| Chapter 5 |

(Im)permanence of Polish Constitutionalism: in Search of an Optimal Vision of the State

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ABSTRACT

Poland is a state where the elites' strong attachment to the idea of a written constitution prevails, as evidenced by the special place held by the Government Act of 3 May 1791 in political and academic discourse. The constitutional awareness of the citizens is also growing year after year as they are increasingly reliant on the provisions of the current Constitution of 2 April 1997, seeking the protection of their rights and freedoms before the courts. However, the period between 1791 and 1997 is not a constitutional vacuum. At that time, although as many as eight Basic Laws[1] were applicable on Polish lands, some of them were imposed on Poles against their will. In total, the 'mathematical' balance of constitutional experience, simplified to some extent, is as follows: 10 constitutional acts are attributable to a period of 206 years (counting from the adoption of the oldest until the adoption of the youngest Constitution); thus, the average lifespan of each of them is 20 years and 7 months. If we change the frame of reference and consider the period between 1791 and 2021, the average validity of the constitution on Polish lands increases to 23 years. If only the validity of individual Basic Laws is taken as a reference, the average decreases to approximately 12 years. In political practice, as discussed below, Polish constitutions were created slowly but quickly collapsed.

KEYWORDS

constitutionalism, constitutional history, transition, independence.

1. Government Act of May 3, 1791

In 1795, the third partition of Poland took place,[2] and the First Republic of Poland ceased to exist. Earlier, however, Polish elites sought to conduct political reforms, the

1 Constitution of the Duchy of Warsaw of 1807 granted by Emperor Bonaparte, Constitution of the Kingdom of Poland of 1930 granted by Tsar Alexander I, Small Constitution of 1919, Constitution of 17 March 1921, Constitution of 23 April 1935, Small Constitution of 1947, Constitution of the People's Republic of Poland of 22 July 1952, Small Constitution of 1992.

2 In 1772, Russia, Prussia and Austria conducted the first partial partition of the territory of the Republic of Poland, and in 1793, Russia and Prussia conducted the second partition of Poland.

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most prominent expression of which was the adoption of a constitution redefining the fundamental principles of the state (Government Act of 3 May 1791).

The Constitution of 3 May built on the political models developed over centuries – albeit with major adjustments. In a direct declaration indicating that "all the power of human society has its origin in the will of the people",[3] one can easily identify traces of previous political solutions based on the "authority of the nobles' nation", which were creatively refined in the Constitution under the influence of the then modern ideas of J.J. Rousseau.[4] Consequently, the Chamber of Deputies became "the image and composition of national omnipotence" and the Deputies "representatives of the entire nation"; the *liberum veto*[5] and the instructions of regional parliaments binding on Deputies were abolished; henceforth, they were primarily to decide on general matters (wherein the influence of J.J. Rousseau may also be detected). The Sejm continued to be a representative body of the nobility, although it was composed of the so-called landed nobility (i.e. landowners); in addition, plenipotentiaries of cities (elected from among the landed burghers) with limited powers were introduced to the Chamber of Deputies.[6] In turn, the king was perceived in the constitution as "the father and head of the nation," reigning "by the grace of God and by the will of the nation", [7] and finally as a representative of the nation (alongside the Sejm). The solution placed the Polish government act among those constitutions that sought a particular 'golden mean' between the 'pure' form of legitimisation of monarchical power (a king by God's grace) and ideas allocating the source of power to the nation.[8] The tradition of electing kings greatly facilitated that task.[9]

The constitution referred to the concept of the eighteenth century supremacy of the nation (people), relating to the monarchy, as well as to the principle of census and indirect elections, which was then a solution commonly applied and primarily limited to the nobility (the nobles' nation). Concurrently, the law on cities,[10] which formed an integral part of the Constitution,[11] initiated – as it might be assumed – a transformation in the perception of the 'citizen' category (up to that point identified with the nobility). Burghers were recognised as free citizens who were guaranteed a hereditary right of ownership, and the nobility was allowed the burgher status. In addition, personal rights of the nobility (which originated in the *neminem captivabimus nisi iure victum* document of 1425) were extended to 'persons settled in cities,' and

3 Constitution of 3 May 1791, Art. V.
4 Cf. Bardach, 1993, p. 87.
5 The constitutional principle of the First Republic of Poland, granting each of the deputies taking part in the proceedings of the Sejm the right to disband it and invalidate the adopted resolutions.
6 The task of city representatives was only presenting the postulates of those cities.
7 Constitution of 3 May 1791, Art. VII.
8 Dobrowolski, 2014, pp. 56–57.
9 In the First Republic, from 1573, kings were elected by the nobility during the so-called free election. Henryk Walezy was the first king elected in this way, and Stanisław August Poniatowski was the last (1764).
10 Law on Cities of 18 April 1791. Our royal cities free in the countries of the Republic.
11 Constitution of 3 May 1791, Art. III.

burghers obtained the right to acquire landed estates. The law on cities also provided for several cases in which a procedure of ennoblement of burghers could be launched. Therefore, the constitution initiated the process of expanding the composition of the political nation and thus a departure from the narrowly construed category of the 'nobles' nation' towards the nation as the total population of the state.[12]

2. Constitutions of the Second Republic of Poland (1918–1939)

On the eve of the outbreak of World War I, two strategies for regaining statehood were formed among the elites of Polish society. Each was based on the anticipated conflict between the occupying states, but their hopes and political calculations were placed elsewhere. The first one, authored by Józef Piłsudski, assumed the creation of a Polish state from the lands of the Russian partition based on the Central Powers (Germany and Austria-Hungary). The second concept sought to unite Polish lands under the auspices of Russia, which would create such a great (population, economic, cultural, and political) potential that independence would have to be regained eventually – a concept authored by Roman Dmowski. The implementation of the former resulted in, *inter alia*, the creation (on 16 August 1914) of a Polish military formation (the Legions) as part of the Austro-Hungarian Army – the latter in the establishment of a Polish association (1906–1917) in the Parliament of the Russian Empire (the so-called Duma). Those programmes were then revised under the influence of current events; ultimately, each of them contributed to the revival of Polish statehood.

