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Selected studies on Polish Constitutional History

Grzegorz
Górski

Monografie
Kolegium
Jagiellońskiego



JAGIELLOŃSKI
INSTYTUT WYDAWNICZY



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Grzegorz
Górski



AKAPIT

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EDUKACYJNE

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Introduction

In my work published in Polish in 2010 – *Polish–Lithuanian Commonwealth. History of the first constitutional monarchy* (Toruń 2010, 2nd edition: Toruń 2017) – I put forward the thesis that this country, created by two nations for almost two centuries, took the form of the first constitutional monarchy in history. As a result of conscious policy, especially of Polish Kings and political elites, this constitutional monarchy took the modern form of a democratic state.

The scope of constitutionally guaranteed freedoms of all social groups in the Polish–Lithuanian Commonwealth until its fall at the end of the 18th century, others – commonly created as exemplary – democratic states (Great Britain, the United States or the Netherlands), reached a comparable level only in the second half of the 19th century.

It was in the Polish–Lithuanian Commonwealth that a model of division and balance of authorities was created as the guiding constitutional principle and guarantee of civil liberties of its inhabitants. It happened in the 16th century, long before when J. S. Mill and Ch. Montesquieu published their theoretical considerations on this subject. It should be remembered that the practical implementation of their ideas took place in Great Britain and the United States only in the nineteenth century.

There is no doubt that for several centuries the Polish–Lithuanian Commonwealth was a phenomenon ahead of epoch-making libertarian achievements by at least 200 years. It was a democratic community of free people, in which there was a rule of law enacted by a freely chosen national representation. It was a country of independent courts in times when the European norm of the absolute state was the ruler's total arbitrariness in the administration of pseudo-justice. It was a state in which the law was an expression of the sovereignty of the nation (*lex est rex*), and the ruler was bound by that law. Finally, it was a country in which in the 16th century the scale of participation of free citizens in deciding about the affairs of the state rose to the level achieved by other states (e.g. Great Britain or the United States) only in the second half of the 19th century.

The existence of such a state constituted a fundamental threat to barbaric absolutist regimes, which from the 17th century dominated the political reality on the European continent. Especially the external aggressiveness and internal oppression of the three most radical European absolutisms – Russia, Prussia and Austria – created a common interest in the annihilation of the Commonwealth.

The Polish–Lithuanian state could not survive between these three brutal regimes, because its very existence prevented in the long run the survival of their radically anti-capacity and aggressive states. It was this common interest that combined the efforts of these three countries and led to the destruction of the Polish–Lithuanian state. And this was the main and decisive reason why the Commonwealth could not survive. As the rulers of these three absolutist regimes jointly announced, Commonwealth, as a state respecting the rights and freedoms of its citizens, was not a “normal” state. Symptomatically, this position was glorified by the then leading Enlightenment intellectuals, and in fact the “useful idiots” of that era, such as Voltaire.

After the destruction of Poland, successive generations of Russian and German politicians and historians convinced Europe and the world that the annihilation of this “abnormal” statehood was inevitable and necessary. In their assessments, the anarchized country suffered internal decay, and their aggressive action was a peculiar act of mercy towards Poles, Lithuanians and Ruthenians. Thus, subjecting the citizens of the Commonwealth to the same extent as their citizens of that time suffered, was to serve their good. This bondage and deprivation of any rights was intended to serve progress and development.

These rulers described themselves as “enlightened”. Despite the complete negation of the freedom and even subjectivity of their subjects, they became favorites of the “progressive” Western European elites of that period. This was mainly because these “enlightened rulers” generously sponsored these “free intellectuals”. Therefore, in general conviction, it is this “enlightened absolutism” that is presented in historiography today as “normal” and “progressive”. However, the Polish–Lithuanian Commonwealth, which was the first to create a model of a modern constitutional state, still functions as a “just victim” of these “enlightened regimes”.

One of the reasons for this is not so much the complete ignorance of the majority of historians of the era, who thoughtlessly repeat patterns

scattered for two hundred years by German and Russian historians and politicians. Equally, this is due to the fact that Polish historians and politicians have competed in self-scourging for decades, despising the achievements of generations of their ancestors. This was mainly reflected in the reproduction of dogmas formulated by Germans and Russians even in Polish studies. "It was not right" and to this day it is "inappropriate" to have an opinion, unless it corresponds to these schemes. Few Polish historians have dared to go against this dictate of untruth.

However, while in the field of historical sciences there were researchers who tried to deal with this situation, among specialists in the field of constitutional history, in practice it was an unknown phenomenon. In this area, we will hardly find a Polish voice. In vain to look for any general, synthetic attempt to present this problem in international literature. Individual voices presenting some Polish achievements in a fragmentary way are lost in confrontation with studies that constantly duplicate German–Russian plans.

