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THE STRUCTURAL POSITION OF THE SEJM OF THE REPUBLIC OF POLAND IN THE LIGHT OF CONSTITUTIONAL PRINCIPLES OF POLITICAL SYSTEM

In an attempt to determine the constitutional position of the parliament, first of all, an attention should be drawn to the basic, constitutional principles of the political system adopted in a specific system of government. Undoubtedly, three systemic principles are crucial factors in this situation: the principle of political representation, political pluralism and the principle of separation and balance of powers. The starting point for determining the content and nature of the parliament must be always the principle of sovereignty of the Nation, because it indicates not only the body of supreme authority in a country, but also a form of exercising that power by the sovereign[2].

1. The introduction to the content of the constitution the principle of sovereignty of the Nation has a special significance in determining the democratic character of a state and public power exercised therein[3]. To the importance of this principle contributes the fact that in the doctrine of constitutional law, it is treated in the category of „principle of principles" in other words a rule determining the content of other constitutional principles[4]. In fact, the adoption in modern constitutional systems the principle of sovereignty of the Nation raises certain effects in various spheres of constitutional regulations of the political system. They relate primarily to the organizational structure of the entire state apparatus and the interactions between various state bodies.

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2 Compare E. Zwierzchowski, *Wprowadzenie do nauki prawa konstytucyjnego państw demokratycznych*, Katowice 1992, p. 10 and the following pages.

3 Compare B. Banaszak, *Porównawcze prawo konstytucyjne współczesnych państw demokratycznych*, Kraków 2004, p. 292 and the following pages.

4 See K. Działocha, *Artykuł 4*, (in:) *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. L. Garlicki, Warszawa 1999–2007, p. 1 and the following pages.

Adoption of the principle of sovereignty of the Nation means that as a sovereign nation is regarded a nation as only it acquires a role of an exclusive and the highest body of authority (or sovereign) which is set by the constitution in a certain country. Consequently, the Nation as a body of supreme authority, is entitled to exercise superior authority by: 1) appointment by direct and universal suffrage constitutionally defined state bodies, 2) co–decision with the representative bodies on issues of great importance for the entire state or units of territorial division (using the institutions of direct democracy), 3) expressing an opinion as to the forms and methods of exercising political power. Sovereign powers in this area are primarily guaranteed in the constitutionally specified catalogue of political rights of all citizens.

The principle of sovereignty of the Nation is widely accepted in the wording of statues. It is also proclaimed by the provision in Article 4 paragraph 1 of the Constitution of 1997, which states that: „Sovereign power in the Republic of Poland belongs to the Nation". In this case, by the term „Nation", we should understand all Polish citizens irrespective of their race, nationality, religion, membership in certain political parties and other characteristics, so as the only criterion for membership to the Republic of Poland was understood in the category of „common good of all citizens" (Article 1 of the Constitution), may be considered the fact of possessing Polish citizenship[5]. The result of accepting in the Republic of Poland the principle of sovereignty of the Nation is the necessity of shaping the political system in systemic practice; such legal regulations which would allow citizens to participate as far as possible in the exercise of state power and would ensure the compliance of undertaken decisions with the intent, will and public interest of public authorities.

The result of the introduction of the principle of sovereignty of the Nation to the catalogue the main principles of the Republic of Poland's political system is to adopt a general assumption that the highest authority in a country is in the hands of the Nation as a specific legal community formed by all citizens[6]. In the modern constitutionalism the Nation is not treated as an entity actually exercising the political power in a country, or at least administering a part of this power. In fact, the Nation within the meaning of all of citizens of a country or as an organized community would not be able to exercise power independently, and in today's political realities and it is not possible. Thus, even in those countries where fundamental laws concentrate on exercising the power by the Nation in the form of direct de-

5 Such understanding of the concept of „Nation" results undoubtedly from the Preamble to the Constitution of the Republic of Poland, with a written declaration: „we, the Polish Nation – all citizens of the Republic of Poland".

6 Compare K. Complak, *Normy pierwszego rozdziału Konstytucji RP*, Wrocław 2007, p. 73 and the following pages; M. Kudej, *Problematyka konstytucyjnej zasady suwerenności narodu*, (in:) *Podstawowe pojęcia pierwszego rozdziału Konstytucji RP*, ed. E. Zwierzchowski, Katowice 2000, p. 56 and the following pages.

mocracy (particularly, the political system of the Swiss Confederation)[7], a decisive factor in systemic practice has, nevertheless, representative (indirect) exercise of power by elected through representatives of the nation elected in universal suffrage[8].

2. The significance of representative democracy, and, therefore, the exercise of sovereign authority by the Nation in the way of political representation, mostly refers to the fact that decisions of major importance to a state are being taken on behalf of the sovereign by the highest representative body (parliament) made up of representatives elected in accordance with the will of the Nation in democratic elections. This particular structure of the principle of political representation (also known in the doctrine of constitutional law as the principle of representative government)[9] is reflected in Article 4 paragraph 2 of the Polish Constitution, which stipulates that „The Nation shall exercise such power directly or through their representatives...". From the here above wording it is clear that the sovereign (Nation) in this case, resigns from the direct form of exercising state power, while providing its representatives the mandate to represent it before the parliament and to take important decisions on behalf of it.

