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Constitutional Moment and the Polish Constitutional Crisis 2015–2018 (a few Critical Remarks)

1. In the middle of the Polish constitutional 2015–2018¹ crisis,² referenc-
es to a ‘constitutional moment’ concept had suddenly and unexpectedly

1 See more about the crisis: W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, “Sydney Law School Research Paper” 2018, Vol. 18/1; W. Sadurski, *Polish Constitutional Tribunal under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enable*, “Hague Journal on the Rule Law” 2018; A. Chmielarz-Grochal, J. Sułkowski, *Appointment of Judges to the Constitutional Tribunal in 2015 as the Trigger Point for a Deep Constitutional Crisis in Poland*, “Przegląd Konstytucyjny” 2018, nr 2, p. 93–99; J. Zajadło, *Constitution-hostile Interpretation*, “Przegląd Konstytucyjny” 2018, nr 2, p. 8 ff.; T.T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, “Review of Central and East European Law” 2018, Vol. 43/2, p. 116–173; M. Wyrzykowski, *Antigone in Warsaw*, in: *Human Rights in Contemporary World. Essays in Honour of Professor Leszek Garlicki*, ed. M. Zubik, Warsaw 2017, p. 372–375; L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland?)*, in: *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold*, ed. A. Szmyt, B. Banaszak, Gdańsk 2016, p. 63–79; M. Wyrzykowski, *Bypassing the Constitution or Changing the Constitutional Order outside the Constitution*, in: *Transformation of Law Systems in Central, Eastern and South-eastern Europe in 1989–2015. Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold*, ed. A. Szmyt, B. Banaszak, Gdańsk 2016, p. 159 ff.; E. Łętowska, A. Wiewiórowska-Domagalska, *A ‘Good’ Change in the Polish Constitutional Tribunal?*, “Osteuropa Recht” 2016, Vol. 1, p. 79 ff. See also M. Bernatt, M. Ziółkowski, *Evasion of Constitution as a Mean of Change of Legal System*, “Washington International Law Journal” 2019 (forthcoming).

2 After the 2015 parliamentary election the right-wing majority became the most important actor on the Polish constitutional stage. During the night sessions of the Parliament, with significant exclusion of the opposition, referring to the Nation’s will and theory of Parliament absolute supremacy, the aforementioned majority adopted a series of acts and statutes aimed at changing scope of competence, procedures applied by and composition of the Tribunal,

appeared in the Polish public and academic debate. It was mentioned in the context of the President of the Republic (hereinafter: the President) efforts to hold a consultative³ referendum on the change of the Constitution of 2 April 1997. Despite the fact that the doubts whether the President had the power to put the question (whether a new constitution should be adopted or the present one amended up) for vote

the Supreme Court and the National Council of Judiciary. For the first time in the history of Poland, the Parliament invalidated the previous Tribunal Judges' election and elected its "own Judges" to the seats already filled. It should be emphasised that all statutes were introduced, proceeded and adopted despite many constitutional doubts and arguments that had been raised by a number of constitutional institutions (such as the Supreme Court and the Polish Ombudsman), the Polish Bar Council and organizations (such as leading NGOs and schools of law). Elected in 2015, the President of the Republic has become an important actor. Before the end of the first year of his term, he refused to appoint the Tribunal Justices that had been constitutionally elected by the previous Parliament, and – at the same time – he appointed three persons (elected by the new Parliament) to Tribunal Judge positions which were not actually vacant. The important role during the crisis was also played by the Government. The Prime Minister refused to publish in the Official Journal the Tribunal judgments on unconstitutionality of selected acts that had been adopted by the Parliament in 2015 and 2016. The Government also supported the parliamentary majority acts against the President of the Supreme Court and questioned legality of this Judge's election. It should be remembered that at the beginning of the crisis the Constitutional Tribunal strongly opposed the parliamentary majority efforts to change constitutional scope by regular statutes. The Tribunal passed then five important judgments on unconstitutionality of statutes adopted by the Parliament in 2015 and 2016. See judgment of the Constitutional Tribunal (hereinafter referred to as: "CT") of 3 December 2015, K 34/15, OTK ZU 2015, No. 11, item 185; judgment of the CT of 9 December 2015, K 35/15, OTK ZU 2015, No. 11, item 186; judgment of the CT of 9 March 2016, K 47/15, OTK ZU 2016, item 2; judgment of the CT of 11 August 2016, K 39/16, OTK ZU 2016, item 71; judgment of the CT of 7 November 2016, K 44/16, OTK ZU 2018, item 33.

- 3 It should be emphasized that no amendment procedure had started that time. The President's initiative had a purely consultative character and it was based on Article 125(1) of the Constitution of 2 April 1997, *Dziennik Ustaw* (Official Journal of Laws of the Republic of Poland, hereinafter referred to as "Dz.U.") 1997, No. 78, item 483, as amended; hereinafter referred to as: "Constitution." According to this provision: nationwide referendum may be held in respect of matters of particular importance to the State. The President has a power to order a referendum with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators. Therefore the President's motion should not be seen as a part of formal procedure of a constitutional change. The Polish constitution system does not recognize any initial referendum or constitutional referendum which are necessary to start an amendment procedure. There is an obligation to organize a referendum in case of introducing changes to selected chapters of the Constitution only. According to the Article 235(6) of the Constitution, in case of amending provisions on general principles, human rights or amending clause, members of Sejm, Senate or President may require an approval voting. The amendment to the Constitution shall be deemed accepted if the majority of voters express support for an amendment.

were raised,⁴ President Andrzej Duda started an extensive information campaign directed at citizens.⁵ It was *inter alia* based on the references to a notion of a ‘constitutional moment.’ One of the presidential Ministers pointed out: ‘we are now in a situation of constitutional moment, and after 20 years of the Constitution being in force, we can see its scope that may be change.’⁶ In the same context, one of the persons involved in the campaign publicly asked whether the time came for a new pact, for new policies and social order, for a ‘constitutional moment.’⁷

Almost at the same time, the term ‘constitutional moment’ was used in an academic debate both on national and European level, in the context of constitutional crisis. On the one hand, a group of Polish constitutional law scholars carried out a major study and survey into the evaluation of the constitutional provisions by the academia.⁸ They asked the Polish constitutional law academics *inter alia* whether at the time there was a constitutional moment in Poland. For the purpose of the survey, the constitutional moment was defined as: real, serious and urgent legislative substantiation for constitution change in order to implement important social or systemic goals.⁹ The great majority of respondents shared a view that 2018 was not a moment for any constitutional change.¹⁰ On the other hand, the term ‘constitutional moment’ was mentioned in the context

4 See M. Matczak, *Why the Announced Constitutional Referendum in Poland is not a Constitutional Referendum after all*, “Verfassungsblog” 2017, Vol. 5/13; M. Steinbeis, “Do not Go. Do not Vote”: An Interview with Wojciech Sadurski, “Verfassungsblog” 2018, Vol. 7/24.

5 See *Flirting with Poxxit? Poland’s President Wants a Referendum on the EU*, “The Economist” of 20 June 2018.

6 Minister Paweł Mucha in Interview with Krzysztof Losz, “Nasz Dziennik” of 2 January 2018.

7 A. Młynarska-Sobaczewska, *Czy to już moment konstytucyjny?*, “Dziennik Gazeta Prawna” of 21 December 2017, p. E3. It was also observed that ‘it would be very difficult to find such a moment in 1997 when the Constitution was adopted [...]. Therefore, it is also hard to judge whether Poles experience a constitutional moment now. However, it seems that the time of current public and general deliberation about the Constitution, may suggests that we are ready to change the established order’ – A. Młynarska-Sobaczewska, *Czy to...*, p. E3. See A. Młynarska-Sobaczewska, *Wokół pojęcia momentu konstytucyjnego*, in: *Dookoła Wojtek... Księga pamiątkowa poświęcona Doktorowi Arturowi Wojciechowi Preisnerowi*, red. R. Balicki, M. Jabłoński, Wrocław 2018, p. 133–143.