I experienced this personally, trying to point out the unique Polish constitutional experiences in my various publications. They did not only concern the above-mentioned issues, i.e. those related to the process of creating the first constitutional monarchy. They also referred to specific constitutional issues related to the problem of the reconstruction of Polish statehood at the beginning of the 20th century, the emergence and functioning of specifically Polish experiences in the form of the underground state, constitutional conditions for shaping Soviet statehood in Poland after 1945, and finally conditions regarding restitution independent and sovereign Poland after 1989.

It seems that there is a need to bring the issues raised in these publications in a relatively compact way. Thanks to such a procedure, a chance arises to reach a broader spectrum of recipients, and thus to signal a polemical attitude towards dominant patterns, positions. Hence the idea of collecting a number of presentations in a uniform volume, which is devoted to a group of selected problems in the history of Polish constitutionalism. However, some important introductory remarks must be made here.

First, the texts contained in the presented volume are not a simple duplication of texts already published. They are worked out, updated and re-

worded in such a way as to correspond with each other for the purposes of this publication. In this sense, it is to a great extent the original material.

Secondly, the collected materials relate to selected issues. Therefore, they are not an attempt to create the impression that I am striving to bring closer the full constitutional history of Poland. Creating such work is a postulate of the highest importance, however, this volume is not the answer to such expectation. My goal is to present only selected issues.

Thirdly, the issues raised here have different levels of significance for the entire Polish constitutional history. Their choice in no way resulted from an attempt to give them one or another meaning in this hierarchy. The author's goal was only to draw attention to some special elements. In my opinion, they should be taken into account when developing various studies, including those related to political history.

Fourthly and finally, both the selection of sources, especially legal and constitutional documents, and the literature used in the creation of this collection are by no means exhaustive. It is neither my goal nor the need to post thousands of items on the issues raised here. As a rule, it is not my goal to lead dozens or hundreds of polemics on the pages of this study with the number of positions or views that cannot be counted. The aim of the author is to present his vision and his position, and only to the extent that it requires clearer clarification of it, I refer to selected thoughts or views from existing literature.

I would like the above reservations to be taken into account especially by anyone who critically approaches my views and theses. I hope that any interest expressed in polemical voices will also allow for better preparation of a broader and full elaboration of Poland's constitutional history.

I.

The Federal Structure of the Polish– –Lithuanian Commonwealth in 16th –18th Centuries

Introduction

Looking from the European perspective, the Polish–Lithuanian Commonwealth, which existed in the 11th–18th centuries, was a state with a unique constitutional system. The model shaped in this country was characterized by unknown in other countries in this time form of relations between state's authorities, personalized in the King and parliament – *Sejm* – on the one side and society with its institutions¹ on the second side.

A very big part of this society could say about themselves like French king Louis XIV in the end of 17th century – "State is me"². Those people had authentic influence on public affairs on the central level and on the local level³.

The institutions' shape of the Polish–Lithuanian Commonwealth – *Res publicae* – country with a king on the top of these institutions but also republic under the rule of their citizens, was expression of these influences⁴.

In the end of 16th century almost all European countries began the process of strong centralization of the kings' power. It was mostly result of the Reformation. Reformation broken position of the Catholic Church and made position of new protestant churches and most of national

¹ More about this unique state in the European background in: W. J. Redoway (red.), *The Cambridge History of Poland*, Cambridge 1951. See also: A. Zamoyski, *The Polish Way: A thousand years' history of Poles and their culture*, London 1989.

² About this wrote in very interesting study J. Jędruch, *Constitutions, Elections and Legislatures of Poland 1493–1977*, Washington 1982 and S. Plaza, *Próby reform ustrojowych w czasie pierwszego bezkrólewia*, Kraków 1969. He wrote about first period of shaping new model of Commonwealth. J.A. Gierowski, *The Polish – Lithuanian Commonwealth in the XVIIIth Century. From Anarchy to Well – organized State*, Kraków 1996, concentrated on final phase of its functioning. In this study a lot of remarks about absolutistic European context. We can also find a lot of interesting remarks in interesting problems in N. Davis, *God's Playground: A history of Poland*, Vol. 1, Oxford 1981.

³ It was result of process which excellently described in his book H. J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge, Ma, 1983.

⁴ H. Olszewski in his study: *Rzeczpospolita. Przyczynek do dziejów ideologii polityczno-prawnej w dawnej Polsce*. [in:] *Sejm w dawnej Rzeczypospolitej. Ustrój i idee*, Vol. 2, Poznań 2002, gave interesting review about understanding of the term Rzeczpospolita – Commonwealth in 15th and 16th century Poland.

catholic churches, much more dependent to the lay authorities. It opened doors to the successive strengthening position of rulers against their subjects.