The consequence of the Triple Entente states' involvement was, on the one hand, the 'Polish cause' being listed in the peace programme of the US President (W. Wilson),[13] and on the other, the presence of Poland's representatives (R. Dmowski and I. Paderewski) on the side of the victors at the Peace Conference in Versailles. In turn, the involvement on the part of the Central Powers led to the creation – under the Act of 5 November 1916[14] – of the bedrock of Polish statehood: the formation of state authorities (Temporary Council of State, Regency Council),[15] the development of state administration (the foundations of the Polish foreign service and the organisation of the Polish Army), the development of Polish local self-government, education and the

12 As posited in the context of statements about the uniform and centralised structure of the state, Uruszczak, 2011, p. 35.

13 The peace programme consisted of 14 items. Item 13 read: "An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant".

14 The Act of 5 November 1916 was promulgated on behalf of two emperors (Wilhelm II and Franz Joseph) after the occupation of Warsaw by German troops and proclaimed the creation of the Kingdom of Poland "from the lands torn from Russian rule".

15 On 6 December 1916, the occupation authorities created the Provisional Council of State in Warsaw, which established the Regency Council that in turn established (on 13 December 1917) the first Polish government (of Jan Kucharzewski).

judiciary as well as the issuance of a number of legal acts, which were then assimilated by the resurgent Polish state.[16]

On 13 February 1918, the Regency Council announced that it would henceforth exercise supreme powers based on the will of the people, and a few months later (on 7 October 1918) it proclaimed Poland's independence, announcing the holding of parliamentary elections under democratic principles. In making that decision, the Council referred to W. Wilson's peace programme, which had been accepted a few days earlier by the Central Powers as the basis for peace negotiations. Subsequently, the Regency Council handed over the general command over the Polish army to J. Piłsudski (on 11 November), and a little later (on 14 November), it handed over all the supreme powers to him.[17]

The construction of legal foundations of the state commenced immediately following the end of hostilities. On 22 November 1918, Interim Chief of State J. Piłsudski issued a Decree on the Supreme Representative Power of the Republic of Poland,[18] pursuant to which the supreme authority was to be exercised by the chief of state through the government until the parliament was elected. That decree initiated a departure from the original concept of the revival of Polish statehood as a monarchy in favour of a republic. Subsequently (on 28 November 1918), a decree on electoral law was issued to the Legislative Sejm; thereunder, elections based on the principles of immediacy, secrecy, universality, proportionality and equality could be held.[19] The act granted the rights to vote and to be elected to women, which should be seen as an expression of respect for them "as equal citizens, giving prominence to their status in the renascent Poland. Thereby, the attitude of Polish women who were involved in national affairs on an equal footing with men during the partitions was acknowledged".[20] The first parliamentary elections after regaining independence were held on 26 January 1919; however, due to hostilities,[21] not all districts could hold elections, and the composition of the Legislative Sejm continued to be supplemented until 24 March 1922.[22]

16 Cf. Górski, 2018, p. 10.

17 Under the Regency Council's decision, J. Pilsudski held power until 29 November 1918 (when a decree on the supreme representative authority of the Republic of Poland was proclaimed, Journal of Laws of the Polish State, hereinafter: Dz. Pr. P.P., No. 17, item 41)https://pl.wikipedia.org/wiki/Rada_Regencyjna – cite_note-14.

18 O.J. of 1918, No. 17, item 41.

19 Dz. Pr. P.P. No. 18, item 46.

20 Lis-Staranowicz, 2018, p. 31.

21 E.g.: the Polish-Ukrainian conflict over Lviv lasted from 1 November 1918 until 22 May 1919.

22 In the elections on 26 January 1919, 291 deputies were elected. At later dates, elections were held: in the Suwałki district – postponed due to German occupation (16 February 1919); in the Cieszyn district – postponed due to the Polish-Czechoslovak conflict (14 March 1919); 42 deputies were elected in Wielkopolska (1 June 1919); in Białystok districts – 11 deputies (15 June 1919); in Pomerania – 20 deputies (2 May 1920). In addition, 20 deputies were elected (24 March 1922) by the Seimas of Central Lithuania (Vilnius). Pursuant to the decree of 7 February 1919 (Journal of Laws of 1919, No. 14, item 193.), the seats of Poles sitting in 1918 in the parliament of the German Reich (16 deputies) and in the Austrian parliament from Eastern Galicia (28 deputies) were recognised; 442 was the final number of deputies of the Legislative Sejm.

Regaining independence was a continued pursuit of many generations of Poles sacrificing their lives to fight for freedom. The renascent Poland first had to face external threats, strengthening its borders,[23] but an equally important challenge was to unite the lands that had so far remained in the structures of foreign states and thus had separate law, administration, official language or even communication networks built for the purposes of the partitioning states. The renascent Poland also had to face extensive illiteracy as well as high unemployment and poverty (particularly severe after the period of World War I, which was fought mainly on our lands).

The Legislative Sejm quickly proceeded to prepare the constitution of the renascent state[24]; however, those works were prolonged due to a complex international situation (including, primarily, the Polish-Bolshevik war) and a significant political and ideological diversity of the Sejm, which lacked the dominant political force, and most deputies had no parliamentary experience. Nevertheless, the constitutional debate was open to all political parties and intellectual centres.[25] Hence, the Constitution of 17 March 1921[26] (the so-called March Constitution) resulted from a political compromise.[27] Following its adoption, the Marshal of the Legislative Sejm stated that "[a]s of today, the Republic of Poland is entering the path of legal development. The State is an organised nation, and the Constitution is the foundation of organisation" and expressed hope that "after laying the foundation for the edifice of the State" its further expansion would continue in the same spirit, so that "we always remember that the State is the certainty of life, freedom, property, the rule of law and justice".[28]

23 "According to Iwo C. Pogonowski's Historical Atlas of Poland, there were six concurrent wars on the borders of Poland from 1918 to 1922, between Poland and: Ukraine, Germany (over Poznan), Germany (over Silesia), Lithuania, Czechoslovakia, and the Soviet Union. Add to this the end of the First World War, the Russian Civil War, Allied Intervention in that war, and the Paris Peace Conference, and the reader can see just how confusing and unstable the European political situation was" (Drobnicki, 1997, pp. 95–104)*;* started by the Bolsheviks taking advantage of the difficult economic and social situation of the country, it was of vital importance for maintaining national sovereignty (see Davies, 2020).