With regard to the principle of political representation the doctrine of constitutional law is of the opinion that so widely adopted in the constitutional solutions (including the Article 4 paragraph 2 of the Constitution of the Republic of Poland of 1997) formula for the exercise of sovereign power of the Nation, by hand of appointed by the voters representatives of the sovereign, is actually called legal fiction of representation[10]. Its significance lies in the fact that voters give a mandate to the selected deputies to represent their will, and the will of representatives is expressed by them in the parliament and is assigned to the Nation. The consequence of such an outlined structure of representation is that the decisions taken by the deputies are always binding for the sovereign (Nation), and therefore cannot be questioned by it during the parliament's term. It is not until the next election when voters are able to choose such representatives who will be better than all existing deputies at implementing their interest when making decisions by the parliament.

To implement the principle of political representation it is necessary to consistently apply democratic electoral procedures during a selection of members of the

7 Compare Z. Czeszejko–Sochacki, *System konstytucyjny Szwajcarii*, Warszawa 2002, p. 31 and the following pages.

8 Compare M. Granat, *Konstytucyjne zasady ustroju*, (in:) *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2008, p. 116.

9 See E. Popławska, *Zasada rządów przedstawicielskich i formy demokracji bezpośredniej*, (in:) *Zasady podstawowe polskiej konstytucji*, ed. W. Sokolewicz, Warszawa 1998, p. 123 and the following pages.

10 Compare B. Banaszak, *Porównawcze prawo…*, *op. cit.*, p. 323 and M. Granat, *Konstytucyjne zasady…*, *op. cit.*, p. 122.

parliament, which must be based on constitutional principles of universality, equality, directness and confidential voting (Article 96 and 97 of the Constitution of the Republic of Poland). Particularly noteworthy here is, undoubtedly, the principle of universality, because it determines the category of persons eligible for active and passive right to vote in direct elections to certain state bodies. The importance of this principle results from the fact that its adoption and adherence in constitutional practice has become obviously the most visible manifestation of the implementation of the constitutional principle of the sovereignty of the Nation, where the Nation is an entity able to launch activities and express its sovereign will through its representatives elected by the citizens through the electoral act[11]. Moreover, the principle of the universality of elections is traditionally included in the doctrine of constitutional law to the most important democratic model of electoral law[12].

Moreover, it should be pointed out that for the purpose of the principle of political representation it is crucial not only to take advantage of fully democratic election rules but also to carry out elections on a regular basis, in other words not less frequently than as it is specified in the constitutionally established dates (Article 98 of the Constitution of the Republic of Poland), finishing certain terms of office of the parliament[13]. Thus, an exceptional lengthening of the parliament's term may be acceptable only in exceptional situation which is stated in the provision of Article 228 paragraph 7 of the constitution now in force. Therein limitation causes that selected in the parliamentary elections representatives of the Nation (members of the parliament and senators) do not receive a mandate given to them by the sovereign in perpetuity, but on an exactly specified in constitutional norms period of time (in this event for the period of a four–year–term of the Sejm and Senate). Due to the above, the possibility of periodical rotation of political parties forming the parliamentary majority is guaranteed. The remaining political parties may rely on the assumption that in the next elections they will gain support of the voters which will allow them to form a stable parliamentary majority and choosing among themselves own government.

3. In today's political system is impossible to imagine the structure of political representation without a significant share of the political parties[14]. Their role is clearly pointed out in various stages of the electoral process, starting from the mode of nomination of candidates to the Sejm and Senate. The provision of Article

11 Compare J. Buczkowski, *Podstawowe zasady prawa wyborczego III Rzeczypospolitej*, Lublin 1998, p. 45; A. Żukowski, *System wyborczy do Sejmu i Senatu RP*, Warszawa 2004, p. 58 and the following pages.

12 Compare K. Skotnicki, *Zasada powszechności w prawie wyborczym. Zagadnienia teorii i praktyki*, Łódź 2000, p. 9 and the following pages.

13 Compare L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2007, p. 54.

14 Compare M. Chmaj, *Wolność tworzenia i działania partii politycznych. Studium porównawcze*, Olsztyn 2006, p. 114 and the following pages.

100 paragraph 1 of the Polish Constitution emphasises this fact by stating that: „Candidates for Deputies and Senators may be nominated by political parties and voters". Granting political parties this power is fully justified, since in any electoral system the political parties are the „driving force" of the election campaign. They play a decisive role in it, developing election programs, which then are presented by candidates to voters, and they are trying to popularize them among the general public[15]. Even after the elections, political parties fulfil the same important role, taking actions towards the establishment and maintenance of the parliamentary majority, and then join to participate actively in the functioning of the parliament.

There is no doubt that the guarantee of effective participation of different parties and political groups in the process of representation is basing a country's political system on the principle of pluralism[16]. The mutual relationship between the principles of pluralism and representation boils down to the fact that political pluralism is an essential prerequisite for the democratic character of political representation[17]. This excludes the determination of representation by one political party, because this system must be based on the existence and activities of at least a few political parties presenting different political programs. Consequently, it can be assumed that political parties operating in conditions of political pluralism do not deform the process of representation, but they do the opposite – they allow it to obtain a democratic legitimacy and the actual meaning[18]. According to Article 11 paragraph 1 of the Polish Constitution political parties organise themselves on a voluntary basis and equality of Polish citizens '*in order to influence on the shape of state policy by the use of democratic means'*.