8 See more about the results of the survey: M. Florczak-Wątor, M.M. Wiszowaty, P. Radziejwicz, *Ankieta o Konstytucji Rzeczypospolitej Polskiej. Wyniki badań przeprowadzonych wśród przedstawicieli nauki prawa konstytucyjnego w 2017 r.*, “Państwo i Prawo” 2016, nr 6, p. 3 ff.

9 See M. Florczak-Wątor, M.M. Wiszowaty, P. Radziejwicz, *Ankieta...*, p. 16.

10 See M. Florczak-Wątor, M.M. Wiszowaty, P. Radziejwicz, *Ankieta...*, p. 16.

of the debate concerning the rule of law crisis within the European Union. The European Union law scholars observed that:

This term indicates a situation that deeply impacts on the future path of the constitutional order without formally amending it. At issue is whether illiberal democracies become part of the European public order as laid out in Article 2 TEU, or are opposed by it. In any event, the consequences could be truly far-reaching.¹¹

The above mentioned use of the term ‘constitutional moment,’ both in political and academic debates, allows to distinguish common meaning of ‘constitutional moment’ (based on a literal understanding of the words used) from its conventional and academic meaning (based on a theory of constitutional law). In the latter sense, the term ‘constitutional moment’ is mentioned in at least two meanings. Firstly, this term is used in a descriptive way in the context of activation of formal amendment procedure and in order to summarize an assessment of constitution’s capacity to fulfill its functions in a changing society. It requires a confrontation of constitutionalism achievements with a new and important systemic and social problems. In this respect, the ‘constitutional moment’ may be seen as a substantiation for formal constitutional change. It shall be based on a well-developed research, that includes broad evaluation of constitutional court’s case-law, customs of constitutional authorities and academic’s findings. References to the ‘constitutional moment’ in this sense are usually made just before an adoption of a broad or general revision as well as fundamental formal change of a constitution. Secondly, the term ‘constitutional moment’ is commonly used by academics in a descriptive, normative and ‘interpretive’¹² way with direct or indirect references to the widely discussed theory developed by Bruce Ackerman. On the one hand, it describes fundamental transformations of constitutional orders either with a violation of formal constitutional requirements

11 A. von Bogdandy, P. Bogdanowicz, I. Canor, M. Taborowski, M. Schmid, *Guest Editorial: A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines*, “Common Market Law Review” 2018, Vol. 55/4, p. 984.

12 See more about interpretative character of Ackerman’s theory: M. Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, “Case Western Reserve Law Review” 1996, Vol. 46, p. 852–857; B. Ackerman, *Rooted Cosmopolitanism (1994)*, <http://digitalcommons.law.yale.edu/fss_papers/135>.

of change or without such a violation but just outside a constitutional amendment procedure. Such transformations shall be strongly supported by citizens, preceded by long-term deliberations and confirmed by general elections as well as a constitutional case law. On the other hand, the term 'constitutional moment' is used in an interpretive sense in order to provide a sufficient constitutional legitimation for constitutional changes that are later recognized by the citizens, public authorities and judiciary. The Ackerman's theory is primarily based on: dualistic concept of democracy, distinction between ordinary and constitutional legislation, and two-track way in which citizens are involved in a process of constitutional change. One of its key element is the notion of 'higher lawmaking.'

2. Regarding the fact that the direct references to Ackerman's theory were made during the President's information campaign¹³ for consultative referendum in 2018 and taking into account recent modest references made by Polish academics,¹⁴ this article aims to confront fundamental conditions and implications of constitutional moment theory with the Polish constitutional framework. Firstly, I will argue that it may be controversial to refer directly to the constitutional moment in an interpretive sense due to the scope of current Polish constitutional regulation and its historical development. Secondly, I will argue that according to the fundamental findings of Ackerman's theory its application during the constitutional crisis in Poland is also impossible both in a descriptive as well as interpretive sense. With references to Sujit Choudhry's interpretation of Ackerman's higher lawmaking,¹⁵ the article will conclude that Poland may have a constitutional moment (in a descriptive sense only) with the end of constitutional crisis and the need to restore the rule of law.

3. The concept of a constitutional moment is based on a distinction between monistic¹⁶ and dualistic¹⁷ democracy and between sub-constitution-

13 See A. Młynarska-Sobaczewska, *Czy to...*, p. E3.

14 See A. Młynarska-Sobaczewska, *Wokół...*, p. 133–143.

15 See S. Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, "International Journal of Constitutional Law" 2008, Vol. 6/2, p. 193–230.

16 See B. Ackerman, *We the People. Vol. 1. Foundations*, Cambridge (MA) 1995, p. 7–10.

17 See B. Ackerman, *We the People. Vol. 1...*, p. 6, 32–33.

al policies (decisions taken on constitutional basis in order to implement and develop constitutional provisions) and constitutional policies (decisions taken on constitutional amendment provisions or regardless of such procedure of change in order to transform constitutional system).

The conventional approach, widely represented in the history of constitutionalism on both sides of the Atlantic, either completely excludes a parallel exercise of power to constitutional design by sovereign directly (i.e. nation) and sovereign's representatives at the same time under the same constitutional act (stronger claim), or it excludes such a multi-centricity of power to constitutional design except in cases directly enumerated by the constitutional provisions (weaker claim). According to this approach, the constitutional legitimacy and authority is given to the sovereign representatives who won fair elections and who are ready for future evaluation by voters on equal and fair conditions in next general election. The Ackerman's dualistic concept of democracy assumes that at the same time and under the same constitutional provisions, both the representatives elected in a free and fair elections as well as the citizens (indirectly) – under strictly defined circumstances – may exercise power to support or to oppose to a change of constitutional system.¹⁸ This is the case of 'higher lawmaking,' when the presidency or Congress may earn broad popular consent required for fundamental change in the name of *We the People*.¹⁹ Duality presupposes a kind of 'two-track constitutional legislation.' It is important to note that according to Ackerman's concept, the existing citizen movement that supports constitutional transformation is essential.

Therefore, the fundamental difference between dualism and monism lies in different concepts of 'democracy,' 'national sovereignty,' and 'parliamentary sovereignty.' For the purposes of this article, it may be reduced to the question of citizens' participation in constitutional policy: whether the change of a constitution can be made by the sovereign's representatives only according to procedure of change designed for them directly in a written constitution, or whether it is possible for the transformation to take place either as a result of sovereign's representatives or a consequences of citizens involvement. The choice between monism

18 See B. Ackerman, *We the People*. Vol. 1..., p. 6.

19 See B. Ackerman, *We the People*. Vol. 1..., p. 6.

and dualism cannot be reduced only to axiology. It is also determined by history. As B. Ackerman pointed out:

After two centuries of development, America's political identity is at war with the system of constitutional revision left by the Framers. We understand ourselves today as Americans first and Californians second. But the amendment system was written for a people who thought of themselves primarily as New Yorkers or Georgians. We have become a nation-centered People stuck with a state-centered system of formal amendment. This disjunction between state-centered form and nation-centered substance serves as the dynamic force behind the living Constitution. Although Americans may worship the text, they have not allowed it to stand in the way of their rising national consciousness. Since the Civil War, they have given decisive and self-conscious support to national politicians and their judicial appointees as they have repeatedly adapted state-centered institutions, and constitutional texts, to express national purposes. The great challenge for constitutional law is to develop historically sensitive categories for understanding these developments.²⁰

The constitutional moment theory is replay for this constitutional challenge.

It is based on Ackerman's criticism of the 'Bicentennial Myth'²¹ (assumption that the basis of the American constitutionalism are unchangeable and continuous).²² He emphasizes that, the history of the American constitutionalism includes: original sin of breaking the rules by the Founders,²³ adoption of an amendment with a violation of Article V of the US Constitution²⁴ as well as substantial transformation of constitutional order made by 'transformative opinions'²⁵ of the New Deal and 'landmark statutes'²⁶ (that 'adapted New Deal forms of public administration in ways that

20 B. Ackerman, 2006 *Oliver Wendell Holmes Lectures: The Living Constitution*, "Harvard Law Review" 2007, Vol. 120, p. 1743.