24 Already in 1918, Prime Minister J. Moraczewski pointed out that the development of a new constitution was a priority of the Polish authorities. In January 1919, the Constitutional Office was established under the Prime Minister to prepare draft constitutions that took into account the diversity of constitutional thought (Krukowski, 1977, pp. 13–22). However, prior to adoption of a full constitution on 20 February 1919 the Legislative Sejm adopted a resolution to entrust Józef Piłsudski with the continued office of the Chief of State (Dz.Pr.P.P. of 1919, No. 19, item 226). That act, popularly known as the Small Constitution, defined the legal basis of the state system for a transitional period.

25 On 25 January 1919, the then Prime Minister (I. Paderewski) appointed a team from the group of 'men of science' to evaluate the drafts, known as a Survey on the draft Constitution of the Republic of Poland; however, the Survey was not limited to evaluation, but it developed its own draft, in which it based the system on the republican system and the American model (based on the US Constitution). The government did not accept that draft as its own but forwarded it to the Legislative Sejm (see more in Kruk, 2021, p. 8).

26 Journal of Laws of 1921 No. 44, item 267.

27 Krukowski, 1977, pp. 107–108.

28 For a shorthand report of the 221st session of the Legislative Sejm on 17 March 1921 see Pietrzak, 2001, p. 10.

The March Constitution opens with a preamble that contains an invocation to Almighty God and clarifies the purpose of its enactment, i.e. to provide the nation with a social, moral, and material order based on "eternal principles of law and freedom". The task of the state authorities was to respect the law and care for the citizens. The introduction also emphasised the relationship of the state with the constitutional tradition, as it referred to "the great tradition of the memorable Constitution of 3 May". However, that reference was symbolic since, first, the Constitution of 1791 did not provide a permanent basis for the Polish system (it was repealed in 1793), but rather, it created intellectual national heritage carefully protected in the collective memory of Poles during the partitions. Second, the loss of statehood in 1795 resulted in 'suspending' Polish constitutionalism, which lacked conditions for development and evolution; thus, the March Constitution did not stem from native constitutional thought and was not a simple continuation of the Constitution of 3 May. It originated in the knowledge and experience of the Polish elite, who were educated, obtained academic titles abroad or represented Poles in the parliaments of the partitioning countries. The content of the constitution was strongly influenced by the French concepts of the Third Republic.[29]

The constitution comprised 126 articles contained in seven chapters.[30] The system of government was based on the principles of national sovereignty, separation of powers, parliamentary-cabinet form of government, bicameral parliament, independence of the courts, decentralisation of public authority, judicial control of the administration and the principle of equality before the law. The constitution guaranteed an extensive catalogue of rights and freedoms, including social rights. Notwithstanding the adopted principle of separation of powers, the Sejm in the bicameral structure of legislative power took the lead.

From the point of view of Polish statehood and its identity, confirmation by the constitution of the nation's sovereign rights (Art. 2) was of greatest importance. The Basic Law did not define the concept of nation, but it primarily had a legal meaning and encompassed all Polish citizens.[31] The constitution did not explicitly emphasise the multinational social structure nor the dominant position of Polish nationality in the State (the right to vote was vested in citizens of the Republic of Poland irrespective of their nationality). Citizenship and the rights of the individual, thanks to which the inhabitants "could manifest all the activity provided for in the

29 The Constitutional Commission, having a choice between two systems of government: the American and the Anglo-French model, i.e. the presidential and parliamentary system, opted for the parliamentary one, as a model known and proven in Europe, and the system of the French Third Republic was regarded as such (see Kruk, 2021, p. 9).

30 The first chapter was entitled 'The Republic,' and the subsequent ones were as follows: Legislative power (II), Executive power (III), Judicial power (IV), Universal obligations and civil rights (V), General provisions (VI), Transitional provisions (VII).

31 The ethnic structure in Poland in 1921 (census) was as follows: 69% Poles, 14.3% Ukrainians, 7.8% Jews, 3.8% Belarusians, 3.3% Germans.

constitutional provisions" were therefore "a clear bond uniting members of the national community".[32] It was only the preamble of the constitution that referred to Poles, as only they

> can 'give thanks to Providence' for liberation from captivity, since only in the Polish soul can there be full awareness of the tradition of the State, which ended its political existence at the end of the 18th century, since only in the Polish memory can there be a grateful recollection of 'the bravery and perseverance of the sacrificial struggle of the generations who continuously devoted their best efforts to the cause of independence'.[33]

It was the nation thus construed that fought for its own state and created its identity.[34] Concurrently, the constitution guaranteed all citizens of the Republic of Poland equality before the law and special protection of the State, while abolishing class privileges and family titles. The constitution also contained several provisions addressed to minorities. For example, every citizen had the right to preserve their nationality and to cultivate their language and national specificity. National, religious and linguistic minorities had the right to form unions and associations, charitable, religious and social institutions, schools and other educational institutions as well as to use their language freely and to observe the rules of their religion. The issue of the nation is similarly perceived by the provisions of the current Constitution of 1997, the preamble of which clearly identifies the Polish nation with all citizens but also expresses gratitude to "ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values"; it also indicates "ties of community with our compatriots dispersed throughout the world", and in the articulated part, it refers to "the culture that is the source of the Nation's identity" and to "Poles living abroad" and their relations "with the national-cultural heritage" (Art. 6). At the same time, the constitution in force guarantees national and ethnic minorities "the right to create their own educational, cultural and religious institutions and to participate in the resolution of matters concerning their cultural identity" (Art. 35[2]).