Adoption of a model of representation based on the principle of political pluralism is essential in the process of selecting by the Nation its representatives to the composition of representative bodies. Since then the sovereign uses not only the right of selecting its representatives, but also the opportunity to choose from presented election programs selected by voters in the act of voting, which programs are later pursued by members of both houses of parliament. Consequently, the sovereign, along with the act of creation of the representatives, chooses a certain political attitude presented during the election campaign by political parties involved therein[19]. Far–reaching possibilities of being chosen by the electorate from various election programs are guaranteed, however, only if during the election all ma-

15 Compare W. Skrzydlo, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2007, p. 99.

16 The principle of political pluralism was adopted in Article 11 of the Constitution of RP from 1997 by ensuring freedoms of creating and functioning of political parties.

17 It is suggested by M. Granat, *Konstrukcja zasady reprezentacji politycznej w Konstytucji RP z 1997 roku*, (in:) *Podstawowe pojęcia…*, *op. cit.*, p. 86.

18 *Ibidem*, p. 87.

19 Compare E. Zwierzchowski, *Wprowadzenie do nauki…*, *op. cit.*, p. 13.

jor political parties and groups can compete against each other freely. The practical application of the suffrage rules of clear and unfettered competition between political parties has also an enormous influence on the subsequent alignment of political forces in the parliament and the mutual relations between the parliamentary majority and the opposition. It is undeniable that the consistent observance of these rules does not usually deprive of the chances for gaining own representation in the Sejm also by those political parties which have not attracted significant support during the election by the electorate. Meanwhile, from the members of these political parties a core part of an organized parliamentary opposition is derived from in the Sejm, because these parties have a small number of parliamentary seats and are usually ignored during the process of forming a coalition after the elections, which constitutes a new government's political base[20].

4. An important guarantee of the implementation of the constitutional principle of political representation is also the fact that the parliament as a body representing the Nation would enjoy a strong position in the system of the supreme organs of a state[21]. On the grounds of the wording of Article 4 paragraph 2 of the Polish Constitution that the Nation exercises power through their representatives, it means that this power „should be characterized by some important features, and the bodies performing it must have relevant competences"[22]. Undoubtedly, such requirements correspond to the nature of a state power guaranteed by the constitution to both chambers of parliament, which are selected by the Nation in the elections based on the principle of universality and must be treated in the same category, as the most important exponents of the will of the sovereign.

The Sejm and Senate have been classified in accordance with the constitutional principle of separation and balance of powers (Article 10 paragraphs 1 and 2) to the organs of legislative power, which to some extent, determined that the parliament was granted a very broad range of competences. Of particular importance in this case are those functions of the parliament which can be implemented jointly by both chambers, so a systemic and legislative function. A significant importance should be given to powers of the Sejm resulting from its function of parliamentary control, which focuses essentially on the current control of the executive[23]. With a full conviction we can therefore assume that the exercise by the parliament of its basic functions allows it (and thus on the principle of political representation the

20 Widely explained in S. Bożyk, *Partie polityczne a Sejm RP*, Warszawa 2006, p. 14 and the following pages.

21 Compare Z. Witkowski, *Wybrane zasady naczelne ustroju politycznego i gospodarczego Rzeczypospolitej Polskiej*, (in:) *Ustrój konstytucyjny Rzeczypospolitej Polskiej*, ed. R. Mojak, Lublin 2000, p. 80.

22 M. Kudej, *Problematyka…*, *op. cit.*, p. 63.

23 Compare A. Bałaban, *Pozycja ustrojowa i funkcje Sejmu RP*, Warszawa 2005, p. 107 and the following pages. See M. Kruk, *Funkcja kontrolna Sejmu RP*, Warszawa 2009.

sovereign) for a real possibility of a permanent impact on the main directions of state policy.

5. As I have already pointed out, in the contemporary realities of the political system it is impossible to imagine the structure of political representation without its significant participation in the framework of political parties, effective participation of these groups in a complex process of representation is possible only in such a political system, which was formed on the grounds of the principle of political pluralism. This particular role of political parties is simply limited to the fact that each political party tries to take over power in a state or to secure a share in its exercise. Commonly occurring competition among political parties takes place not only during elections, but also when each party competes to gain as large representation in the parliament as possible, but also during carrying out the functions of a government.

The function of governing in a democratic state is carried out by political parties in two ways: 1) directly, 2) by exerting influence on a state policy[24]. The first form of carrying out the function of governing takes place when a winning party or a coalition of parties forms in the parliament after winning elections, the ruling majority and appoints personnel to positions in the highest state organs. In turn, the function of governing limited only to exerting a specific influence on the implementation of state policy refers essentially to those political parties which lost the elections and found themselves in opposition to the ruling party or coalition. Then, these opposition groups usually try to join into the process of co–governing of a country, using the existing possibilities of the current impact on the content of those decisions that may be taken as a result of a compromise between the governmental majority and the opposition. Such activities performed by opposition parties, even in situations when their final effect is insignificant, must be regarded as a form of active participation in the implementation of the broader functions of governing[25].