21 See B. Ackerman, *We the People. Vol. 1...*, p. 34.

22 See B. Ackerman, *We the People. Vol. 1...*, p. 34–58.

23 See B. Ackerman, N. Katyal, *Our Unconventional Founding*, "University of Chicago Law Review" 1995, Vol. 62/2, p. 478–573.

24 See B. Ackerman, *We the People. Vol. 2. Transformations*, Cambridge (MA) 2001, p. 99–185.

25 B. Ackerman, *We the People. Vol. 2...*, p. 270.

26 B. Ackerman, *We the People. Vol. 3. The Civil Rights Revolution*, Cambridge (MA) 2014, p. 83.

revolutionized traditional notions of state's rights²⁷). As a consequence, more than two hundred years of the US Constitution being in force should not imply *per se* an unchanged character of the constitutional system but rather lead to a conclusion that a few periods may be distinguished: the foundation, the reconstruction and the New Deal²⁸ as well as the second reconstruction²⁹ ('one of the greatest acts of popular sovereignty in American history').³⁰ At the same time, Ackerman rejects suppositions that differences in those constitutional regimes and changes made outside Article 5 implied lack of authority.³¹ According to the constitutional moment theory, even deep redefinition of axiological and institutional foundation of state and constitution does not automatically lead to lack of legitimacy.³² As long as such transformation is based either on amendment procedure or fulfills conditions of higher lawmaking ('third way'),³³ it shall be recognized as a constitutionally legitimized.³⁴

'Higher lawmaking' includes several stages. These stages are spread over the time necessary for a public debate and divided by at least one fair general election. The first stage is 'signaling',³⁵ which amounts to the creation of a civic movement for the change of the constitutional order. This movement must demonstrate specific (i.e. deep, broad, firm) support for the constitutional change. Each of these adjectives finds its expansion in the work of Ackerman.³⁶ Referring to the depth of support

27 B. Ackerman, *We the People*. Vol. 3..., p. 324.

28 See B. Ackerman, *We the People*. Vol. 1..., p. 58.

29 See B. Ackerman, *We the People*. Vol. 3..., p. 18, 49.

30 See B. Ackerman, *We the People*. Vol. 3..., p. 81.

31 See B. Ackerman, *We the People*. Vol. 2..., p. 33.

32 See B. Ackerman, *We the People*. Vol. 2..., p. 270.

33 See B. Ackerman, *We the People*. Vol. 2..., p. 33.

34 As it was later pointed out by Sujit Choudhry: 'At the heart of Ackerman's theory is the following problem: America's constitutional development contains many examples of fundamental, dramatic constitutional changes that appear to have occurred outside the textually prescribed procedures for constitutional amendment. Technically speaking, those constitutional changes are legally invalid. To the extent that these changes have marked the beginning of new constitutional regimes, Ackerman frames the central problem of American constitutional law as one of coming to terms with illegal regime change, or, as Commonwealth constitutional theorists would say, revolutionary legality. The easy solution to this difficulty is to deny there is any problem at all' – S. Choudhry, *Ackerman's...*, p. 201.

35 B. Ackerman, *We the People*. Vol. 1..., p. 272.

36 See B. Ackerman, *We the People*. Vol. 1..., p. 272–277.

for the change of the constitution, Ackerman indicates that this support cannot be limited only to citizens that are usually involved in public life in the capital.³⁷ At the second stage ('proposal'),³⁸ the idea of changing the constitution is reduced to explicit, clear and understandable postulates that can be accepted or rejected by citizens. Traditionally, this role in the US is played by political parties.³⁹ The experience of American constitutionalism indicates that presidential elections usually mobilize citizens and may suggest their willingness to signal the need of changing the constitution. The third stage (mobilized deliberation)⁴⁰ is the time of intensified public discussion that should involve representatives of all authorities and the majority of citizens. This stage includes several more phases: 'constitutional impasse,' 'decisive electoral mandate,' 'unconventional assault,' 'switch in time,' 'consolidating election.' After a period of deliberation in which one of the discussed options for change at the political level will win, the role of the judiciary is to 'codify'⁴¹ or 'translate' the change as part of the process of interpreting constitutional principles for the future.

To give an answer for the question whether constitutional moment conditions are complied with is almost impossible at a real time and it may be given *ex post* only.⁴² In isolation from American culture and constitutionalism, it may be pointed out that, Ackerman's 'third way' does not allow to separate constitutional change (pretending to 'higher lawmaking') from statutory lawlessness (i.e. when majority adopts unconstitutional systemic statutes in order to achieve irreversible change in the legal system).⁴³ Moreover it was persuasively argued that the higher lawmaking may not fulfill its function in case of deep social or political divisions. In order to fulfill its regulatory function⁴⁴ and give an answer to a question of legality as well as to provide sufficient legitimacy, rules

37 See B. Ackerman, *We the People. Vol. 1...*, p. 270–271.

38 See B. Ackerman, *We the People. Vol. 1...*, p. 280–285.

39 See B. Ackerman, *We the People. Vol. 1...*, p. 281–282.

40 See B. Ackerman, *We the People. Vol. 1...*, p. 285–288.

41 See B. Ackerman, *We the People. Vol. 1...*, p. 289–290.

42 Compare with S. Choudhry, *Ackerman's...*, p. 202–203.

43 Compare with observations of S. Choudhry, *Ackerman's...*, p. 202 ff.

44 See S. Choudhry, *Ackerman's...*, p. 197.

of constitutional design shall be perceived as neutral and fair by all participants of constitutional debate or by the third party (external observer).⁴⁵

4. Bruce Ackerman's *We the People* volumes were intended to describe a distinctive and unique character of the American constitutionalism and had no claims to be directly applicable to other constitutional orders.⁴⁶ They were based on deep historical findings (regarding also the founding moment⁴⁷), argument on reinterpretation of the Article V of the US Constitution towards popular sovereignty and separation of powers between the presidency, Congress and the Supreme Court⁴⁸ and argument on 'new nation-centered understanding of American citizenship' which 'required a nation-centered system of constitutional revision.'⁴⁹ It is also true that a worldwide comparative discussion was triggered especially by *The Civil Rights Revolution*.⁵⁰ Numerous academics findings demonstrated and proved the possibility to adapt the concept of a constitutional moment to comparative analyses. The temptation to make reference to the constitutional moment theory in case of Poland may be historically justified and understood. The long history of Polish constitutionalism that includes a regular citizens involvement and principle of sovereignty incorporation (instead of references to the sovereignty of parliament) make Polish democracy dualistic (in Ackerman's sense). Moreover, the rise, scope, power and nature of the 'Solidarity' movement, proved that Polish modern constitutionalism is revolutionary (in Ackerman's sense⁵¹) in its origins⁵² and may be transformed with w strong support of 'mobilized people.'

45 See S. Choudhry, *Ackerman's...*, p. 197.

46 See S. Choudhry, *Ackerman's...*, p. 196; R. Weil, *Constitutional Statutes or Overriding the Court – On Bruce Ackerman's We the People: The Civil Rights Revolution*, "Jerusalem Review of Legal Studies" 2016, Vol. 13/1, p. 9–10.

47 See B. Ackerman, N. Katyal, *Our...*, p. 539–573.

48 See B. Ackerman, *We the People. Vol. 3...*, p. 4, 43.

49 B. Ackerman, *2006 Oliver...*, p. 1743, 1748.

50 See for instance the discussion on "Jerusalem Review of Legal Studies" 2016, Vol. 13/1.

51 See the use of the term 'revolutionary': B. Ackerman, *The Rise of World Constitutionalism*, "Yale Occasional Papers" 1996, Vol. 4, < http://digitalcommons.law.yale.edu/ylosop_papers/4 >.