An extensive catalogue of rights and freedoms was a characteristic feature of the March Constitution,[35] which provided for universal suffrage, the right of access to the courts, freedom of speech and religion, personal liberty, the right to property, freedom of assembly and the right to petition, among other things. The constitutional regulation of social rights deserves to be emphasised. Struggling with illiteracy, Poland guaranteed universal and compulsory education to all its citizens; education in state and local government schools was free of charge, and

32 Wołpiuk, 2014, pp. 374 et seq.
33 Cf. Paszkudzki, 1926, p. 1.
34 Cf. Komarnicki, 1923, p. 16.
35 Fitkus, 2010, pp. 77–98.

material assistance for continuing education at secondary and higher education institutions was guaranteed "to exceptionally gifted and impoverished students". Employment remained under the special protection of the state, and paid work of children under the age of 15 years as well as night work of women and juvenile workers in industries, which was detrimental to their health, was prohibited. In the event of unemployment, illness, accident and infirmity, every citizen had the right to social security. The state also protected children not receiving sufficient parental care and experiencing neglect.

The March Constitution was the so-called 'rigid act'. Its amendment required a majority of two-thirds of votes both in the Sejm and in the Senate. Achieving such a majority in the political realities of the Second Republic of Poland proved extremely difficult. Despite the provisions protecting the identity of the Basic Law, the 'fathers of the Constitution' were open to dialogue with future generations as they made it possible to revise its provisions every 25 years by a simple majority of votes of the National Assembly (the combined Sejm and Senate). That procedure made the constitution open to changes that resulted from the evolution of the social and political system; it was also an expression of concern for the continuation of the constitution as the legal basis of the state.

However, the permanence and stability of the state system failed to become, contrary to the assumptions of the creators of the constitution, its characteristic feature. It failed to lay the foundations for the government's stable operation, which resulted in the "chronic impermanence" of subsequent cabinets.[36] The constitution 'explicitly favouring' the parliament did not provide mechanisms to protect the government when the parliament was politically fractured. In turn, the imbalance between the executive and the parliament was the cause of political crises, which concluded with the so-called 'May coup' and the revision of the constitution adopted on 2 August 1926.[37] As a result, the executive strengthened its position by exercising power "outside the provisions of the Constitution".[38] However, from a contemporary perspective, it should be noted that the singular permanence of the March Constitution was manifested in the appropriation of some of its solutions by the Constitution of 1997, including the parliamentary-cabinet system, but already rationalised by the experience of 1921–1926.

The shortcomings of the March Constitution and the political transformations of Europe in the 1930s towards authoritarian rule left their mark on the Polish political system and ended the Constitution of 1921. In turn, the Constitution of

36 In the period between the fall of 1922 and May 1926, the government changed five times, and counting from November 1918, that number would have to be tripled (Kawalec, 2009, pp. 103–134).

37 Act of 2 August 1926 amending and supplementing the Constitution of the Republic of Poland of 17 March 1921, Journal of Laws of 1926, No. 78, item 442.

38 Before May 1926, political power was concentrated in the hands of the Sejm; after May, in the hands of Marshal Piłsudski, who politically decided on the composition of the government and its duration (Cybichowski, 1933, p. 17).

April 1935 (hereinafter: the April Constitution)[39] was adopted under a defective procedure, and its validity and legality were challenged. It rejected the assumptions of its predecessor, including the principle of national sovereignty fundamental in democracy, and the parliament lost its status of political representative. Instead, that constitution adopted the uniformity of state power and the division of state functions; the president became the most important centre of power. The responsibility before God and history for the destinies of the state rested thereon, and one and indivisible authority of the state was vested therein (Art. 2). The president personified the state and its continuity. The bodies of the state, under the authority of the President of the Republic, included the Government, the Sejm, the Senate, the armed forces, the Courts and the State Control. The constitution entrusted the president with the task of "harmonising the activities of the supreme authorities of the State, providing him with the right to appoint and dismiss members of the Government and with the right to dissolve the chambers, thus making him an arbitrator of political conflicts".[40]

The Constitution of 1935 established the principles of separation of the state and society and of cooperation between citizens and the state for the pursuit of the common good, subject to the supreme role of the state in relation to society (Art. 4 and 5); the principle of the rule of the civic elite, formed on the basis of "criteria of efforts and merits for the common good" (Art. 7); and the principle of social solidarity (Art. 9).[41]

The Constitution of 1935 consisted of 82 articles included in 14 chapters,[42] of which the longest chapter was devoted to the president's office (Chapter II). The constitution did not contain a preamble clarifying the purpose of its adoption, but in Chapter I, entitled "The Republic of Poland," it formulated the assumptions of the new system. The function of the preamble was assumed by Art. 1 of the Constitution, which stated that the Polish State was the common good of all citizens, and "the Polish State resurrected by the efforts and sacrifices of its worthiest sons it is to be bequeathed as a historic heritage from generation to generation"; hence, it was an obligation of "each generation" to "increase the power and authority of the State by its own efforts". Thereby, the creators of the constitution expressed the obligation to maintain the permanence and continuity of Poland.

It is noted in legal literature that the "April Constitution created an entirely new, highly original model of a social state, with a developed concept of solidarity

39 Journal of Laws of 1935, No. 30, item 227.

40 Starzewski, 1937, p. 370.

41 Kulesza, 2017, p. 37.

42 Chapter I is entitled 'The Republic of Poland' and the subsequent ones 'The President' (II); 'The Government' (III), 'The Sejm' (IV), 'The Senate' (V), 'Legislation' (VI), 'The Budget' (VII), 'The Armed Forces' (VIII), 'The Administration of Justice' (IX) , 'The State Administration' (X), 'The State Control' (XI), 'State of Emergency' (XII), 'Amendment to the Constitution' (XIII) and 'Final Provisions' (XIV).

referring to the thought of L. Duguit and developed on Polish soil by L. Caro".[43] From this vantage point, it may be deemed "one of the most significant products of the original Polish legal thought" and "a unique contribution in the history of Poland to the development of world constitutionalism in the 20th century".[44]