The expression of this tendency was a liquidation or far reaching limitation and marginalization of the representative institutions shaped in 13th–14th centuries and determination in process of liquidation territorial and administrative diversity in most European countries. After this a process of forcing new, unified forms of administering country has been started⁵. In this way, absolutist regimes were created in almost all European countries.

Former model with autonomy of territorial structures, respecting diversity of liberties for various forms of corporations have been saved only in the Netherlands Provinces and partly in Swiss Cantons. In both there was no strong central authority and in consequence pressure on territorial and other communities. Both examples however are incomparable with Polish–Lithuanian state. The United Netherlands Provinces obviously played important role in international politics but never been European superpower. Swiss cantons never been even European power. Both countries have had small territories and small population. Polish–Lithuanian Commonwealth with about 1 mln. sq. km. and population in the middle of 17th century larger than Germany and England, has been leading European superpower⁶. For that this structure has been really a unique in Europe.

Federalism in medieval and modern Europe

For understanding the essence of the structure of this time Polish–Lithuanian state the best is to use definition of federal state in the mean-

⁵ Interesting presentation of this process we can find in: R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge 1995.

⁶ Commonwealth's population in the middle of 17th century amounted Rzeczpospolita 11 mln. people while Germany 10,3 mln. and England only 6,6 mln. people. See: *Historia Polski w liczbach. Ludność. Terytorium*, Warszawa 1993, p. 20.

ing known from works of American scientists like D. Eliazar⁷ V. D. Lutz⁸, V. Ostrom⁹, J. Wayne Baker¹⁰, and many others.

First let us briefly present their meaning of federalism, which is strongly differ with European one.

The basic role in developing American researches about federalism played Daniel Eliazar. He has indicated sources of American federalism and how actual they are till our days. Eliazar has found modern concept of federalism in 16th and 17th centuries works of radical Calvinist thinkers. There were specially H. Bulinger, Ph. Duplessi – Mornay and J. Althusius and others like better known T. Hobbes and J. Locke.

These writers based on Old Testament Books and were also strongly anti-Catholic and anti-Lutheran. Their concepts of political and social order reacted on the contemporary situation in Catholic and Lutheran countries. This contemporary context made them deaf for the fact, that their ideas have also based on former writings of Christian thinkers like St. Thomas of Aquinas and Marsilius of Padua. Anti-Catholic attitude made them also deaf on Polish – Lithuanian experience, although it was practical not theoretical one. D. Eliazar who has been fascinated in these Calvinist ideas, also omitted catholic accomplishments.

D. Eliazar analyzed formation of modern notion of *covenant* in comparison with notions of *compact* and *contract*. He has differentiated contract which has a private character and compact and covenant which both had a public character. Compact and covenant differentiated among themselves in relation to God. Compact has been understood as an agreement among the people and covenant has been the same but under God's authority. It was also a covenant with God and the oath has played key role in it.

⁷ On the first place we have to mention his book: *Covenant and Commonwealth: From Christian Separation through Protestant Reformation. The Covenant Tradition in Politics*, Vol. II, New Brunswick–London 1996.

⁸ D. Lutz, *From Covenant to Constitution in American Political Thought*, [in:] Publius: The Journal of American Federalism, 1980, Vol. 4, and also more about it in: *The Origins of American Constitutionalism*, Baton Rouge 1988. There are also a lot of interesting literature.

⁹ V. Ostrom, *The meaning of American Federalism. Continuing a Self – Government Society*, 1991, which is a summary of his and his wife's years of studies about federalism.

¹⁰ J. Wayne Baker, *Faces of Federalism: From Bullinger to Jefferson*, [in:] Publius: The Journal of Federalism, 2000, Vol. 4.

J. Wayne Baker characterized very precisely and briefly Bulinger's, Mornay's and Althusius' ideas in his interesting study. D. Lutz showed how strongly these ideas influenced on Framers of United State and its Constitution.

Generally speaking, they all saw roots of federal model in covenant background. Agreement of people with God and among themselves, under the God's law, authorized by Him, strengthen by the oath, and right to fight with all, who are acting against this agreement including king or other state power and finally crucial role of the community of people – this is a nature of covenant – federal system.

The analysis of these backgrounds of modern federalism ideas strengthening us in statement, that Calvinist concepts were a some kind of return to ideas characteristic for 11th–13th centuries and they both rooted in Old Testament writings and Roman republican practical experiences.