52 See more about revolutionary constitutionalism in the latest Ackerman's project (*Revolutionary Constitutions Charismatic Leadership and the Rule of Law*, Cambridge (MA) 2019, forthcoming), which parts were presented in Trieste and Berlin during the lectures given by Ackerman in 2018 (see < <https://www.units.it/video/bruce-ackerman-lectio-magistralis> > and < <https://>

The possibility of the application of the constitutional moment theory in the Polish constitutional order depends on the answer to a question whether Article 4⁵³ in conjunction with the Preamble⁵⁴ and Article 235⁵⁵ of the Constitution justifies a monistic rather than a dualistic approach. The latter undoubtedly may find a historical support in the period of transformations that took place in Poland in 1989–1993. It may also be justified by the distinction between ‘supreme power’ and ‘power’

www.americanacademy.de/videoaudio/general-theory-world-constitutionalism >). According to Ackerman, revolutionary constitutions were preceded by the self-conscious mobilization of citizens that raised objections against then political and legal order. Just like in the case of ‘higher lawmaking,’ Ackerman recognises few stages of revolutionary constitutionalism: rising of the citizens movement, adoption of a revolutionary declaration that proclaimed new values and new ‘progressive’ vision of constitutionalism, appearance of a charismatic leader, direct and public confrontation with an old regime and adoption of new constitutional acts. One of distinctive features of the new acts are ‘never again’ provisions, as Ackerman calls constitutional regulation aimed directly to protect next generations against a rebirth of the fallen regimes.

53 According to this provision: 1. Supreme power in the Republic of Poland shall be vested in the Nation. 2. The Nation shall exercise such power directly or through their representatives.

54 According to the Preamble (which is relevant for interpretation of the constitutional provisions in Polish constitutional order): ‘Having regard for the existence and future of our Homeland [...] We, the Polish Nation – all citizens of the Republic [...] recalling the best traditions of the First and the Second Republic [...] Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies [...] Hereby establish this Constitution of the Republic of Poland as the basic law for the State.’

55 According to this provision: 1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic. 2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days. 3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm. 4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators. 5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill. 6. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment. 7. After conclusion of the procedures specified in paras 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland.

in the text of Article 4 of the Constitution. Once it may be argued that such distinction reflects the possibility of Ackerman's two-track citizens involvement into constitutional politics. According to the wording of Article 4 of Constitution, read together with the principle of legality, Nation's representatives may exercise only the powers and competences vested in them by the constitutional provisions, whereas a broader 'supreme power' to act on constitutional level, remains reserved for 'We, the Polish Nation – all citizens of the Republic' (to use the Preamble term). It could be also argued that new and creative interpretation of the constitutional provisions concerning the instruments of direct democracy (national referendum – Article 125 – and popular legislative initiative – Article 118(2)) could play a key role in the constitutional order transformation. Finally, dualistic approach is a very pragmatic solution when there is a need to explain continuity and legality of constitutional order in case of an amendment being adopted in violation of the provisions concerning changes in the Constitution. However, well-established interpretation of constitutional provisions may strongly support a different point of view.

First of all, according to Tribunal case law constitutional phrase concerning Nation's 'supreme power' shall be read in the historical context of previous constitutional regulation that proclaimed dictatorship of the proletariat, provided parliament a highest authority and allowed Sejm to act in the name of the 'the working people of the towns and villages'.⁵⁶ Therefore the meaning of the Article 4(1) of Constitution, shall be firstly interpreted as a rejection of concepts of: state's power unity, supreme role of parliament as well as acting in the name of the people without direct legal competence.⁵⁷ Due to the historical reason and risk

56 See Article 1, 2 and 15 of the Constitution of the Polish People's Republic of 22 July 1952, Dz.U. 1976, No. 7, item 36, consolidated text, as amended; hereinafter referred to as "the Constitution of 1952."

57 In the case of unconstitutionality of the provisions on Judges' election, the Tribunal pointed out that, "The obligation to observe the Constitution is particularly important with regard to persons in power. This is, inter alia, manifested by an oath of office that must be taken before assuming the office by Sejm Deputies, Senators, the President, members of the Council of Ministers, as well as other officials. What safeguards the principle of the supremacy of the Constitution, and ultimately also the rights and freedoms of the individual, is inter alia the judicial review of the constitutionality of norms, conducted by an independent authority which is separate from the legislature and the executive. Since their origins, constitutional courts in European legal culture have been conceived of as «safeguards for individuals against the tyranny of a major-

of abuses of power exercised by or in the name of the people, directly mentioned by the Preamble to the Constitution as ‘the bitter experiences of the times when fundamental freedoms and human rights were violated,’ a particular restraint shall understandable in the case of any changes outside the amendment procedure in Poland.

Secondly, it is true that the Polish Constitution was directly based on the principle of sovereignty of people. However, it does not mean that sovereign may act outside the procedure and under special circumstances in order to change constitutional system. Article 4 of the Constitution describes only two forms of democracy in an exhaustive and unequivocal manner: representative and direct democracy⁵⁸ (which was reduced to referendum and public legislative initiative by the further constitutional provisions).⁵⁹ Only those two forms of exercising power may have legal effect.⁶⁰ Due to the wording of Article 4 as well as other provisions on Sejm and Senate as well as limited constitutional regulation

ity» and guarantors of the precedence of law over power. After the experience of the totalitarian regimes, there is no doubt that even a democratically-elected parliament has no competence to issue determinations that would be contrary to the Constitution, even if they were justified by ‘the good of the Nation,’ where the term is understood in an abstract way. Thus, the constitution-maker has delineated substantive and procedural limits for public authorities, within which all their determinations must fall in every case’ (judgment of the CT of 3 December 2015, K 34/15, OTK ZU 2015, No. 11, item 185). The Tribunal also emphasized that, it “is not only the guarantor of the supremacy of the Constitution, but it also safeguards the tri-division of powers. Any regulations concerning the Tribunal may not lead to a situation where it would lose its capacity to carry out its activity’ (judgment of the CT of 9 December 2015, K 34/15, OTK ZU 2015, No. 11, item 185). For the Tribunal there was no doubt that one of the most important aims of Articles 8 and 10 of the Constitution is to protect against the concentration of powers and competences in one office. Referring to the previous case-law, the Tribunal reminded that the Parliament should not have a supreme position in the Polish constitutional system and highlighted that the supremacy of nation principle (Article 4 of the Constitution) did not authorize the Parliament to assume other constitutional bodies’ competences in the name of the nation (judgment of the CT of 22 September 2006, U 4/06, OTK ZU 2006, No. 8, item 109). Article 4 of the Constitution means in particular a prohibition for legislative, as well as executive or judiciary, to replace or oppose to the Constitution (enacted in accordance with a special procedure by the National Assembly and approved in a referendum by the Nation) as well as to act in the name of the nation in breach of the constitutional law.

58 See K. Działocha, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom 1*, red. L. Garlicki, M. Zubik, Warszawa 2016, p. 222.

59 See more about direct democracy instruments under the Polish constitutional regulation: A.K. Piasecki, *Direct Democracy in Poland after 1989*, “The Sejm Review” 2007 (3rd special issue), p. 145–165.

60 See K. Działocha, in: *Konstytucja...*, p. 224.

on the institutions of direct democracy, it is said that those forms of democracy are not equal.⁶¹ The representative democracy has a key role to play in the Polish constitutional order.⁶² National referendum is a supplementary form only⁶³ and it cannot be used in constitutional design (i.e. to adopt amendment)⁶⁴ as it would circumvent the constitutional change procedure regulated by Article 235 of the Constitution. According to this provision the popular voting is possible only in order to approve amendments to chapters one, two or twelve of the Constitution. Therefore there is no place for a different form of 'We the Polish Nation' being involved both on a regular as well as constitutional policy levels.