Taking into account of the principal aims of political parties, it should be emphasized that the achievement of these objectives is integrally linked with the formation of the composition of parliament, its structure and mode of operation and the exercise of the legislative authority. In fact, political parties have always had a decisive influence on the course and final outcome of the parliamentary elections, which in turn determines the process of creating a government, as well as determines the appointment by the parliament of a number of other positions in a state.

24 Compare. M. Sobolewski, *Rola systemów partyjnych w kontroli władzy państwowej*, Zesz. Naukowe UJ, Prace Prawnicze 1966, z. 2, p. 276 and the following pages.

25 See S. Bożyk, *Opozycja parlamentarna w Sejmie RP*, Warszawa 2006, p. 23 and the following pages.

After elections, particular political parties through their parliamentary fractions (clubs) influence the internal organization, forms of activities and the implementation of the core functions of the parliament. As a result, every modern parliament has become an authority which personnel, as well as the substantial directions of activities are determined by the political parties.

Such a defined role of political parties can take place only in a country whose political system was formed on the principle of political pluralism. The principle of political pluralism, which is one of the fundamental constitutional principles, refers largely to the fact that legal regulations established and functioning in a certain state (primarily of constitutional status) ensure the furthest possible discretion on the formation and functioning of political parties[26]. To achieve the principle of political pluralism understood in that way it is necessary to accept significantly different ideas and political programs within the framework of a country, where the ideas and programs are always unambiguous expression of a pluralist organisation of a society. By articulating different political programs is, of course, possible only in conditions of a multiparty system, where in order to take power in a country at least a few major political parties has to compete with each other. In this event a multi–party system is also an inseparable feature connected with pluralism of political parties, because the constitutional principle of political pluralism always determines a certain multiparty system[27].

It should be noted that only in conditions of political pluralism and a multiparty system a peaceful competition between different policy options for transfer and governance in a country becomes possible. Its indications are mainly and clearly expressed aspirations of different political parties aimed at gaining a majority in parliament by an active participation in free and competitive parliamentary elections. There is no doubt that an essential condition for use of freedom of competition in a competition process for the acquisition or maintenance of power must be perceived as ensuring equality of the main actors of the political scene towards the law[28]. Consequently, this means an absolute requirement for the same treatment, by the provisions of functioning law, of all legally operating political parties. Moreover, we cannot forget that guarantying equal opportunities in a peaceful competition between parties having significantly different political programs on the topic of taking over and governing in a country is one of the basic forms of fulfilment of the constitutional principle of the sovereignty of the Nation.

26 Compare M. Chmaj, *Wolność tworzenia*…, *op. cit.*, p. 55 and the following pages

27 The principle of pluralism excludes every form of one–party system, for example: a monopoly of one party which was in use in countries of real socialism and performing the managing role a communistic party. Compare. M. Granat, *Zasada pluralizmu politycznego*, (in:) *Polskie prawo konstytucyjne*…, *op. cit.*, p. 130 and the following pages

28 Compare A. Jamróz, *Demokracja współczesna. Wprowadzenie*, Białystok 1993, p. 48.

6. Constitution of the Republic of Poland of 1997 establishes the principle of political pluralism in Article 11 paragraph 1, which states that: 'The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means'. The presented formulation of the principle of political pluralism in the Polish constitution does not depart from the extent of the constitutional status of the regulation of political parties in other constitutional systems[29]. Adopting in this form the principle of pluralism is entirely understandable, because the aspiration to shape legal frameworks in such forms which would be able to guarantee, without exception, an equal chance for winning the competition for gaining power for all active political parties, thus, declaring a complete freedom to form a party, at present characterizes each democratic state. One cannot also deny that in conditions of genuine diversity of the existing political scene, based on the constitutional principle of political pluralism, it is possible to shape a factual competition between the governing and opposition parties. A real political pluralism guarantees a current control over the ruling persons performed by opposition groups and it also creates a personnel and program alternative, allowing for a flexible way of changing governments by the use of coalition agreements or by a different outcome of the next elections[30].

From the point of view of political position of the Sejm of significant importance is the definition of the constitutional formula of the fundamental goal of political pluralism of political parties. It is appointed by the provision of Article 11 paragraph 1 sentence 2, stating that: '*Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means'*. This constitutional formula has just been extended in the law of 27 June 1997 *on political parties*[31], where the objective of the functioning of a party was considered '*participation in public life through democratic means to exert influence on the shaping of state policy or the exercise of public authority'* (Article 1 paragraph1). It seems that both of these objectives should be considered inseparably because the exercise of public power, undoubtedly, it is set within the frames of development of a state's policy[32]. It is more difficult to specify the used in the Constitution and the law on political parties, concept of „*democratic methods*."