The idea of solidarity, which emerges from Art. 4 and 5 of the Constitution, does not allow the April Constitution to be placed alongside the constitutions of authoritarian states that were created in the 1920s and 1930s. According to legal historians, the constitution rejected "the idea of integrating the state and society into one whole under the model of principles and experiences of totalitarianisms neighbouring Poland".[45] Its provisions emphasise, on the one hand, the role of society, including local and economic self-government (to which the state ensures the freedom of development), and on the other, the creativity of the individual that is the "lever of collective existence". Nevertheless, the constitution did not contain extensive guarantees of rights and freedoms but merely stipulated that "the State assures its citizens the possibility of developing their personal capabilities, as also liberty of conscience, speech and assembly", making the common good the limit of those freedoms.[46]

The eminent Polish constitutionalist of that period, Wacław Komarnicki, claimed that "the principle of concentration of power in the hands of the Head of State found its fullest embodiment in the new Polish system" enabling "the operation of the state's organisation while eliminating the parliament's participation", but at the same time "the structure of the state was formed in such a manner as to enable constitutional cooperation between the president and the parliament". Thereby, the constitution creates, in his opinion, a "singular systemic dualism, which opens up the possibility of further evolution either in an authoritative or a democratic direction". In conclusion, he pointed out that "the evolution of the political system (...) and its permanence" are not contingent "on the wording of constitutional articles, but on the development of socio-political relations in Poland".[47]

The Constitution of 1935 is one of the 'least' and 'most' permanent Polish Basic Laws. Two circumstances are the source of this paradox. On the one hand, the outbreak of World War II caused Poland (divided into German and Soviet occupation parts) to lose independence; thus, territorially, the state shaped by that constitution ceased to exist. On the other hand, however, the Constitution of 1935 was still applied as it authorised the president to independently appoint his successor in a situation of war, thus securing the continuity of state power. The said competence, combined with the freedom to form the government of the Council of Ministers, was the legal basis for the operation of the Polish government in exile in London (until 1990) and taking action

43 Leopold Caro (1864–1939) was a lawyer and lecturer at the Jan Kazimierz University in Lviv. The concept of social solidarity was the backbone of his scholarly thought (see Caro, 1931; 1937).
44 Górski, 2003, p. 211.
45 Kulesza, 2005, p. 44.
46 Kulesza, 2005, p. 44.
47 Komarnicki, 1937, p. 194.

to gain full sovereignty of Poland both until 1945 and later.[48] Such was the value of the (im)permanent Constitution of 1935. Moreover, that constitution was never formally repealed – neither by the communist governments established after 1945 nor by the democratic parliament of the Third Republic of Poland revived in 1989.

The communist authorities in Poland challenged the value of political thought of the March Constitution and the April Constitution because of the "bourgeois" nature of the former and the authoritarian nature of the latter[49]; however, they were the subject of research of theoreticians of constitutional law and historians of the system. The experience of their application set the direction of work on a new constitution for a democratic and sovereign Poland in the 1990s. This is the merit that should be credited to the "impermanent" constitutions of the interwar period.

3. Constitutions of the Third Republic of Poland

The process of breaking away from communism and thus regaining independence, began in 1989. It was initiated by an agreement between representatives of the communist state and the democratic opposition concluded at a round table (the so-called 'roundtable agreement').[50] The most important provisions of that agreement included enabling the legal activity of the Independent Self-Governing Trade Union "Solidarity" after its ban during the period of martial law[51] and the establishment of three new authorities – the President, the Senate[52] and the National Council of the Judiciary[53] – as well as conducting the so-called contractual elections to the Sejm and fully free elections to the 100-member Senate. The contractual nature of those elections consisted in the fact that 65% of parliamentary seats were guaranteed to the parties of the

48 "The highest authorities of the Republic of Poland in exile (in France, and then in Great Britain) and the structures of the Polish Underground State established in the country operated under the provisions of the April Constitution. The Constitution laid the foundations for the continuation, with all the characteristics of lawfulness, of the activities of Polish state authorities, both internationally and internally, and to an extent incomparable with the situation of any country occupied during World War II" (Górski, 2003, pp. 212–213).

49 The communist authorities adopted two constitutions. The first was one adopted in 1947 (the so-called Small Constitution) and the second one in 1952. The latter was formally repealed on 29 December 1989, but some of its provisions were applied until the entry into force of the Constitution of 2 April 1997.

50 Discussions lasted from 6 February until 5 April 1989. The strikes of 1988 were an immediate cause of their commencement, yet major reasons also included (a) the growing economic crisis and the necessity for the opposition to authorise reforms, and (b) plans to fundamentally change the role of the USSR in the bloc of communist states.

51 Martial law was introduced by the communist General W. Jaruzelski on 13 December 1981 to proscribe the trade union NSZZ 'Solidarność' established following the strikes in August 1980.

52 After the end of World War II, the Senate was not restored; communists regarded it as a symbol of the 'bourgeois' Polish system.

53 The National Council of the Judiciary was to safeguard judicial independence and participate in the procedure of appointing judges.

communist regime,[54] and the remaining ones (35%) were intended to be filled in free elections. The elections were held on 4 (first round) and 18 (second round) June 1989.[55]

When assessing the nature and significance of the agreement, it should be noted that the roundtable was not a debate on the end of communism or on breaking away from it, and even less so on the Communists giving up power. It was only an unprecedented success of the then-opposition in the elections of June 1989,[56] which was surprising for both parties to the agreement and triggered a significant acceleration of political changes. In other words, of crucial importance for the pace of regaining an independent state is for it to be attributed to the will of the sovereign nation created in those elections, regaining its subjectivity and rejecting communism.