Polish roots of the federal system

The same consciousness was present in Poland since 11th–12th Centuries. For that decisions made in 16th century, which shaped constitutional model of the Polish–Lithuanian Commonwealth strongly based on these ideas. In 13th century in Polish Kingdom (still divided into a lot of principalities¹¹) a new model of relations between princes and their subjects was shaped¹².

In this model was no place for powerful king or strong and centralized princes authority. This authority needed support from its subjects. This model (we can call it as "*dialogue model*") was supported by leading writers of the period like Wincenty Kadłubek and Janko of Czarnków, and many others authors. They all promoted Roman, republican roots of most of the structures established in Poland¹³.

For "noble nation" which shaped themselves in 14th and 15th centuries these Roman republican tradition in strict connection with Christian vi-

¹¹ It was result of disintegration process started in the middle of 12th century. Kingdom was divided for more than twenty principalities ruled by princes from ruling Piast Family.

¹² More about we can find in R. Grodecki, *Dzieje wewnętrzne Polski w XIII wieku*, [in:] *Polska Piastowska*, Warszawa 1969.

¹³ H. Olszewski, op. cit.

sion of social relations in the spirit of St. Thomas of Aquinas theories, were a foundation for thinking and acting.

Constitutional foundations of the Polish–Lithuanian Commonwealth

In the beginning of 16th century first stage of struggle for the shape of state ended. In 1505 at Sejm session in Radom constitution (act) *Nihil novi* was accepted. This new regulation gave to Sejm legislative authority (with a king) in all state's matters. Nation became a crucial element in shaping legal order of the state¹⁴.

Culmination of the second stage of this struggle came in the middle of second part of 16th century. Four extremely important regulations shaped constitutional structure of the Polish–Lithuanian Commonwealth. They were:

1. Lublin Union Act of 1569¹⁵,
2. Warsaw General Confederation Act of 1573¹⁶,
3. Henry's Articles of 1573¹⁷,

and

4. Warsaw Sejm Constitution establishing Crown Tribunal of 1578¹⁸.

First regulation assumed two hundred years connections between Polish kingdom and Great Duchy of Lithuania. Two separate states became in 1569 a one Commonwealth under rule of common King and common parliament in Sejm. Kingdom and Duchy established one "*undivided and indifferent body*" in "*Commonwealth of two states and two Nations in one people united*".

¹⁴ Most actual study about *Nihil novi* constitution is: S. Grodziski, S. Salmonowicz, *Uwagi o królewskim ustawodawstwie*, [in:] *Parlamentaryzm i prawodawstwo przez wieki*, Kraków 1999. See also: W. Uruszczak, "*Sejm Walny wszystkich państw naszych*". *Konstytucja Nihil novi i sejm w Radomiu w 1505 roku*, *Czasopismo Prawno-Historyczne*, 2005, Vol. 57, No. 1.

¹⁵ J. Sawicki, *Wybór tekstów źródłowych z historii państwa i prawa polskiego*, Vol. 1, Warszawa 1952, p. 141–148.

¹⁶ *Volumina Legum*, Vol. 2, p. 124–125.

¹⁷ *Volumina Legum*, Vol. 2, p. 897–901.

¹⁸ *Volumina Legum*, Vol. 2, p. 962–973.

Sejm in Lublin regulated rules of succession of king's and great prince's throne and declared, that *"during the coronation of new king all laws, and privileges and liberties of both nations have to be confirmed by the oath forever"*.

All Commonwealth legislation was vested to the Sejm composed by the King and two chambers – Senate (as representation of the clergy and great nobles) and House of Deputies (as a representation of noble nation and partially main cities). In Lublin Act was also obligation to the King to make regulations:

- guarantying complete balance in monetary systems in both parts of the Commonwealth,
- liquidating all toll barriers between both parts, and
- liquidating all legal inconveniences for Polish citizens in Duchy and Lithuanian citizens in Crown.

Common authorities – King and Sejm – were responsible for foreign affairs and defense policy of the Commonwealth. In all other areas Crown and Duchy saved whole autonomy. They separately could decide about all internal affairs, saved their administration and legal systems.

New model of state structure was accepted *"in the name of Lord"* by representatives of both nations. In this Act, the Sejm solemnly declared:

"To our God in the Holy Trinity Glory forever and to our King in God's Grace lord and lord Sigmund August immortal gratitude and the same to famous Polish Crown and Lithuanian Great Duchy glory and adornment forever".