Third of all, the Constitution was preceded by a special constitutional act in 1992,⁶⁵ that directly provided legal basis for the National Assembly to adopt the text of the Constitution and for the sovereign to approve this text in a special constitutional referendum. Having regard to the fact that wording of the constitutional provisions does not give any power to adopt a new constitution⁶⁶ as well as it does not provide any mandatory approval for constitutional amendments by the sovereign, leaving constitutional design to the Sejm, the Senate and the President, I am of the opinion that, the subject of the 'supreme power' had limited himself in exercising constituent power (to use J.-E. Sieyès⁶⁷ term). While

61 See K. Działocha, in: *Konstytucja...*, p. 225.

62 See M. Florczak-Wątor, in: *Konstytucja. Tom 1. Komentarz do art. 1–86*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 274.

63 See P. Sarnecki, *Central Ideas of the Constitution of the Republic of Poland of 2nd April 1997*, "Droit Polonais Contemporain Revue Trimestrielle" 1997, Vol. 1–2 (113–116), p. 17–18; K. Działocha, in: *Konstytucja...*, p. 225; M. Florczak-Wątor, in: *Konstytucja...*, p. 276; M. Pietrzak, *Demokracja reprezentacyjna i bezpośrednia w Konstytucji Rzeczypospolitej Polskiej*, in: *Referendum Konstytucyjne w Polsce*, red. M.T. Staszewski, Warszawa 1997, p. 26, 31.

64 See B. Naleziński, in: *Konstytucja RP. Tom 2. Komentarz do art. 87–243*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 557; P. Tuleja, B. Szczurowski, in: *Konstytucja RP. Tom 2. Komentarz do art. 87–243*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 1655.

65 Act of 23 April 1992 on proceeding of preparing and adopting constitution of the Republic of Poland, Dz.U. 1992, No. 67, item 336 as amended.

66 I am of the opinion that due to the intention expressed in founding moment, the fact that constitution was adopted in a national referendum as well as taking into account wording and aim of Article 235 of Constitution, there is no legal basis for competence to adopt a new constitution or to introduce a complete revision of all constitutional provisions. Such a deep transformation of the constitutional order shall be proceeded by the legal change of amending clause first and accepted in a national referendum in accordance with the Article 235 of the Constitution.

67 See J.-E. Sieyès, *Czym jest stan trzeci? Esej o przywilejach*, tłum. M. Jarosz, Warszawa 2016, p. 53.

the adoption of the Constitution was a direct act of ‘We, the Polish Nation,’ the amendment power became a competence that is constitutionally reserved for sovereign’s representatives. It was a directly expressed intention in a founding moment to ensure a stability of further constitutional design as well as to rely on division of powers between the Sejm, the Senate and the President only. In my opinion, the legislative history and binding regulation justify references to the concept of primary constituent power (which adopted the constitution) and secondary constituent power (which may adopt amendments to the constitution only).⁶⁸ Therefore, I believe that the Polish constitutional framework may be better described by the ‘three track democracy’ concept and distinction between legislative track (sub-constitutional level), amendment track (ordinary constitutional level) and primary constitutional track (extraordinary constitutional level) proposed by Y. Roznai.⁶⁹ Secondary constituent power is bound by the constitutional provisions and cannot act outside the procedure.⁷⁰

Fourth of all, although the Constitution does not directly contain eternity clause or unchangeable constitutional provisions,⁷¹ implied constitutional limitation for secondary constituent power are increasingly recognized by the Tribunal case law⁷² and scholars.⁷³ Opting

68 See Y. Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Power*, Oxford 2017, p. 120–123.

69 According to Yaniv Roznai’s opinion Ackerman’s theory distinguishing between normal policy and constitutional moments seems to be consistent with division of primary and secondary constituent power ‘with one important distinction: within a constitutional democracy, one has to recognize three not two kinds of tracks.’ Therefore ‘the amendment track is an ordinary track of constitutional politics through which bodies entrusted with the authority to amend the constitution [...] may enact, add, annul or amend constitutional provisions. This is a constitutional level. [...] although the second at constituent power like the constituted power, is itself established in the constitution, it is superior to constituted powers.’ – Y. Roznai, *Unconstitutional...*, p. 127.

70 See Y. Roznai, *Unconstitutional...*, p. 135 ff.

71 See L. Garlicki, *Normy konstytucyjne relatywnie niezmienniane*, in: *Charakter i struktura norm konstytucyjnych*, red. J. Trzcíński, Warszawa 1997, p. 148; W. Sokolewicz, in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom 2*, red. L. Garlicki, Warszawa 2001, p. 6.

72 Judgment of the CT of 24 November 2010, K 32/09, OTK ZU 2010, series A, No. 9, item 108.

73 See i.e. M. Hermann, S. Wronowska, in: *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza, funkcje, aksjologia*, red. J. Mikołajewicz, Warszawa 2015, p. 197; M. Granat, *Rozumienie zmiany Konstytucji RP a tożsamość konstytucyjna*, in: *Problemy zmiany konstytucji*, red. R. Chruściak, Warszawa 2017, s. 277; R. Piotrowski, w: *Preambuła Konstytucji Rzeczypospolitej Polskiej*, red. K. Budziło, Warszawa 2009, p. 140–141.

for such a limitation would be difficult to reconcile with the dualistic approach.⁷⁴

Fifth of all, the constitutional system of sources of law as well as amending clause exclude a possibility to adopt constitutional statutes,⁷⁵ organic statutes⁷⁶ or other parliament's acts of equal status or importance to Constitution. Unity of Constitution as a normative act in Poland and its highest hierarchical position provided directly by Article 8(1) leave no room for 'landmark statutes'⁷⁷ (to use Ackerman's terms), conventions or common law precedents that may serve as a tool and source for fundamental transformation of constitutional order outside amendment proceeding. Even statute of highest legal, political and social importance (i.e. electoral code, on public assemblies, on social pensions, on public health or on public education) shall be understood in Poland not as a 'supplementation' of the constitutional provisions, but rather as a regular legislative development of constitutional rules and principles. It may be overturned by a simple majority. It may be confronted with the substantial constitutional provision and struck down by the Tribunal. It cannot become a part of constitutional canon. It should be also remembered that due to the vast catalogue of constitutional guarantees of human rights, including the protection of social and economic rights, there has been no need for the Constitutional Tribunal to recognize regular statute as a part of constitutional law in substantial meaning.

The above mentioned arguments prove the existence of controversies or difficulties with direct applicability of constitutional moment theory under the current constitutional provisions in Poland.

5. The recent history of Polish constitutionalism may to some extent be comparable to fundamental and substantial constitutional transformations, described by the constructional moment theory. The axiological transformation from the regime of undemocratic Constitution of 1952 to the liberal democracy provided by the Constitution of 1997 does not require any

74 See B. Ackerman, *We the People. Vol. 1...*, p. 15.

75 See P. Tuleja, B. Szczurowski, in: *Konstytucja...*, p. 1647.

76 See M. Wiącek, in: *Konstytucja RP. Tom 2. Komentarz do art. 87–243*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 79.

77 See B. Ackerman, *We the People. Vol. 3...*, p. 9–11, 81, 317–319.

evidence. The institutional distinction between four constitutional regimes (1952–1989, 1989–1992, 1992–1997 and after 1997) is not a matter of controversy. In such circumstances, a temptation to refer to the constitutional moment in an interpretive sense may be understandable.⁷⁸ However, I am of the opinion that there is no need to make such a reference in order to legitimize or justify legality of Polish constitutional transformation. The decision whether in 1997 or 1989–1992 there were descriptively understood constitutional moments depends more on historical and philosophical rather than dogmatic (constitutional) assessment.