Concurrently, the agreements included several solutions that secured the political position and even more so the interests of the "representatives of the old system" already in the "new political reality". Those safeguards (in addition to the aforementioned guarantees of retaining political influence in the Sejm) included maintaining legal dominance of the Sejm in the political system of the state,[57] which even made it possible to undermine the position of the Senate as the second chamber of parliament,[58] and above all, the manner in which the office of the President of the People's Republic of Poland was designed (elected by the National Assembly). That office was to be held by the communist General Wojciech Jaruzelski, which was also a subject of political arrangements. In that manner, "a shift of the centre of power from the Polish United Workers' Party (PZPR) to the office of president" was planned. That task was facilitated by both the length of the presidential term of office (6 years, i.e. 2 years longer than that of the parliament, subject to re-election) and by the president's competences (legislative veto, the right to dissolve the parliament if it infringes the Constitution of the People's Republic of Poland or interstate political and military alliances).[59] Those

54 The parties of the communist regime included the Polish United Workers' Party (PZPR), the United People's Party (ZSL) and the Democratic Alliance (SD).

55 To implement the agreement, 108 constituencies (from two to five seats) were created, in which at least one seat was to be filled by free elections, and the candidates of the regime parties were to run for the remaining seats.

56 Already in the first election round (on 4 June), the anti-communist opposition introduced 160 candidates to the Sejm and 92 candidates to the Senate (for the sake of comparison, out of 264 parliamentary 'coalition seats' in the first round, only three were filled); ultimately, the representatives of the opposition filled all available seats in the Sejm (35%, i.e. 161) and 99 in the Senate.

57 The legal position of the Sejm was formed by the provisions upheld in the constitution, stating that the Sejm was the supreme authority of the state and that only the Sejm (and not the Sejm and the Senate) adopted laws.

58 The opposition Senate could also be marginalised by more political means. The Senate's amendments were rejected in the Sejm by a majority of two-thirds of the votes (66.6% of the composition of the Sejm, i.e. by 307 deputies), and the regime party was guaranteed 65% of seats in the Sejm (299 parliamentary seats). To obtain a two-third majority in the Sejm, only eight seats had to be filled (1.6%) in the free part of the election (out of 35%). Filling them would result in the Senate's incapacitation.

59 As the legislative veto was rejected in the Sejm by a majority of two-thirds of votes (i.e. 66.6%), to block its rejection, the regime party had to fill eight seats (1.6 %) from the pool by free elections (see footnote 76).

solutions allowed to continue a transitional period for up to 12 years (two presidential terms) as well as to reverse the process of democratisation of political life.

However, the way in which W. Jaruzelski held his office was undoubtedly influenced by the events related to his election (on 19 July 1989). It was in fact decided by the representatives of the democratic opposition,[60] and the scale was tipped by one vote.[61] It was a 'typical Pyrrhic victory' since its costs were so great that they weakened the presidency and failed to play the role planned at the roundtable.

As can be seen from the characteristics of the 'transition period' presented above, the 'fuses of the old system' established at the round table did not serve their purpose, but they ensured a 'soft landing' for the political apparatus of the outgoing system already 'in new political realities', and more importantly, they made it possible to retain their political and economic influence, thus devising the manner in which the Third Republic of Poland functioned.

The period of roundtable negotiations also gave rise to a practice of political decision-making behind the scenes ('over the heads of voters'). The best example thereof was a singular resuscitation of the so-called national list, i.e. the opposition's consent to retrieve 33 parliamentary seats[62] vacant in the elections for the Communist Party, which contradicted both the then-applicable law and the unequivocal rejection of communism by voters in 1989. This "negotiating" model of conduct later resulted in the so-called Rywin Affair,[63] which exposed the fact that the content of acts adopted by the Sejm could be devised "behind the scenes."

60 One of the opposition senators voted for W. Jaruzelski, and seven deputies and senators cast invalid votes, which reduced the majority required for election. However, some members of the regime parties voted against W. Jaruzelski (six deputies from the ZSL, four from the SD and one from the PZPR).

61 In the vote on the candidacy of W. Jaruzelski, 537 valid (seven invalid) votes were cast, including 270 votes 'for', 233 'against', and 34 members of the National Assembly abstained from voting. A controversy arose about whether the absolute majority required for election amounted to 269 or 270 votes. Ultimately, the National Assembly determined that the required majority was 269.

62 The national list contained the names of 35 representatives of the government (the opposition was unable to submit its list). The parliamentary mandate was obtained by a candidate who received an absolute majority of votes nationwide. In the first round, only two candidates obtained such a result, while there was no legal basis to conduct the second round (the electoral law contained a legal loophole). As a result, pursuant to a decree of the Council of State (Journal of Laws of 1989, No. 36, item 198), seats not filled in the first round were transferred to the constituencies. Thereby, between the first and the second round of the elections, the number of seats in the constituencies was increased and the candidates absent in the first round were listed.

63 In July 2001, film producer L. Rywin made an offer to the editor-in-chief of the Gazeta Wyborcza (A. Michnik) that for USD 17.5 million he would 'arrange' solutions in the Broadcasting Act that were beneficial for the publisher of the Gazeta Wyborcza. He referred to the 'group holding power' and the then Prime Minister L. Miller. After disclosure of the proposal (publications in the 'Wprost' weekly and the 'Rzeczpospolita' daily), the Sejm appointed a committee of inquiry (on 10 January 2003), which determined that during the government's work on the draft act, the content of the said draft gas been unlawfully amended in unexplained circumstances. L. Rywin was sentenced (in 2004) to two years in prison and a PLN 100,000 fine for assistance in influence peddling. The Rywin affair demonstrated that a law could be 'bought' at that time.

In general, the state system planned at the roundtable for the transitional period assumed the continuation of executive power by the communist regime parties (the government and the presidency were to remain in their hands) with a decisive, previously planned advantage in the Sejm. Political aspirations of the then-opposition were to find an outlet merely in the Senate. It was only the electoral defeat of the Communist Party that disturbed the system thus designed; there were perturbations with the election of the regime president (as a result of which he failed to exercise his extensive powers), and the system of power to date (i.e. close dependence of the regime parties on the PZPR) became destabilised, which in turn opened the way for a government with the first non-communist Prime Minister (Tadeusz Mazowiecki) and therefore for the collapse of the roundtable arrangements. It should be remembered, however, that the so-called ministries of force were staffed by representatives of the PZPR,[64] which had its long-term consequences (at that time, files of the communist secret police were being destroyed on a large scale).[65]

Political acceleration resulted in an amendment to the then-current Constitution of 1952 on 9 December 1989.[66] Thereunder, (a) the name of the state was changed (the Polish People's Republic was replaced by the Republic of Poland) and the traditional emblem of the Polish state restored (i.e. the image of a crowned white eagle against a red field); (b) the principle of a democratic state governed by the rule of law, the principle of sovereignty of the Nation (in place of the principle of sovereignty of the working people of towns and villages), the principle of freedom to form and operate political parties, the principle of freedom of economic activity and the protection of property (which replaced the principle of planned economy with the principle of economic freedom) were established; (c) the provisions on the leading role of the Communist Party and the alliance with the USSR were removed from the Constitution.

