ed. K Pokorna-Ignatowicz, Kraków 2008, pp. 44-45.

[24] *Archiwum Lecha Kaczyńskiego*, Oficjalna strona Prezydenta Rzeczypospolitej Polskiej, https://www.prezydent.pl (01.07.2022).

[25] *Prezydent podpisał ustawę i kieruje ją do TK*, Oficjalna strona Prezydenta Rzeczypospolitej Polskiej, https://www.prezydent.pl (01.07.2022).

[26] *Archiwum Bronisława Komorowskiego*, Oficjalna strona Prezydenta Rzeczypospolitej Polskiej, https://www.prezydent.pl (01.07.2022).

Conclusion

The subject matter undertaken in this research article prompts several reflections and answers to the research questions posed. Firstly, on the example of the presidency of L. Kaczyński's presidency, it can be observed that the problem of coabitism influences the number of undertaken motions to examine the constitutionality of laws, which was manifested by the highest number of laws referred to the Constitutional Tribunal. In this case, there is also a visible connection with the number of legislative vetoes, of which 18 were recorded during L. Kaczyński's presidency. In the case of the other presidencies, the problem of cohabitation did not appear, which is also reflected in the smaller number of motions referred to the TK. Secondly, consequential control is a mechanism used in the Polish constitutional practice, while the analysis shows that presidents made more frequent use of preventive legislative control.

Requesting a review of the constitutionality of laws can also be an element of friction between politicians, a well-known competence dispute from L. Kaczyński's presidency, when the subject of disagreement was who was to represent Poland at the Brussels summit scheduled for 15-16th October 2008 . The matter was taken up by the Constitutional Tribunal at the request of the Prime Minister, which ruled that the President may take part in EU summits if he deems it necessary, but that he should cooperate with the Prime Minister. The Court pointed out that it is the Head of Government who leads the delegation[27].

Undoubtedly, the President, through his powers under Article 122(3) of the Constitution, can influence government policy. Actions related to the preventive referral of a law to the TC for examination of its constitutionality delay the entry into force of the law and sometimes cause it not to enter into force. Well, the fate of legislation should not become a subject of political friction, as the President should put himself first in ensuring compliance with the Constitution. However, it should not be forgotten that persons holding the office of the president come from certain political backgrounds, which have their own views on certain issues, which may influence the decision of the head of state.

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Prewencyjna kontrola konstytucyjności ustaw w latach 1997–2020 – analiza porównawcza

Streszczenie

Prezydent RP na mocy art. 122 Konstytucji RP z 2 kwietnia 1997 r. posiada wyłączną kompetencję do zainicjowania kontroli prewencyjnej przepisów ustawy przed Trybunałem Konstytucyjnym, mającej na celu zbadanie ich konstytucyjności. Istotą tego

działania jest dążenie do zbadania tych regulacji, które wzbudzają wątpliwości głowy państwa w zakresie ich zgodności z ustawą zasadniczą. Uregulowania prawne dotyczące procedury usunięcia niezgodności określone zostały zarówno w Konstytucji RP, jak i w Regulaminie Sejmu. W niniejszym artykule przedstawiona zostanie analiza praktyki ustrojowej w ramach badanego zagadnienia.

Słowa kluczowe: Sejm i Senat, marszałek Sejmu, Trybunał Konstytucyjny, niezgodność, regulamin Sejmu