Firstly, the Polish Constitution is still young and did not experience any excessive incompatibility with dynamic social and political changes, that could not be resolved by an interpretation or change in accordance with its Chapter XII. It was amended twice (in 2006⁷⁹ and 2009⁸⁰) and it has never been modified outside the formal procedure of change. More than 20 draft amendments have been submitted by the members of Sejm and the President since 1997, mainly in order to prohibit abortion, to introduce new provisions for further European integration or recently to legalize the unconstitutional election of members of Constitutional Tribunal in 2015. They did not receive a sufficient support of a majority in the Parliament. These draft amendments were not a subject of self-conscious broader citizens' mobilization.

Secondly, the Constitution of 1997 was approved by the Nation in the constitutional referendum⁸¹ and it had been preceded by 5 years of constitu-

78 See the mentioned above Ackerman's classification of the Polish citizens mobilization in late 80s and early 90s a revolutionary in its nature.

79 Article 55 of the Constitutions was changed to allow an extradition of a Polish citizen under directly specified constitutional circumstances. The amendment was a reaction for the Constitutional Tribunal Judgment on unconstitutionality of statutory provisions on execution European Arrest Warrant that implemented EU secondary law. Having regard to the fact that previous Article 55 of Constitution directly and clearly prohibited extradition of Polish citizens, the Constitutional Tribunal pointed about that national Parliament had three solutions only. First it might change the Constitution. Second solution was to renegotiate EU secondary law on European Arrest Warrant. Third given solution was to leave the EU. See judgment of the CT of 27 April 2005, P 1/05, OTK ZU 2005, series A, No. 4, item 42.

80 It added article 99(3) to the Constitution: "No person sentenced to imprisonment by a final judgment for an intentional indictable offence may be elected to the Sejm or the Senate."

81 See S. Gebethner, *The 1997 Referendum on the Constitution in Poland. The Controversies and the Compromise*, "Droit Polonais Contemporain Revue Trimestrielle" 1997, Vol. 1–2 (113–116), p. 135–162.

tional debate within the Constitutional Committee of the National Assembly and after more than 7 years of public discussion about perspectives and future shape of the constitutional system.⁸² Moreover, the binding constitutional provisions on human rights largely incorporated case-law developments of the Constitutional Tribunal (established in 1986) as well as standards of European Convention on Human Rights (ratified by Poland in 1993). Therefore, the year when Constitution was adopted may be seen less as a substantial revolution rather than as an end of important part of evolution of human rights protection in Poland.⁸³

Thirdly, it is true that constitutional amendments of 1989–1992 rejected the political philosophy as well as all fundamental principles of undemocratic Constitution of 1952.⁸⁴ It may also be argued that by doing so this amendments violated basic and unchangeable principles of previous constitutional system. According to some scholars' opinions of the pervious system,⁸⁵ the Constitution of 1952 contained implied limitations for constituent power (i.e. the principle of dictatorship of the proletariat). In this perspective, the Polish constitutional transformation was revolutionary in its substance. It should be however remembered that the theory on implied limitations was not widely shared under the Constitution of 1952. Just like Polish previous constitutional acts of 1921 or 1935, it did not provide direct or indirect substantial limitations for amendments as well as authority to check of the constitutionality

82 See R. Chruściak, *The Constitution of the Republic of Poland of 2 April 1997 – The Course of Parliamentary Work from 1995–1997*, "Droit Polonais Contemporain Revue Trimestrielle" 1997, Vol. 1–2 (113–116), p. 163–177; M. Mazurkiewicz, *The Draft of the Constitution of the Republic of Poland (1996) – Its Political Conditions and Expectations*, in: *Constitution-making Process*, ed. M. Wyrzykowski, Warsaw 1998, p. 115–125; P. Winczorek, *The Influence of Constitution-making Procedures on the Development of Constitutional Culture*, in: *Constitutionals Cultures*, ed. M. Wyrzykowski, Warsaw 2000, p. 209–219.

83 It seems that in Ackerman's 2018–2019 typology, the current Polish Constitution cannot be classified as a typical revolutionary constitution but rather as a revolutionary born constitution. However such a classification does not include a whole exceptionality of the Polish transformation and its road to a new democratic constitution. See more about the exceptionality of the constitutional transformations in the region and a numbers of problems that raised in this context – A. Sajó, *Constitution without the Constitutional Moment: A View from the New Member States*, "International Journal of Constitutional Law" 2005, Vol. 3/2–3, p. 243–261.

84 See L. Garlicki, in: *The Role of the Constitution in a Changing Society. Joint Polish-Norwegian Conference (Oslo, 14–16 May 1991)*, Oslo 1991, p. 18–19.

85 See S. Rozmaryn, *Konstytucja jako ustawa zasadnicza PRL*, Warszawa 1967, p. 274–276.

of an amendment. The modern concept of unconstitutional constitutional amendment was incompatible with the supremacy of parliament then. Therefore, ‘axiological revolution’ did not contest legality or brake continuity of the legal system in time.

Fourthly, democratic transformation that started in Poland in 1989 was based on a number of amendments adopted by Nation’s representatives acting in compliance with the requirements of formal procedure of constitutional change provided by the Constitution of 1952. Even the *Rechtsstaat* principle introduction into the Polish legal order⁸⁶ as well as modification of fundamental principles of the Constitution of 1952 had been carefully made in accordance with the amendment procedure.⁸⁷ The ‘chain of authority’ in a narrow (normative, Kelsen) sense was unbroken. Therefore there was no need to refer to higher lawmaking, within the meaning of constitutional moment theory.

There is no doubt that the interpretation of numerous of the Constitution’s provision has been changed evolutionarily⁸⁸ since it was adopted. It is also clear that the Constitutional Tribunal played a key role in this process.⁸⁹ All judgments on constitutionality of accession to the European Union and later changes of the treaties as well as others Tribunal’s ruling on human rights may serve as a finest example. However, it does not mean that such a continuum of changes in interpretation of constitutional text constituted any transformation that may be comparable to the changes described and legitimized by the constitutional moment theory in U.S. constitutionalism. Concepts of landmark judgments and star decisions are not fully compatible with the Polish constitutional system.

86 See more about the meaning and consequences of the *Rechtsstaat* principle and its relation with the rule of law in the Polish context: M.F. Brzezinski, L. Garlicki, *Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?*, “Stanford Journal of International Law” 1995, Vol. 31, *passim*.

87 See Act of 29 December 1989 on the amendment to the Constitution of the Polish People’s Republic, Dz.U. 1989, No. 75, item 444.

88 See i.e. D. Lis-Staranowicz, J. Galster, *Europeanization of Polish Constitutional Law*, “The Sejm Review” 2014 (5th special issue), p. 85–111; K. Wojtyczek, *The Impact of the Treaty of Lisbon on Poland’s System of Government*, “The Sejm Review” 2014 (5th special issue), p. 149–167.

89 For criticism see: B. Banaszak, *The Judicial Activism of the Constitutional Tribunal*, “The Sejm Review” 2014 (5th special issue), p. 5–25.

6. As it was mentioned above, the concept of constitutional moment was used in a President's campaign in order to support the 2018 referendum and idea of new legal order.

Admittedly Ackerman points out that the consultation referendum may undoubtedly be the only tool of mobilized deliberation, but it does not exhaust this process.⁹⁰ The period of deliberation should be longer and last for years. The purpose of a sufficiently long period of deliberation is to create the opportunity for opponents to change the constitution.⁹¹

Nevertheless, I believe that in 2018 there was neither signaling nor even more the formulation of a real agenda for constitutional transformation. Before the President issued a proposal to amend the Constitution and conduct a consultative referendum on this matter, there was no real citizens' movement for a constitutional change. On the contrary, the presidential campaign was supposed to create this movement. Moreover, the direction of change suggested by the President and resulting from the proposed questions in the consultation referendum can hardly be described as reformatory. The questions formulated by the President referred mainly to the current constitutional regulation and raised issues that were resolved while applying the constitutional provisions.