Ordering and holding the first free elections to the newly created local government (27 May 1990)[67] was another major step in the 'recovery of the state', followed by the first general and direct presidential elections in the history of Poland (first round held on 25 November, second round on 9 December) upon W. Jaruzelski's resignation[68] concluded with the election of L. Wałęsa (leader of the NSZZ 'Soli-

64 The government led by T. Mazowiecki included 12 ministers from the former opposition, one independent, four ministers each from the PZPR and the ZSL and three ministers from the SD. Communist generals, F. Siwicki and Cz. Kiszczak, became ministers of National Defence and Internal Affairs.

65 Mass destruction of the Security Service files began in the second half of 1989 and lasted continuously until 31 December 1990.

66 Journal of Laws of 1989, No. 75, item 444.

67 On 8 March 1990, the Parliament passed an Act amending the Constitution (Journal of Laws, No. 16, item 94), an Act on Local Government (Journal of Laws, No. 16, item 95) and an Electoral Act for Municipal Councils (Journal of Laws, No. 16, item 96).

68 On taking office by the newly elected president-elect, pursuant to the Act of 27 September 1990 amending the Constitution of the Republic of Poland (Journal of Laws, No. 67, item 397), the term of office of President W. Jaruzelski expired.

darity'). In turn, the first fully free parliamentary elections were held only on 27 October 1991.[69]

On the day of the swearing-in of President L. Wałęsa (22 December 1990), the activities of the Polish authorities in exile also came to a symbolic end. At the Royal Castle in Warsaw, the last President of the Republic of Poland in exile (Ryszard Kaczorowski) handed over the insignia of presidential power of the Second Republic of Poland to the newly sworn-in President.[70]

The structure of the state bodies formed during the period of political transformations survived the transitional period and was incorporated – albeit with certain adjustments – into the so-called Small Constitution of 1992[71] and then into the Constitution of the Republic of Poland of 2 April 1997.

The long-term perspective that separated the beginning of political changes (1989) from the adoption of the full Basic Law impacted the form of the Constitution of 2 April 1997, which became, as it were, the aggregate of Polish experiences during the period of political transformation.[72] The greatest relative number of changes during that period concerned the Council of Ministers. The most important of those included the establishment of the so-called constructive vote of no confidence, according to which the Sejm was able to dismiss the prime minister (and thus the government) only by simultaneously appointing a new prime minister (Art. 158). Nevertheless, the changes in the formation of the presidential office introduced in subsequent acts of constitutional rank did not infringe the basic systemic concept thereof. Even the amendment in 1990 to the way in which the head of state was elected cannot call such an assessment into question. His basic political tasks remained virtually unchanged. In practice, there were also no fundamental changes with respect to the legislative power, especially in relation to the dominant role of the Sejm in the bicameral system.

The Constitution of 1997 is not only a simple summary of the experiences of the political transformation period (1989–1997), but it is also based on the political experience of the Second Republic of Poland and abolishes communist rule based on the subordination of the individual to the state; therefore, it contains an extensive catalogue of constitutional rights and freedoms.[73] That catalogue forms a singular

69 As a result of the elections, 29 committees entered the Sejm, of which 11 had only one deputy.
70 Those included the original jack of the President of the Republic of Poland and the seal of the Office of the President included in the Constitution of 1935.
71 Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive authorities and on local self-government (Journal of Laws of 1992, No. 84, item 426).
72 The Constitution expanded the catalogue of constitutional principles of the state (Chapter I), and other principles were established alongside the principles already existing in the Polish legal system (principles of the rule of law, national sovereignty, and separation of powers): the protection of human dignity and constitutional rights, the common good and subsidiarity and the principle of statehood, extrapolated from the content of the Constitution by the Constitutional Tribunal.
73 Chapter II of the Constitution is the most extensive one and consists of 56 articles structured in a general part, a catalogue of personal, political and social rights, and freedoms and obligations towards the homeland. That chapter also contains measures to protect constitutional rights and freedoms.

"constitution within the constitution", and the core of the regulation is the principle of inherent and inalienable human dignity (Art. 30).[74] As Mirosław Granat notes:

> The Tribunal deems human dignity a value 'of central importance for constructing an axiology of current constitutional solutions.' It is 'an axiological basis and premise of the entire constitutional order.' It is of paramount importance for the interpretation and application of 'all other provisions on the rights, freedoms and obligations of the individual' (...). The Constitutional Tribunal calls it a 'transcendent value,' which would suggest that it derives from outside the legal order. It is an 'absolute' value. The Tribunal also refers to the 'importance' of human dignity, which is evidenced by the fact that dignity 'is the link between the natural law and statutory law.' To recapitulate, it should be noted that human dignity has a significant impact on human rights, but it itself remains outside or above the law. It is a primordial value that need not be 'acquired.' It is universal and serves everyone (it is not selective).[75]

The protection of human dignity is therefore a central task of the state and of the rule of law.

Under the influence of European constitutionalism, the Constitution of 1997 defined the limits of the legislator's interference with constitutional rights and freedoms. Their boundaries may only be established by law and solely if they are necessary in a democratic state for its security or public order or for the protection of the environment, public health and morals, or the freedoms and rights of others. Those restrictions must not affect the substance of freedoms and rights (Art. 31[3]). This solution refers to the so-called proportionality test of restrictions on the rights and freedoms developed in the jurisprudence of the Constitutional Tribunal.[76]

A horizontal effect attributed to constitutional rights and freedoms is an interesting phenomenon that emerged at the beginning of the twenty-first century in Poland. The horizontal effect entails that constitutional norms modify or shape not only the domains of public law (the state and its authorities) but also the content of private law relations.[77] As a result, the courts, by referring to constitutional norms when resolving individual disputes, reinforce and develop the normative nature of the Constitution of 1997.