29 Compare W. Sokolewicz, *Artykuł 11*, (in:) *Konstytucja Rzeczypospolitej*…, *op. cit.*, p. 1 and the following pages.

30 Compare M. Gulczyński, *Zasada pluralizmu politycznego*, (in:) *Zasady podstawowe*…, *op. cit.*, p. 175.

31 The Journal of Laws (Dz.U.) No. 79, item 859.

32 Compare M. Granat, A. Gorgol, J. Sobczak, *Ustawa o partiach politycznych. Komentarz*, Warszawa 2000, p. 20.

The usage by the legislator of this inaccurate definition in order to concrete actions of political parties, in practice, poses serious difficulties of interpretation. Hence, it would be more appropriate here to use the term „*method in accordance with the law*". In this case, however, we can appeal to the Constitutional Tribunal, and mainly to the contents of the decision of 26 January 1993 (U. 10/92), therefore, issued before the enactment of the current Constitution of the Republic of Poland. In its decision, the Tribunal held that the need of state policy requires democratic means forcing inter alia, ensuring political parties legal conditions that enable them to freely carry out their function, in particular through specific „parliamentary" mechanisms. This means that the main form of exploitation of democratic methods of operation by political parties were considered all forms of parliamentary activity, so a participation in both the existing organizational structures and functioning, as well as the implementation of the core functions of the parliament[33].

The above observations lead to the conclusion that the principle of political pluralism is essential not only for determining the status and role of political parties, but also for the relationship between political parties and parliament. Guaranteed within its framework the freedom of establishment and functioning of political parties and the consequent principle of equality of the parties before the law means that law must contain the same possibilities for implementing the core functions of parliament for both parties forming a government coalition as well as political parties and groups being in certain period of time in opposition to the parliamentary majority[34]. It should also be noted that the adoption of the constitutional principle of political pluralism, including the recognition, ensuring and respecting the rights of the opposition, is an important condition for realization of the principle of the division and balance of powers underlying the definition of the Sejm in the structure of the state supreme bodies of the Republic of Poland.

7. The position of the parliament among the main public authorities has traditionally been dependent on the system of state organs in a country, which consists of general rules governing the structure of the state apparatus, the organizational form of state authorities and the mutual relations between them. The rules of relations between the systems of state bodies can be very diverse. Some bodies may occupy a primary position, while others may be subordinated to them, the system balance may also exist between them. On the grounds of the construction of a system of state bodies lie closely related principles: 1) the principle of separation of function of the state apparatus between various groups of state bodies, 2) the principle of unity of action the whole state apparatus, and thus all of its organs. Every

33 See W. Sokolewicz, *Artykuł 11*…, *op. cit.*, p. 39 and the following pages.

34 Compare S. Bożyk, *Partie polityczne*…, *op. cit.*, p. 33.

theoretical concept of building the state apparatus, to a lesser or greater extent, always recognizes and accepts these two principles[35].

It can be assumed that the system of state bodies in every structural system is structured in a way to serve for the best implementation of socio–political and economic tasks of a state, resulting from the nature of the existing framework of its political system. Therefore, the system model of these bodies depends mainly on the constitutional principles on which a political system of a country was based. There is no doubt that the entire system of state bodies is influenced by different systemic rules, including such fundamental principles of the political system as the principle of the sovereignty of the Nation and democratic rule of law. Critical to the organizational structure of the state apparatus, as well as the basic rules of its operation have two opposing principles that collide with each other over at least the last two centuries. These include: the principle of unity of state power and the principle of separation of powers[36].

The principle of unity of state power comes down to the fact that in the structure of the state apparatus there is a vivid dominance of one authority, to which any other state bodies are subordinated directly or indirectly. This principle of organization of the state apparatus is well–known in an undemocratic form, the total concentration of power in the hands of individuals or very small group of people. In this form the principle of the unity of power was applied in the absolute monarchy, as well as in countries with a fascist regime, authoritarian systems of government and in many (especially in the twentieth century) dictatorial regimes.

The presented principle may also occur in a democratic form, where the highest authority (dominating) in the system of supreme organs of state is the parliament. Such a formula of the principle of unity of state power is based, similarly as in the system of separation of powers, on selecting classic state functions and vesting them within the competence of bodies in the state apparatus. However, it differs from the parliament by the fact that the parliament is a superior body over other bodies of central government[37]. Democratic variant of the principle of unity of power did not find a wider application in contemporary constitutional systems.

In contrast to the concept of the unity of state power, the principle of separation of powers has become widely used in democratic systems of governance based on the organization of state institutions. Of more significant importance, however, is the fact that this principle is recognized primarily as one of the fundamental principles of the state system, usually formulated directly in the essential content

35 Compare S. Bożyk, *System organów państwowych*, (in:) *Prawo konstytucyjne*, ed. M. Grzybowski, Białystok 2009, p. 136 and the following pages.

36 Compare E. Zwierzchowski, *Wprowadzenie do nauki…*, *op. cit.*, p. 42.

37 *Ibidem*, p. 48.

of constitutions. On the European ground the principle of separation of powers from the very beginning, i.e. since the birth of the first written constitutional acts in the late eighteenth century, was shaped and treated in the category of contrasting structures of absolute rule, which was characterized by the highest concentration of power in the hands of one entity (the monarch). In this sense, this principle should be regarded as one of the most important guarantees of democracy existing in a certain country of systemic governing[38].