The vast majority of questions concerned social and economic rights (i.e. protection of work, right to retirement and motherhood). Three of them referred to international affairs (sovereignty and membership in the European Union and the North Atlantic Alliance), and two related to forms of direct democracy (a referendum approving the change of the constitution and a consultation referendum). Another two questions concerned political issues. One of them returned to the historically rejected concept of strengthening the role of the head of state towards the Council of Ministers, and the second one concerned the three-level administrative division of the country. The only real added value to the discussion on the change of the Constitution was the question about the mandatory nationwide referendum approving such a change.

It should be noted that the questions regarding to social and economic rights referred to the institutions or rights guaranteed by applicable

90 See B. Ackerman, *We the People. Vol. 1...*, p. 285.

91 See B. Ackerman, *We the People. Vol. 1...*, p. 286.

constitutional provisions, and not to new issues which were not yet known to the Polish legal system, and which hence should be regulated due to social changes or significant needs of citizens. For example, the principle of the protection of acquired rights was one of the first principles derived by the Constitutional Tribunal from the principle of democratic legal state in the early 1990s. Also, the protection of the right to a retirement pension and other social benefits (including those for mothers due to childbirth), protection of work and family – all of them postulated by the President – have been constitutionally guaranteed (see Article 18, Article 32, Article 33, Articles 65–67, Article 71 par. 2 of the Constitution). Terms used in the referendum questions (e.g. social market economy) have had their significance, grounded in the long-term practice of the Constitutional Tribunal and legal theory. As a consequence, the proposed questions did not make any significant contribution to the discussion on the constitutional protection of economic and social rights. The same was true of the questions regarding international affairs. The binding Constitution relates both to the European Union and NATO membership. The wisdom of its authors was manifested in the synthetic and universal formulation of Article 90 and the provisions of Chapter III of the Constitution, which allow the country to join various international organizations. Also the principle of Polish sovereignty within the European Union is now explicitly guaranteed at the constitutional level. The interpretation of Article 8. of the Constitution, settled in the jurisprudence of the Constitutional Tribunal, does not leave any doubts that the Constitution is the law of the strongest binding force. The constitutional “guarantee” of membership in international organizations is not a practice that is unknown to the constitutional law in other countries. However, such “membership warrants” mean that any potential withdrawal from an international organization would require amendments to the Constitution. In addition to that, the constitutional guarantee of the country’s membership in an international organization is the basis for adopting an interpretation conducive to preserving the coherence of constitutional law and the law of that organization. Thus, it strengthens integration processes.

Since the questions of the consultation referendum on the amendment of the Constitution mainly concerned already regulated matters and rights already protected constitutionally at a high level, the question

about the purpose of such a referendum seems justified. The answer to the referendum questions could not provide, however, knowledge about the attitude of voters to new institutions or legal solutions, which should be regulated at the constitutional level, due to: insoluble interpretational problems arising in the practice of law enforcement, significant social changes or new challenges (e.g. development of new technologies). The proposals of questions presented on behalf of the President – under the guise of discussion about the new constitutional regulation – were in fact aimed at assessing the binding Constitution in a consultation referendum. In other words, the referendum was planned not as much as an element of public debate about the desired directions of constitutional reform and new challenges of constitutionalism, but as a plebiscite that in case of an unambiguous result (which is not difficult to achieve in this type of referendum) is supposed to justify any future actions against the Constitution. The fact that presidential ministers and participants of the presidential debate appealed to a notion of a constitutional moment, and, in particular to the stage of the proposal, should be considered – at best – as a misunderstanding.

It shall be noticed that in the end President's motion for referendum did not achieve the required majority in Senate. Senators voted 10 in favor to 30 against, with 52 abstentions, in the 100-member upper house of parliament that is dominated by the governing right-wing Law and Justice party.

7. The answer to the question about the possibility of explaining the ongoing constitutional crisis in Poland by referring to the concept of a constitutional moment is a separate issue. One could state *prima facie* that the reforms introduced by the parliamentary majority and approved by the President in 2015–2018 are just an example of the fundamental axiological and institutional transformation of the Polish legal system,⁹² which is carried out only through statutes and outside the procedure of changing constitutional provisions. In my opinion, however, such a statement would be an abuse of the concept of a constitutional moment and its instrumentalization. The following arguments support this claim.

Firstly, the concept of a constitutional moment is connected with the existence of the constitutional judiciary of unwavering legitimacy that is independent from the legislative and executive power. The independence

92 Compare with A. Młynarska-Sobaczewska, *Wokół...*, p. 138–139.

and impartiality of the constitutional court is a condition for the integrity of the first stages of “higher lawmaking” (signaling, proposing and deliberating). Participants of the constitutional debate, their initiators and opponents, should be guaranteed with judicial proceedings and the possibility of hearing the case by an independent and impartial court in the event of any violation of law by one of the parties involved in “higher lawmaking.” The independent constitutional court plays a key role in the final stage of the process of “higher legislation” when it “reinterprets” constitutional provisions, confirms constitutional reform completed outside the formal procedure of amending the constitution, and thus legitimizes the actions of “higher lawmaking.” Thus, in my opinion, in the current situation there is no possibility of referring to the concept of a constitutional moment. Three persons sitting in in the Constitutional Tribunal are not judges of the Constitutional Tribunal, the President of the Constitutional Tribunal was elected on the basis of provisions violating Article 194(2) and Article 197 in conjunction from Articles 10 and 173 of the Constitution. What is more, it was proven on the basis of the analysis of the Constitutional Tribunal’s files that the new President of the Constitutional Tribunal is violating the Constitutional Tribunal Act and ‘manually’ controls the composition of the panels (sitting on the cases). There is an ongoing discussion in the science of law on the consequences of judgments issued in the panels established in violation of the Constitution. Unlawful refusal to publish Constitutional Tribunal judgments, and then publishing them in the Journal of Laws with the proviso that they were issued in violation of law, constitutes a model manifestation of delegitimization of the constitutional court by another public authority. As a consequence, the poorly appointed constitutional court of low legitimacy cannot fulfill its role in the “higher lawmaking” process.

Secondly, the concept of a constitutional moment assumes a minimum of acceptance for *living constitutionalism*. It is difficult to justify the admissibility of “higher lawmaking” and modification of the constitution beyond the procedure of changing it from the position of originalism (referring to the original meaning of the text of the constitution) or textualism (referring to the ordinary meaning of the text of the constitution). In the Polish political system, the appropriate use of the concept of *living constitutionalism* (or *living originalism*) should not elicit

major controversies.⁹³ It should be noted that in the post-2015 political system, the representatives of public authorities, including the participants of the presidential debate on the constitutional moment, criticized references to the *living constitutionalism* concept provided in the period preceding the constitutional crisis. This criticism was mainly directed against the Constitutional Tribunal, which was accused of excessive judicial activism and the dynamic reading of constitutional provisions in a way that violated the parliament's right to conduct constitutional policy. In my opinion, a lawyer who principally criticizes the dynamic reading of the Constitution by the Constitutional Tribunal before 2015, and at the same time believes that a constitutional moment after that date is possible in Poland, can be accused of inconsistency.

Thirdly, the concept of a constitutional moment assumes that the system transformation is carried out legally provided that the next stages of higher lawmaking are met. It should be noted that deep reforms regarding the public prosecutor's office, public media and laws restricting the freedom of assembly or the right to privacy were introduced in 2015–2018 without prior signaling, public discussion and passed in spite of numerous constitutional doubts raised on national and international arena. It seems that an important element of the constitutional moment concept is the transparency of the system transformation project and its submission to the discussion. In my opinion, this transparency is not to be reconciled with the interpretation phenomenon that has been present in Poland since 2015, and observed by Jerzy Zajadło – i.e. the interpretation hostile to the Constitution.⁹⁴

93 Examples from constitutional jurisprudence can only be multiplied (e.g. reinterpretation of the notion of damage under Article 77(1), cultural goods in Article 73, expropriation from Article 21 (2), so that it includes the elimination of intangible property rights, the right to court from Article 45 (1) – firstly a three-element, then a four-element; derivation of the right to the minimum level of security under Article 30 of the Constitution). The science of law provides other examples of the dynamic reading of the constitutional text (e.g. on the basis of Article 18 of the Constitution, which in science increasingly began to refer to same-sex relationships despite the fact that this provision constitutes marriage as a relationship between a woman and a man).