A separate chapter in the constitution devoted to the sources of law (Chapter III) is an original and unique solution. It was a response to the 'instability' of the sources of

74 Cf. Granat and Granat, 2019, pp. 195–206.

75 Granat, 2014, p.13.

76 The proportionality test has been present in the case law of the Constitutional Tribunal since the 1990s (e.g. decision of the Constitutional Tribunal of 26 April 1995, file ref. no. K 11/95) and is based in particular on the acknowledgment of the inviolable core of a given right or freedom, which should remain free from the interference of the legislator, even when it acts to protect the values indicated in Art. 31(3) of the Polish Constitution (e.g. the judgement of the Constitutional Tribunal of 12 January 1999, file ref. no. P 2/98).

77 See Florczak-Wątor, 2014.

law in communist states, in which various authorities of government administration enjoyed unlimited regulatory discretion at the expense of the parliament's legislative power. As a result, the constitutional regulation of the sources of law is based on a division into the so-called system of generally applicable law (subjectively and objectively finite) and the system of internally binding law (they may not constitute the legal basis for a decision in an individual case.)

Developing provisions anticipating Polish membership in the EU is an important novelty of the Constitution of the Republic of Poland. An integration clause was introduced into the Constitution, giving authorisation to delegate the competences of state authorities in certain matters to an international organisation or body (Art. 90[1]) and setting out a specific ratification procedure for an international agreement under which those competences are transferred (Art. 90[2]-[4]). The constitution also determined the place of acts of law adopted by that international organisation in the system of sources of law (Art. 91[3]), which is consistent with the primacy assigned to the constitution (Art/ 8).

The Republic of Poland may therefore delegate the powers of its authorities 'in certain matters' to the European Union, which means that transferring 'all the powers of a given authority' or 'the totality of matters in a given area' or competences that essentially determine the nature of a given state authority is prohibited. State authorities must not be accorded only the competences 'in a few matters' preserved 'even for the sake of appearances,' as it would violate the so-called 'core' of their powers and undermine 'the purpose of existence or operation of any of the authorities of the Republic of Poland'. Therefore, it could not function as a sovereign and democratic state. The constitution also provides grounds for concluding that there exist competences excluded 'from transfer', comprising the 'hard core' of the powers of state authorities, 'fundamental to the system of a given state', i.e. those 'whose transfer would not be possible under Article 90 of the Constitution'.[78] Thus, the constitutional legislator expressed its will to guarantee the statehood of the Republic of Poland.[79] In this context, the Constitutional Tribunal also identified the principle of statehood (with its detailed aspect created by the principle of preserving sovereignty in the process of European integration). Among constitutionally protected goods, the preamble to the constitution gives priority to 'regaining sovereignty construed as the possibility of deciding the fate of Poland', and the sovereignty of the state may thus be deemed a national value. Therefore, the preamble determines the interpretation of the provisions of the Constitution of the Republic of Poland concerning the sovereignty of the Nation (Art. 4), the independence, inviolability and indivisibility of the territory of the State, its sovereignty and security (Art. 5 and Art. 104[1], Art. 126[2] and Art. 130), and at the same time, the provisions applicable to membership in the European Union (Art. 9, 90 and 91). This, in turn, allowed the Constitutional Tribunal to

78 Judgement of the Constitutional Tribunal of 11 May 2005, file ref. no. K 18/04, item 4.1 and 8.4; Judgement of the Constitutional Tribunal of 24 November 2010, file ref. no. K 32/09, item 2.1.
79 Wojtyczek, 2007, p. 162.

infer the said principle of statehood from the provisions of the Constitution.[80] As held by the Constitutional Tribunal, its main function is precisely to shape the boundaries of the transfer of competences of public authorities of the Republic of Poland to the EU. Consequently, according to the Constitutional Tribunal, the 'matter covered by a complete prohibition on transfer' should include

> the provisions defining the guiding principles of the Constitution and the provisions on individual rights determining the identity of the state, including in particular the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition of transferring constitutional authority and competences to create competences.[81]

4. Conclusions

The Government Act of 3 May 1791 – one of the icons in the history of world constitutionalism – lasted several months and was formally repealed in November 1793. In turn, the Constitution of 1921, which was supposed to be a permanent social contract and constitute a strong basis for a resurgent state, collapsed after 14 years of validity. Another Constitutional Law of 1935 was an act aimed at strengthening the executive power as well as at maintaining the permanence and continuity of the Polish state, which already lost its independence on 1 September 1939. That date marks the end of the 'actual' validity of that constitution on Polish lands; this was never formally repealed, and the Polish government in exile operated thereunder (1990). After the collapse of communist rule, reforms of the political, social and economic system (1989–1992) commenced, resulting in subsequent amendments to the communist Constitution of 1952. However, the legal solutions of the period of political transformations, which were intended to be of a temporary nature, became a permanent component of constitutionalism in Poland and formed the cornerstone of the Constitution of 1997, which is the most enduring Polish Basic Law, soon to celebrate its 25th anniversary.[82]

80 Judgement of the Constitutional Tribunal of 24 November 2010, file ref. no. K 32/09, item 2.2.
81 Judgement of the Constitutional Tribunal of 24 November 2010, file ref. no. K 32/09, item 2.1.
82 "Our data show that most constitutions die young, and only a handful last longer than fifty years. At the extreme, the island of Hispaniola, home to the Dominican Republic and Haiti, has been the setting for nearly 7 percent of the world's constitutions and perennial governmental instability. Indeed, the life expectancy of a national constitution in our data is 19 years, precisely the period Jefferson thought optimal" (see Ginsburg, Melton and Elkins, 2010, pp. 1–2).

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