Founded under this principle the separation of powers is usually approached in three ways: 1) functional (objective), 2) organizational (personal), 3) personnel[39]. The first of these, namely the separation of powers in the objective sense, comes down basically to the fact that in a particular country different spheres of the fundamental nature of its activities must be separated. To these spheres of activity (function) of a state we may include: legislation, realisation of executive functions and carrying out the functions of justice. The subjective approach to the separation of powers means in turn that each of the three above–mentioned fields of state activity is attributed to three entirely separate categories of the supreme organs of state. This leads to a substantial organizational separation of the legislative power, executive power and the judiciary. Within such a triple division of authority, the legislative power is vested into the hands of a one–chamber or two–chamber parliament, executive power is concentrated in one body (the president is both a head of state and a government) or is dualistic in nature (performed by two separate bodies of the executive: the head of state and government), the judicial power shall be vested in independent judicial authorities. The separation of powers in terms of personnel means the possibility of exclusion from holding concurrent posts by the same person (or organized group of persons) in the bodies of the state fulfilling different functions within the divided state authorities[40]. To this rule we can define, however, some exceptions, for example, the principle of holding a certain function in a government simultaneously with a deputy mandate in a parlament which can be practised in many systems.

There is no doubt that for the purpose of realisation of the concept of separation of powers is particularly important to determine the relationship between the legislative, executive and judicial power. These relations should be characterized by a relative balance between them, so that to exclude the possibility of domination of any authority over the other authorities of a certain country. Therefore, a fully justified need always arises in order to equip the individual authorities with such

38 Compare. L. Garlicki, *Polskie prawo…*, *op. cit.*, p. 68 and the following pages.

39 Compare B. Banaszak, *Porównawcze prawo…*, *op. cit.*, p. 397 and the following pages. See also W. Skrzydło, *Zasada podziału władzy i równowagi władz*, (in:) *Polskie prawo…*, *op. cit.*, p. 124 and the following pages.

40 That is way it is necessary to apply in practice the principle of *incompatibilitas*, meaning not holding certain functions and posts in a state.

measures by which they could exert influence on the functioning of other authorities, without infringing at the same time conferred competences to them, thereby ensuring efficient operation of the entire state apparatus[41]. An essential component of this organization rule of the state apparatus is, therefore, a system of mutual inhibition and balance of the authorities.

8. Presenting the essence of the constitutional principle of separation of powers, it is necessary to draw attention to the fact that this rule in its classic form cannot be fully and consistently implemented in practice, in any modern constitutional state. A significant growth of state's function contributed to it substantially, so that now it is not possible to precisely distinguish between three categories of public bodies. Hence, there is a long–standing phenomenon of „transfer" of responsibilities between different authorities, with one of the most striking example which is granting authorities of the executive power a regulation of law (under the so called delegated legislation) of normative acts with the force of a law. The result is often more or less a vivid departure from the formula of balancing authorities. Then, a predominance of either the parliament over the bodies of the executive is marked, or executive has a significant impact on the functioning of the legislature. Critical to the realization of the idea of separation of powers has always been the activity of political parties. It is common ground that even when a certain political party (or a formed coalition of political parties) has a majority of seats in the parliament to form a government at the same time, the division of power in the legislature and the executive becomes illusory. That is way the separation and mutual inhibition of these two authorities are then replaced by the interaction of the legislative and executive power. The only division which will remain in this situation and take on greater importance will definitely be a clear distinction between the government's majority and the political opposition in a parliament.

Appearing tendency in the systemic practice of individual countries to move away from the classic formula of separation of powers, generally, exerts an impact on the constitutional position of the parliament in the structure of the supreme organs of state. Consequently, its systemic position is determined by the political system of governance, which operates under the authority of the legislature. It is most significant in the parliamentary systems of government (including the United Kingdom, Germany, the Nordic countries), where the parliament has significant powers in the legislative and executive control. In the presidential system, the legislative and executive power were shaped, in turn, on a principle of separation between them and the mutual inhibition and the balancing of these two authorities (*the principle of checks and balances*). The most limited role of parliament towards

41 Compare B. Banaszak, *Porównawcze prawo…*, *op. cit.*, p. 393.

the executive (holding constitutionally guaranteed dominant position in the system of state bodies) takes place in the semi–presidential system of the French Fifth Republic, for example, where the parliament may exercise legislative function only in areas assigned to it by the constitution, because a principle of presumption of competence for the legislative bodies of executive power was adopted.

9. The principle of separation of powers went through constitutionalisation process in the first constitutional act – the U.S. Constitution of 1787. Then, it was proclaimed in constitutions of other countries, so that it has become by far a dominant formula for determining the structure of state bodies in the different constitutional systems. In Poland, the principle of separation of powers was adopted by the Constitution of May 3, 1791, and then by the March Constitution of 1921. The rejection of this constitutional principle took place in the Constitution of April 1935, which – like the Constitution of the People's Republic of Poland – stood on the basis of the unity of state power. Restoration in the Polish system the separation of powers principle, albeit at a reduced form, was described only in Article 1 of the Small Constitution of 1992.[42] This provision states that: '*The organs of the State within the scope of legislative power are – the Sejm and Senate of the Republic of Poland, and within the executive power – the President of the Republic of Poland and the Council of Ministers, within the scope of the judiciary power – independent courts*'. Adopted in the Small Constitution the structure of the separation of powers principle did not yet give an unambiguous answer to the question, about the consequences in that way formulated principle for the functioning of the supreme state bodies, and especially whether such outlined division should be regarded as a far–reaching separation of authorities, or as the balancing and interaction between them[43].

