ABUSE OF LAW BY CENTRAL AND EASTERN EUROPE HEADS OF STATES

ARTUR OLECHNO

University of Bialystok, Faculty of Law, Poland

Abstract in original language:
In this presentation the author would like to indicate essential issues connected with the problem of abuse of competence and powers by Heads of State in young democratic countries of Central and Eastern Europe. These countries tend to adopt some specific constitutional solutions. This phenomenon has been influenced by several negative factors that are somehow typical of young democracies, such as, e.g., lack of parliamentary stability or certain "over-legal" rules of conduct that have failed to develop (due to lack of time).

Key words in original language:
Abuse of law, competence, constitution, liability, democracy.

In my presentation I would like to indicate essential issues connected with the problem of abuse of competence and powers by Heads of State in young democratic countries of Central and Eastern Europe. These countries tend to adopt some specific constitutional solutions. This phenomenon has been influenced by several negative factors that are somehow typical of young democracies, such as, e.g., lack of parliamentary stability or certain "over-legal" rules of conduct that have failed to develop (due to lack of time). These factors plus sometimes deliberate abuse of entrusted powers have led to some kind of distortion of the institution of Head of State resulting in the situation when legal provisions depart from the constitutional practice.

In Poland, the untranslatable eponym "law falandization", i.e. a pejorative term describing some attempts at interpreting law or justifying the authorities' actions that are teetering on the edge of law, has become a commonly used term. It refers to "bending" the law or attempting to interpret it in the interim interest of an interpreter. This term derives from the surname of Chief of President Lech Walesa's (1990-1995) Chancellery – Prof. Lech Falandysz, who insisted that President had the right to dismiss two members of the National Broadcasting Council he had himself appointed. Law did not envisage any possibility of their dismissal but at the same time neither excluded (nor banned) this. Therefore, this case was not unambiguously determined by the rules of the law. Mr. Falandysz claimed that if someone had the right to appoint a person to hold a post, then it was only logical he or she was also entitled to dismiss them as well.

Polish Constitutional Tribunal has rejected this opinion many times. In one of many verdicts thereon (W 7/94), the Tribunal ruled universally that …"only one unequivocal conclusion may be derived from both the constitutional principle of legality and the principle of a democratic state of law, namely, if legal norms do not clearly stipulate powers of a State body, such power must not be presumed, what is more, any intention that has not explicitly been expressed by the legislator may not be attributed to him on the basis of any other kind of power. The Constitutional Tribunal took a firm position on provisions concerning powers in its jurisdiction, and ruled many times that provisions on competence and powers "are always subject to strict literal interpretation, and it is not allowed to presume that some issues that are not listed by way of , e.g., interpretation of purpose, may be covered by them."

A different approach may result in “acquiring” additional powers, and sometimes even influence the constitutional position of President. Ukraine under the rule of Leonid Kuczma may serve as an example here. The Ukrainian President fully subordinated central and local units of executive power to himself, frequently surpassing the sphere of his own competence and powers. Political disputes between the Head of State and Parliament proved that it was the President who held real power and had final impact upon internal and external policy of the State. The President won this dispute on the edge of law, which may be exemplified by abuse of the right to veto. Exercising the right to veto, the President violated the provisions of the Constitution many a time, and specifically, a 15-day period enshrined thereon to sign or return a bill for revision. There were cases of bills returned on the 18th, 20th, and even 21st day after they had been received[1]. What is more, it was in breach of Art. 94 paragraph 3 thereon as well, which stipulated that after the lapse of a 15-day period, a bill shall be found accepted and President shall be obliged to sign it. Moreover, some bills were returned to the Supreme Council twice or even three times (!)[2].

Lack of a provision on President’s liability in such cases and no reaction from other State bodies, as well as the unfortunate provision itself, favor violation of law and the Constitution in this respect. It seems here that a good solution would have been a clear statement of the Ukraine’s Constitutional Court in this matter, or at best a change of the Constitution, for instance by crossing out a part of the provision” “…. shall be found accepted and thus must be signed….”, and replacing it with a new one which would mean that a bill shall be binding after it has been re-passed by the Supreme Council without President’s signature. Such a solution has been adopted, e.g., in the USA.