In European history 16th century is recognized as an age of extremely fired religious conflicts. In this perspective Polish–Lithuanian Commonwealth was an oasis of religious peace and freedom. This is not a place to describe reasons and circumstances why its happened¹⁹. We have to only remind that in Polish tradition since the middle of 14th century, state authorities accepted as equal two Christian denominations – catholic (Latin) and orthodox in Ruthenium lands²⁰ gained by Casimir the Great. During

¹⁹ See excellent summary of this problem in S. Salmonowicz, *La tolerance religieuse dans la "modele polonais" (XVIe – XVIIIe siecles)*, [in:] *350 anniversaire des Traités de Westphalie 1648 – 1998. Une genèse de l'Europe, une société à reconstruire. Actes du Colloque International. Starsbourg 15 au 17 octobre 1998*, Strasbourg 1998. There are also a lot of interesting literature about European context.

²⁰ These areas were then called Halicka Ruthenia. In the fall of the Polish-Lithuanian state, when they became part of the Austrian Empire, they were called Galicia. In Polish literature, the name of Eastern Małopolska was established in the 19th and 20th centuries.

the reign of this great king thousands of Jews persecuted in whole Europe and outside also came to Polish Kingdom where they were accepted with unprecedented privileges.

In Lithuanian Duchy pagan princes were tolerated orthodox ruthenian population and after princes baptism in the end of 14th century in Roman Catholic Church, nothing changed there. Reformation movement in Kingdom and in Great Duchy was not persecuted by state and Catholic Church authorities and for that reason could develop free. But in this atmosphere of religious freedom, there was no however spectacular progress of reformed churches.

In 1555 after terrible religious wars in Germany an *Augsburg Peace* was accepted with very inhuman principle – *cuius regio eius religio*. Polish–Lithuanian Commonwealth constructed completely alternative solution. In *Warsaw Confederation Act* of 1573 representation of the Nation declared religious freedom in Commonwealth. Assembled in Warsaw Catholics, protestants and orthodoxies jointly declared: *"We promises ourselves and future generations by our oath, faith, honesty, honor and conscience to protect peace among us and not to bloodshed and to stay together against those, who would like make bloodshed"*.

When new character of relations between Polish and Lithuanian parts of the Commonwealth was determined and religious freedom and peace was protected, there time for codifying other principal regulations of political system of the Commonwealth came. Next two regulations were meant to precise it. Key role played regulations which protected Nation's influence for the personal shape and functioning of all public offices.

The preamble to the *Henry's Articles*²¹ illustrating the essence of this act. Decision was made by *"nobles and knighthood of the Kingdom Polish and Lithuanian nations"*. King was on the second place and this order confirmed primacy of the nation's representation in the country.

This statement also confirmed primacy of the nation's sovereignty, which is one of the principles of modern constitutionalism. Cooperation between nation and the King is also illustration of their covenant made in Face of God, basing on His Order and Law.

Next Articles' regulations confirming strengthening of the nation's sovereignty. King guaranteed to the nation *"free"* election of his successors

²¹ Henry represented French ruling family Valois and fought for Polish throne with Habsburg's candidate. After one year he escaped from Poland and gained French throne.

and mentioned above religious freedom. He accepted nation's participation in shaping most important decisions in the field of foreign affairs, right to declare war and peace and finally decisions concerning general mobilization and in all taxation questions.

For better governing of the state matters under the nation's control, special council composed by sixteen persons was composed. Members of this council were elected by the Sejm from the members of Senate.

King also confirmed that the Sejm would have regular sessions each two years and when it is "*violently need*" in each time.

King confirmed his respect for all privileges and liberties of all groups in kingdom and not to tax his subjects "*without consent of all nation in Sejm*".

Last two points of Articles were also very important. First King again declared forever all liberties of his subjects and legal order of the Commonwealth. After this was stipulation that if the King would make something "*against rules, liberties, articles, (...) Commonwealth citizens would be free from obedience and faith*".

In 1578 Crown Tribunal and three years later Lithuanian Tribunal were established. It was from one side resume of over hundred years struggle with arbitrary kings' judiciary and from the other side logical completion of the shaping Commonwealth architecture. Both Tribunals took from the King's hands appellate jurisdiction for most of the judicial cases. There were also model of democratic creation of Tribunals by local communities and this system guaranteed their independence to king's rule.

In the later years Tribunals were criticized by the nobles, specially in 18th century, when nobles oligarchic families made them depended to their interests. But comparing both Tribunals with European courts of the same level in this period we can say, that they were good example of efficient and honest judiciary. And what is also very important, Tribunals were free from the characteristic in western Europe kings' pressure for such a bodies²².