94 According to J. Zajadło: 'The Constitution-hostile interpretation is a political strategy accompanied by specific perverse political rhetoric with quite a primitive, populist character. The authors of this strategy usually demonstrate the will or even obligation to observe the constitution, but at the same time they call the constitution «internally contradictory and conflictogenic,» «postcommunist,» «a constitution for elites, not for ordinary people,» etc. This strat-

Fourthly, there shall be no doubts that the Ackerman's concept of constitutional moment is absolutely incompatible with the theories of 'sovereignty of parliament'⁹⁵ or 'Nation's will'⁹⁶ that made a career in a trivialized version during the Polish constitutional crisis 2015–2018. In statements addressing the problem of justification and legitimization of the constitutional crisis in Poland 2015–2018, it is sometimes pointed out that one of its causes was the dynamic development of constitutional law, bypassing the democratic participation of citizens,⁹⁷ but mainly due to the Constitutional Tribunal's actions, which, however, are devoid of democratic legitimacy. It should be noted, however, that it is slightly inconsistent to appeal to a constitutional moment in the notion of Ackerman and raise the countermajoritarian argument.

To sum up: I do not see any grounds for using the concept of a constitutional moment in order to describe or legitimize the current situation in Poland. The "higher legislation" criteria have not been met. The changes

egy is not even overt but deeply concealed behind the screen of showy slogans. In the current situation, the often repeated phrase "our legislature is compliant with the constitution" because it was confirmed by a verdict of the Constitutional Tribunal" is particularly perfidious, perverse, and even wicked. So in the final instance, the phenomenon of interpretatio constitutionis hostilis is an example of extreme instrumentalization of the process of interpretation for the needs of current politics, ergo an example of recognizing the primacy of politics over law, even at the level of the basic law [...] In the case of constitution-hostile interpretation, it is otherwise: its aim is mostly to forcibly include system even those normative solutions in the legal which are clearly unconstitutional, but the authors want them to become the valid law. Of course, on the basis of the adopted interpretation principles and rules we would say it is quite easy: it is sufficient to abrogate those norms from the system using the basis known to all lawyers with average knowledge: *lex superior derogat legi inferiori*. And this is the whole problem. Interpretatio constitutionis hostilis does not recognize any commonly accepted paradigms of jurisprudence; it creates its own, new paradigms nobody knew before' – J. Zajadło, *Constitution-hostile...*, p. 8 and 13.

95 Expert Report on issues regarding the Constitutional Tribunal commissioned by the Speaker of the Sejm, M. Kuchciński, in July 2017, < <http://www.marekkuchcinski.pl/wp-content/uploads/2016/09/EN-Raport-Zespo%C5%82u-Ekspert%C3%B3w-do-spraw-problematyki-Trybuna%C5%82u-Konstytucyjnego-wersja-angielska-1.pdf> >.

96 See i.e. K. Morawiecki, in: *Sprawozdanie stenograficzne z 2. posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 25 listopada 2015 r.*, p. 78; M. Ast, in: *Sprawozdanie stenograficzne z 3. posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 2 grudnia 2015 r.*, p. 14–15.

97 According to Adam Czarnota's opinion: 'I interpret the present constitutional crisis in Poland and some other countries in Central-Eastern Europe as an attempt to take the constitution seriously and return it to the citizens' – *The Constitutional Tribunal*, "Verfassungsblog" of 3 June 2017, < <https://verfassungsblog.de/the-constitutional-tribunal> >.

from 2015–2018 were not preceded by either a signaling phase, a proposal phase or a broad public debate. Even if one tries to defend the opposite thesis, it is necessary to remind the important role of the independent judiciary, including constitutional jurisdiction, in the concept of B. Ackerman. The changes introduced in the years 2015–2017 to the Act on Common Courts, the Supreme Court, the National Council of the Judiciary and the Constitutional Tribunal preclude making an honest reference to the concept of a constitutional moment. In addition, in one possible interpretation this concept should exclude any rapid changes, being in particular the result of one electoral process. With additional assumptions, resulting for instance from the theory of justice, one should also exclude changes having an effect on their proposers themselves. Finally, what also should be noted is an extremely important problem of the legality of the actions taken by the entities that propose changes. In particular, the blatant violation of constitutional law by the entity proposing a change in the constitutional order should exclude a secondary attempt to legitimize these violations by referring to the concept of a constitutional moment.

8. The concept of a constitutional moment met criticism, which focused on both theoretical and historical foundations. After many years, however, in the science of comparative constitutional law, an attempt was made to reinterpret the concept of a constitutional moment as a descriptive concept of the constitutional crisis.

According to the reinterpretation presented by Sujit Choudhry, all constitutional moments identified by B. Ackerman originate in the violation of law.⁹⁸ Each of the constitutional moments was preceded by a serious crisis. This crisis could only have deepened if one had tried to make a constitutional change in the manner provided in Article 5 of the Constitution. To stop the deepening crisis it was necessary to make changes either in violation of this provision or completely outside the change procedure. In other words, appealing to higher legislation and changing the constitutional order without changing the constitution was necessary to get out of the constitutional crisis. With such a reading of the theory of a constitutional

98 See S. Choudhry, *Ackerman's...*, p. 198.

moment, the ongoing constitutional crisis in Poland should not be the proof of a constitutional moment but its announcement in the future.

In my opinion, the scale and depth of law violations, committed in 2015–2018, cannot be left unanswered by a future legislator if the Constitution is to fulfill its regulatory and legitimative function in the future. The natural and simplest answer should be an appropriate change in constitutional provisions reversing the violations from 2015–2018. If such a change, in accordance with Article 235 of the Constitution, is not possible due to the lack of a sufficient constitutional majority, the theory of a constitutional moment may in the future help in restoration of the rule of law. The signaling phase was, however, initiated by mass protests and publicly formulated postulates of restoring the rule of law. After that, there should be a phase of proposals that must be recognized by voters. Next, a period of deliberation over specific statutory (!) proposals to restore the rule of law should begin. In principle, the enactment of these laws should be preceded by subsequent elections (e.g. presidential or parliamentary) in which the postulate of the rule of law gains voters' acceptance. Then, according to the theory of a constitutional moment, it will be legitimated to restore the rule of law at the level of ordinary laws. Consequently, it will be possible to consider *ex post* whether the second (since the 1990s) constitutional moment has not appeared in the history of Polish constitutionalism.

The outlined scenario primarily refers to the area of the theory of legitimacy and depends on the adequacy of the concept of a constitutional moment in the Polish political conditions, which – as I tried to show in point 3 – is highly debatable after the current Constitution entered into force.

Summary

In the middle of the Polish constitutional 2015–2018 crisis, references to a 'constitutional moment' concept had suddenly and unexpectedly appeared in the Polish public debate. This article aims to confront fundamental conditions and implications of constitutional moment theory with the Polish constitutional framework. Firstly, I will argue that it may be controversial to refer directly to the constitutional moment in an interpretive sense due to the scope of current Polish constitutional regulation and its historical development. Secondly, I will argue that

according to the fundamental findings of Bruce Ackerman's theory its application during the constitutional crisis in Poland is also impossible both in a descriptive as well as interpretive sense. Then, with references to Sujit Choudhry's interpretation of Ackerman's 'higher lawmaking,' the article will conclude that Poland may have a constitutional moment (in a descriptive sense only) at the end of constitutional crisis and the need to restore the rule of law.

Keywords: constitutional moment, constitutional law, constitutional design, Polish transformation, constitutional crisis

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