For many years, lack of specific provisions in constitutions with regard to such issues as impeachment procedure, counter-signature of presidential acts, or the above mentioned right to veto, have been another problem not only in Ukraine. Bearing this in mind, constitutional practice is becoming even more important. Such a situation, however, leads to an increase of anti-presidential moods sooner or later, which means strengthening of opposition forces that are proclaiming the necessity to weaken President powers, which as such is a threat to democracy. After regaining independence, the authorities treated the law as a tool in the hands of the rulers. New authorities’ task, which was crucial in the process of the country’s democratization, was to recognize the law as a superior value, whereas observance of the law – as an absolute duty and obligation of State bodies. The authorities do not fulfil this obligation regardless of a political option. Remaining with the example of Ukraine, after defeating Leonid Kuczma, new elected President Victor Juszczenko already at the beginning of his term of office followed in his predecessor’s footsteps. New governors who had not been accepted by the government were appointed on 4th February 2005 by the President in breach of the Constitution. What is more, the President passed a decree changing competence and

---

[1] The following Acts, respectively: *Pro rachunkowu pałatu, Pro derżawni harantiji widnowlennja zaoszczadżeń hromadjan Ukrajiny i Pro zupinenja spadu silskohospodarskoho wyrobnictwa ta prodowolcze zabezpeczennja krajiny u 1997-1998.*

[2] E.g. the following Acts: *Pro miscewi derżawni administracji i Pro osobliwostki priwatizaciji majna w agropromysłowomu kompleksi*, See also W. I. Hołowatenko *Weto Prezydenta jak ważil zabezpieczennja derżawno-prawowoji reformy w Ukrajani, Derżawno-prawowa reforma w Ukrajani – materiały konf.*, *November* 1997, Instytut zakonodawstwa WRU, 1997, p.137.

powers of Secretary of National Security and Defence Council even though the Constitution grants him the right to pass decrees only with regard to issues that are not regulated in legislation, whereas the Council's activity and the scope of Secretary's powers are regulated by an appropriate Act. I am convinced many of us here could find similar examples in their countries.

Efficient functioning of Constitutional Courts and the institution of constitutional liability (impeachment) should be a counterweight for such conduct in a democratic state. At present, the institution of impeachment, which mainly refers to President's liability, has been introduced by most constitutions of democratic states, naturally including the countries of the discussed region. Nevertheless, it should be emphasized that it happened only after the collapse of the so called Eastern Block since constitutions of socialistic countries had not envisaged constitutional liability. A breakthrough happened in 1982 when Poland established the institution of the State Tribunal, which somehow referred to pre-war solutions. Only the collapse of the system caused that in newly passed Constitutions there was a place for constitutional liability. The subject as well as object scope of the liability differs, however, is has already become customary to include Presidents among those to be held liable for treason (Czech Republic, Slovakia, Romania, Russia and Lithuania), a breach of the Constitution (Slovakia, Bulgaria, Romania, Russia and Ukraine), a breach of the Constitution and Laws (Poland and Hungary), or committing an offence (Poland, Hungary, Lithuania, Estonia, Latvia, Russia and Ukraine). Whereas a choice of a judicial body most often resulted from either a traditional political system or a reference to western democracies: Constitutional Court (Czech Republic, Slovakia, Hungary and Bulgaria), parliament (Lithuania, Ukraine and Russia), special court (Poland) or common courts (Estonia and Latvia).

A flaw in this institution, however, is its low efficacy. I would like to invoke here the examples of Romania and Lithuania, so far the only case of President's impeachment. Impeachment has already been instituted in Romania twice. In both cases Presidents were charged with violation of the Constitution. For the first time in June 1994 against Ion Iliescu. The opposition's motion, however, failed to win the support of the Supreme Court and did not get required majority of both Houses. The procedure was more advanced in another case though. In February 2007 the charges against President Trajan Basescu won the required support of majority of Chamber of Deputies and Senate (322 v. 108). The President was suspended in his duties, but despite his earlier declarations, he did not resign from his post and waited for the referendum's results. On 19th May 2007, however, Romanians did not accept Parliament's decision and President Basescu could return to his duties.

Lithuanian Constitution of 1992 sets forth President's liability for a breach of the Constitution, faithlessness to Presidential oath or committing an offence (Art. 86). Parliament itself decides about brining charges and the content of the verdict. If President's quilt is proved, one-chamber Seimas may impeach him or her by majority of 3/5 statutory number of members. Perhaps thanks to the straightforward procedure and the participation of only one body, for the first time in the region Lithuania efficiently initiated the impeachment procedure. In result of the procedure that commenced in December 2003, and with the support of Constitutional Court, on 6th April 2004 Seimas impeached President Rolandas Paksas under charges of revealing state secrets to third unauthorized parties, awarding Lithuanian nationality in return for financing election campaign and interfering in private businesses activity. On 13th December 2005 the Supreme Court of the Republic of Lithuania annulled the decision of the Court of Appeal and acquitted R. Paksas of the charges of violation of state secret.

Among numerous solutions, and taking into consideration practices applied so far in the discussed countries, it seems that Constitutional Court is the most appropriate adjudicating body because of its professionalism and a lower degree of politicization than in other cases. Whereas it goes without saying that basic punishment, although not necessarily the only one, in case of proved charges must be dismissal of a person whose conduct contradicts the importance and high standing of the office they hold. Moreover, consolidation of certain appropriate conducts unfortunately requires time, which young democracies have simply lacked so far.

Contact – email:
a.olechno@uwb.edu.pl