Polish–Lithuanian Commonwealth institutions were shaped in the spirit of covenant philosophy bounded king with his subjects, two nations

²² On the place of these Tribunals in the structure of the state against the background of the situation in Europe, see my comments in: G. Górski, *Trybunał Koronny i Trybunał Litewski na tle sądów ówczesnej Europy. Uwagi porównawcze*, [in:] *Trybunał Koronny w kulturze prawnej Rzeczypospolitej szlacheckiej*, A. Dębiński, W. Bednaruk, M. Lipska (ed.), Lublin 2008.

and finally all of them with God. This covenant based on God's Law and God guaranteed it. If king would break this covenant subjects could legally opposed to him and special rules were adopted for legalizing procedure in such situations.

All these remarks acknowledge us to say that Polish–Lithuanian Commonwealth was a federal state in that sense which mentioned above American writers defined.

Polish–Lithuanian Commonwealth – first European Constitutional Monarchy

But let us also look at the same problem from the perspective of European understanding of the federal system. In this meaning four elements are crucial:

- first is creation of the union of various territorial corporations or states in the free agreement,
- second is a scale of pressure from central government on territorial authorities,
- third is a scale of decentralization in the governing of state and regional matters,
- fourth is a scale of freedom of territorial authorities in administering of local problems.

For better understanding of this question one have to remember about structure of the institutions shaped in Europe in the Middle Ages in 12th and 13th centuries. In these centuries a model of corporate structures and institutions was established. Cities, villages, universities, economic corporations, ethnic groups, territorial commonwealths fought for privileges. When they received them, became a legally separated corporations depended to king's authority basing only on the legal rules.

Kings remained on the top of the union of corporations, which for better expression of their interests created representations: for social groups, for territories, for state at least. In 15th and 16th centuries, when kings strengthen their positions and process of centralization of royal authority

started, these representations and corporations were first victims of this process.

Commonwealth and previously Polish Kingdom were out of this process. In the beginning of 14th century reunification of the kingdom was in progress. In 1320 King Władysław Łokietek confirmed new public character of the state in the formula of *Corona Regni Poloniae*. This model was very friendly to all autonomic corporations in the country.

Władysław's son Casimir the Great strengthened position of these corporations. The nature of Casimir's kingdom we can find in the notion known from the German and Czech context as "*Polish Reich*". The former meaning in public law of the notion "*Reich*" means state of states (in German *Staatenstaat*)²³. In this model of state king ruled over territory directly depended to him and over territories with its own princes (sometimes even kings) who accepted supreme king's authority.

Casimir the Great consequently aimed to minimize number of territorial principalities in Kingdom of Poland. But in fact, in 15th century and first part of 16th century a lot of territories in Kingdom and the same in Lithuanian Duchy, had differentiated legal status and position in relation to central authority. It was necessary to put in order this situation and mentioned above Sejm in Lublin in 1569 specially looked at this problem. In result new model of territorial structure was created by this Sejm.

On the highest stage of territorial architecture were united by common king and Sejm two parts of Commonwealth: Crown of Polish Kingdom and Great Duchy of Lithuania.

On the next levels structure of Duchy was more simple. Duchy was composed of *voivodships*, where Sejmik representing local noble community, played crucial role. Sejmik decided in all local problems, including taxation for local needs. Kings privileges guaranteed self-government for towns and villages. Also private towns and villages had their privileges.

More complicated situation was in Crown. Historically two main provinces were there – Wielkopolska (Great Poland) and Małopolska (Little Poland). After incorporation part of Pruthenia (so called King's Pruthenia – the second part of former Teutonic Knights State – Prince's Pruthenia – was a fief of Polish King) in 1466, this land and its population aspired to the equal position with two main provinces. The same aspiration had Mazovia

²³ R. Grodecki, *Działalność gospodarcza Kazimierza Wielkiego*, [in:] *Polska Piastowska*, continuing this view of older Polish researchers like O. Balzer.

province, also former fief of Polish King. In Lublin decisions three Ruthenian voivodships previously belonged to Great Duchy of Lithuania were incorporated to Małopolska province. For making province of Wielkopolska position equal to Małopolska, Pruthenia and Mazovia were incorporated clearly to this province.

Decisions made in Lublin resulted in Crown's structure with two equal parts. But while in Malopolska province Ruthenian lands had no separate status²⁴, in Wielkopolska province Pruthenia and Mazovia saved a special position. The greatest scale of special regulations saved Pruthenia:

1. particular rules for organisation and functioning general provincial sejmik,
2. principles for Pruthenian *indygenat*²⁵,
3. organisation of territorial structure, local administration and local judiciary, and also military principles,
4. particular regulations for religious liberties,
5. particular privileges in taxation,
6. particular judicial law,
7. special position of Pruthenian cities – first of all three greatest – Gdańsk, Toruń and Elbląg²⁶.