These doubts should no longer be present on the grounds of the interpretation of the principle of separation of powers in the content of the current Constitution of 1997, since this principle was introduced to the political system of the constitution clearly and unambiguously[44]. First, in Article 10 paragraph 1 the basis for the demarcation of the authorities was indicated, which was reflected in the wording that „*The system of the Republic of Poland is based on the separation and balance between the legislative, executive and judicial powers*". Then, in Article 10 paragraph 2 a subjective approach to the principle of separation of powers was described since the legislator pointed out here these constitutional authorities of

42 Compare W. Sokolewicz, *Rozdzielone, lecz czy równe? Legislatywa i egzekutywa w Małej konstytucji 1992 roku*, "Przegląd Sejmowy" 1993, no 1, p. 22 and the following pages.

43 See H. Suchocka, *Zasada podziału i zrównoważenia władz*, (in:) *Zasady podstawowe*…, *op. cit.*, p. 149.

44 Some discrepancies in this field are specified in the doctrine A. Pułło, *Zasada podziału i równoważenia władz (Podstawowe dylematy debaty konstytucyjnej)*, (in:) *Wybrane zagadnienia nowej Konstytucji*, ed. A. Szmyt, Gdańsk 1998, p. 31 and the following pages.

a state which are entrusted with the implementation of the various categories of state power. Thus, both chambers of the parliament (Sejm and Senate) were specified and described in terms of the legislature protectors of legislative power, and to exercise the functions of the executive power the President of the Republic of Poland and the Council of Ministers were appointed, and courts and tribunals were included into the organs of judiciary power[45].

Analysis of the content of Article 10 paragraph 1 of the Constitution of the Republic of Poland allows for a conclusion that the adopted concept of separation of powers requires both dissociation of the legislative, executive and judiciary, as well as shaping the relationship between the various authorities under a system of mutual restraint. The purpose of this solution is undoubtedly to ensure relative stability of these three separated constitutionally supreme state authorities. It should be emphasised that the implementation of the general assumption cannot be certainly guaranteed by only constitutional regulations set up by the legislator, even if they are extremely accurate and not questionable in principle, not causing any discrepancies during their interpretation. In fact, in every democratic political system of every country a decisive influence on the nature of relations between the supreme bodies of state authority are possessed by an alignment of political forces in society, determined by the shape of the existing inner party system. This influence is expressed in the fact that the party systems in operation today, not excluding here the current party system functioning in the Republic of Poland, is usually caused by a far–reaching modification of the constitutional principle of separation and balancing authorities. As a result, in the activities of the supreme organs of state we can notice more often the cooperation and interaction between parliamentary majority and selected by this majority government, rather than consistent application of the approved construction of the separation of powers between the legislative and executive[46].

We cannot omit the fact that in the consequence of such a significant impact on the existing political forces in a state to implement in practice the constitutional principle of separation and balancing of the public authorities, the nature of the relationship between the majority and the parliamentary opposition has been gaining a significant importance. It is relatively easy to notice that the impact of these relations on governance in a democratic state is, in many cases becomes not less than the formed and functioning in political and constitutional realities of a state the model of relations characterized by mutual relations between the legislature and

45 See P. Sarnecki, *Artykuł 10*, (in:) *Konstytucja Rzeczypospolitej…*, *op. cit.*, p. 1 and the following pages.

46 Such a tendency is visible especially in a parliamentary–cabinet version of the separation of power where usually „a political and personal distance between the parliamentary majority and the government is fading" (L. Garlicki, *Polskie prawo…*, *op. cit.*, p. 70). Compare W. Skrzydło, *Ustrój polityczny RP w świetle Konstytucji z 1997 roku*, Kraków 2004, p. 67.

executive. This comment applies to a large extent to the Polish parliamentary practice, since the trend displayed here is also increasingly evident in the functioning of the Sejm of the Republic of Poland.

A definition which was adopted in Article 10 paragraph 1 of the Constitution of the Republic of Poland on the balance of legislative, executive and judiciary powers should not be interpreted as an absolute requirement to maintain full and unwavering balance between the three main authorities in a country. The main intention of the constitutional legislator, declaring shaping the relationship between them on the principle of balance, was merely that the provision of Article10 paragraph 1 excluded the possibility of dominance of one over the other powers to that extent that the remaining powers would deprive *de facto* the independence in carrying out their constitutional duties[47]. Even a brief analysis of the regulations which are included in the current constitution, relating to the system and the competence of the supreme state bodies of the Republic of Poland and the relationships between them, does not allow to conclude that these provisions treat all powers on the principle of mutual balance[48]. In fact, the content of these constitutional norms shows that the relationship between these three divided powers (particularly in the relationship between the legislative and executive power), they acknowledge a far stronger position to organs of the legislative power (the parliament), and under it – the Sejm[49].