In Mazovia we could find some same elements (points 1, 3, 5 and 6) and add one exceptional and characteristic for this land. In this province noble population among all other social groups was the greatest in the country. It was almost 25% of the province's population. In consequence just in Mazovia province greatest number of population could actively participate in public and political life of the country. It played important role because in this land, near Warsaw, was a place where Nation elected new kings. For that Mazovian nobles played crucial political role in this most important political decisions in Commonwealth.

²⁴ But we have to remember about religious diversity and tolerance for majority of Greek–Catholic and orthodox population there. Also legal order based on *Lituanian Statutes* were different there and courts used this law. But the crucial political role there played great ruthenian magnates who Polonaized and converted to Catholicism. They quickly became a strongest political players in al. Community.

²⁵ It was institution allowing foreign person (mostly noble) to became a polish citizen and noble under Sejm control.

²⁶ More about these Pruthenian differences we can find in: S. Salmonowicz, *Prusy Królewskie w Rzeczypospolitej polsko-litewskiej. Uwagi porównawcze*, [in:] *Rzeczpospolita wielu narodów i jej tradycje. Materiały z konferencji "Trzysta lat od początku unii polsko-saskiej. Rzeczpospolita wielu narodów i jej tradycje"*, Kraków 1999, p. 116–118.

I. The Federal Structure of the Polish–Lithuanian Commonwealth...

Like in Lithuania both Crown's provinces were divided on voivodships (and lands) with sejmiki. In voivodships were also king's and private cities and villages. We have to remember that Commonwealth's central administration was very weak. There were not too many functions of the state in this time. For that institutions of Sejmik became in 17th century a real local authority deciding in all voivodship problems and developing their administration. Sejm tried to limit their position in the beginning of 18th century but in practice nothing changed till the beginning of the second part of 18th century. It means that far reaching decentralization of power was realized in Commonwealth.

Looking on the structure of Commonwealth from the perspective of European understanding of federal state model we can say that it was really classical federal state. Reforms made in the second part of 18th century didn't importantly changed this shape of structure of this country. Sejm decisions strengthen this model. Federal and decentralized structure of this country was still unique in comparison with all absolutistic models in continental Europe. Even English model of state in this time was much more centralized and less federal and democratic than Polish–Lithuanian one.

After partitions of this country between three most brutal and aggressive absolutistic regimes in Europe in the end of 18th century the same direction of shaping state institutions model was chosen by Americans. Although there were smaller territory and had only 25 % of population of the Polish–Lithuanian Commonwealth it quickly resulted in creation structure able to functioning on great territory and with great population. This American model is however very close to the former Polish–Lithuanian experience.

II.

**The Act of November 5
in the perspective
of international law**

Introduction – The Act of November 5, 1916

On November 5, 1916, the joint proclamation of the German Emperor Wilhelm and the Austrian Emperor (and King of Hungary) Franz Josef was announced to the public by the general governors of Austria and Germany. Both general governors exercised military administration in the lands of central Poland occupied by their armies since 1915. In the most important issue for Poles, the proclamation contained the following statements:

"Taken over by their unwavering confidence in the final victory of their weapons and their wishes, they caused that the Polish lands (...) torn out of Russian rule to lead a happy future (...) formed, to form from these lands an independent state with a hereditary monarchy and constitutional system. A more precise definition of the borders is reserved, and the New Kingdom will find, in communication with both allied powers, a guarantee needed for the free forces of its development. (...)

The allied monarchs, taking due account of the general political conditions of Europe, as well as the good and security of their own countries and peoples, have an irrefutable hope that now the wishes of the state and national development of the Kingdom of Poland will be fulfilled.

And the great, from the west with the Kingdom of Poland, neighboring powers will happily see at their eastern borders the resurrection and flourishing of a free, happy and own nation with the life of a enjoying state"²⁷.

However, the content of the proclamation was not surprising. The announcement of a change in German policy in Polish matters had already found its official expression a few months earlier. In early April 1916, after the occupation of the Kingdom of Poland for ten months, German Chancellor B. Hollweg stated:

"Germany and Austria–Hungary did not intend to raise the Polish question; the fate of battles moved her. Now it exists and is waiting for its

²⁷ K. Kumaniecki, *Odbudowa państwowości polskiej. Najważniejsze dokumenty 1912–styczeń 1924*, Warszawa–Kraków 1924, p. 48.

solution. It will be solved by Germany and Austria–Hungary. After such shocks, the history quo ante does not know ... This Poland which the Russian faction left (...) no longer exists."²⁸

The Act of November 5 marked a major breakthrough in the treatment of the "Polish cause" by the partitioning powers, but also by the other most important sides of the ongoing Great War. Up to this point, the invaders, despite many differences that divided them often, agreed in their provisions excluding the possibility of restitution of an independent Polish state.