This systemic solution which result is the emerging supremacy of the legislative power (the Sejm), mainly towards the executive[50], shows without doubt a certain specificity of a construction shaped in the system of the Republic of Poland regarding a division and balance of powers. It comes down as a consequence to forming relationship between the legislative and executive power on the basis of a rationalised system of parliamentary government. The supremacy of the parliament in this system among the chief organs of state cannot be treated as a completely new solution. In fact, visibility of the position and role of the legislative power refers very clearly to the Polish parliamentary traditions, which in the past preferred such a model of separation of powers. This was evident mainly in the content of the Constitution of March, which guaranteed a special position of the parliament in the structure of supreme state authorities of the Second Republic of Poland.

47 Compare W. Skrzydło, *Zasada podziału…*, *op. cit.*, p. 127.

48 Compare M. Grzybowski, *System rządów (Sejm – Prezydent – Rada Ministrów)*, (in:) *System rządów Rzeczypospolitej Polskiej. Założenia konstytucyjne a praktyka ustrojowa*, ed. M. Grzybowski, Warszawa 2006, p. 11 and the following pages.

49 Compare S. Bożyk, *Sejm w systemie organów państwowych RP*, Warszawa 2009, p. 59 and the following pages.

50 See R. Mojak, *Parlament a rząd w ustroju III Rzeczypospolitej Polskiej*, Lublin 2007, p. 113 and the following pages.

Resulting from the Constitution of the Republic of Poland supremacy of the Sejm with respect to executive power is reflected in the broadly elaborated competences of this chamber of the parliament, which guarantee it a decisive role in shaping the content of legislation, exercising the functioning control of executive, enforcement parliamentary responsibility of ministers and a prime minister and a significant participation in the process of appointment of a government. We should also remember that the adopted constitutional solutions also provide the executive authority a certain impact on the functioning of the parliament. First of all, two executive bodies have the right to initiate legislation, whereas the President of the Republic of Poland has the right to legislative veto, and may (but only in specific situations described in the constitution) shorten the term of the parliament and order early parliamentary elections.

Ensuring to the legislative bodies in the norms of the Constitution of the Republic of Poland of 1997 clearly exposed position under the principle of separation and balance of powers, finds its justification in the specific character of these bodies. In particular, it manifests itself in the fact that the Sejm and the Senate come from universal and direct suffrage, so they are representative bodies. Both chambers of parliament were appointed to represent the sovereign (the Nation) and, above all, by this principle a significant (and even decisive) legislative power must be guaranteed to the organs of legislative power in the process of exercising the highest power in the country. The existing situation in this field cannot be changed by the fact of the appointment by direct and universal suffrage of the President of the Republic of Poland, because in a pluralistic society a single authority may not be a representative of the Nation[51], due to the fact that this authority does not reflect various policy options which occur in it. This means that the institution of the president does not actually reflect the constitutional principle of political pluralism. This principle is in fact only reflected in the composition of the legislative power, since only the parliament, because of it is elected in democratic elections, which guarantee unfettered competition of various political parties and programs, is able to provide an authentic representation of a pluralistic society[52].

10. In presenting the constitutional position of the Sejm under the principle of separation and balance of powers, we should also pay attention to the problem of the relationship between a head of state and a parliament in cohabitation conditions, namely when the President of the Republic of Poland in office and the government majority in the Sejm represent different political orientations[53]. The co-

51 Compare M. Kudej, *Problematyka*…, *op. cit.*, p. 74 and the following pages.

52 Compare W. Skrzydło, *Zasada podziału*…, *op. cit.*, p. 167.

53 See J. Mordwiłko, *Zagadnienie cohabitation w systemie ustrojowym Francji i Polski*, "Biuletyn Ekspertyzy i Opinie Prawne" 1998, no. 1, p. 74 and the following pages.

habitation in this regard is not at all beneficial to the government and supporting parties in the parliamentary majority, but it should encourage parliamentary minority groups, since the President becomes a natural support for the parliamentary opposition. First of all, he has a real chance to block the legislative initiatives of the government and ruling coalition, which negatively assess the political opposition or the president himself, through the use of this end of the constitutional institutions of the legislative veto. It should therefore be noted that this is not a purely theoretical assumption. In systemic practice of the Third Republic of Poland the President's active engagement in political disputes taking place in the parliament, and in particular the promotion of minority groups in the Sejm, because it was visible both in the final term of the presidency of Lech Walesa (when in autumn of 1993 to December 1995 he was in conflict with the government created by the parliamentary majority of the SLD–PSL), as well as during four years of the presidency of Aleksander Kwaśniewski (since the takeover of power by a coalition of AWS and the Freedom Union in autumn 1997 to the parliamentary elections of 23 September 2001). It also took place during the term of President Lech Kaczynski, who often enjoyed the right of veto over certain legislative initiatives of the ruling coalition. Therefore, the institution of the legislative veto was in fact a very effective source of the head of state's influence on the functioning of the parliament, thus providing one of the main suppression to the principle of separation of powers performed to balance the legislative bodies and bodies of executive power.