The statement of German and Austro–Hungarian monarchs published on November 5, not only this previous consensus, has strongly rejected. The essence of this proclamation was that the problem of rebuilding the Polish state was elevated above the concepts presented so far to create Polish autonomy within individual partitioning states.

Hence, this event actually meant the opening of a completely new phase of tenders for the use of the "Polish cause" in the ongoing war. The main difference was that from now on it was not the "internal" problem of each partitioning party, but an issue that was of international significance. At this time, the invaders of *nolens volens* also entered the logic of systematically expanding the forms of reconstruction of state life proposed to Poles.

From this point of view, the Act of November 5 did not constitute a decision to resurrect real, sovereign Polish statehood, but it undoubtedly was a breakthrough in the way of regaining full independence.

The Fourth Hague Convention of 1907 and its significance for the Act of November 5

Before proceeding to the analysis of the international law consequences of the proclamation of both emperors, it is necessary to recall the basic legal regulations applicable in the area of interest to us. The Fourth

²⁸ K. Kumaniecki, *op. cit.*, p. 42.

Hague Convention of 1907 adopted by the international community was of fundamental importance here²⁹.

Pursuant to the content of Article 42 of that Convention

"A territory is considered occupied if it is actually under the authority of an enemy army. Occupation extends only to territories where this power is established and where it can be exercised".

However, another provision, Article 43 stated that

[together with] *"the moment of the actual transfer of power from the hands of the legal government"* [the occupier was obliged to] *"take all measures in its power to restore and ensure social order and life, observing, except for absolute obstacles, laws in this country"*.

Pursuant to the above-mentioned stipulation, which as signatories bound Germany and Austria–Hungary and Russia, the occupation constituted a transitional state, and subsequent provisions confirmed the occupant's obligation to respect, to the maximum extent, the existing legal situation in the occupied territory. Hence, it was considered that any permanent occupation of occupied territory could be made only after the end of the war under a peace treaty, which could possibly contain new decisions regarding the status of the territory previously occupied.

The international community's response to the Act of November 5

The proclamation of both emperors met with a surprisingly late reaction from Russia and its allies. It was only on November 15, 1916 that the Russian government issued a communique in which it stated:

"German and Austro–Hungarian governments, benefiting from the occupation of a certain part of Russian territory, announced the separation of the Polish region from Russia and the creation of an independent state. (...) The Russian government sees in this act a great violation of international law, which prohibits forcing the inhabitants of the occupied territory to raise arms against their own homeland. The Russian

²⁹ Dziennik Ustaw Rzeczypospolitej Polskiej (dalej: Dz. U. RP) z 1927 r. Nr 21, poz. 161 – *Konwencja dotycząca praw i zwyczajów wojny lądowej z 18 października 1907 r.* (Aneks) [Journal of Laws of the Republic of Poland – JoL].

government considers the issued proclamation to be worthless. Rosya has spoken twice on the Polish question since the beginning of the war and has in view the creation of the Kingdom of Poland [my emphasis – Grzegorz Górski], which will cover all Polish lands³⁰.

On the same day in Paris, the Inter-Allied Commission with the participation of prime ministers – of France – A. Briand and England – H. Asquith, and ambassadors – Italian T. Tittoni and Russian – A. P. Izwolski, agreed on a common position on the German–Austrian proclamation, which was published 16 November. Allied states have stated³¹:

"The principle of international law is unshakable, that military occupation (...) cannot lead to sovereignty over a country so occupied and for that reason under no circumstances gives the right to dispose of it to another power. The German emperor and the Austrian emperor not only committed injustice by the use they make of an occupied country, but also did not recognize the basic principle (...) which (...) prohibits a war-fighting state, forcing opponent's subjects to participate in combat operations against your own country. The allies who hand over this new violation to the court of neutral states inform that they will not consider this violation as an excuse for any measures that the enemy states could in the future order in Poland and that they reserve the right to resist such actions by any means that they have to regulate"³².

Also on November 16, the prime ministers of England and France sent a telegram to the Russian prime minister Stuermer, in which they confirmed their disapproval of "violation of international law and international agreements" and shared the position of Russia protesting "against the creation of a new state in the occupied (...) area", they also stated:

"Already at the beginning of the war, she gave Russia to the peoples of its territory, ensuring the introduction of a system that would suit their needs. Today she solemnly repeated two years ago the emperor's firm decision to declare autonomy in Poland. We are sincerely pleased with this generous resolution of His Majesty's Government for the benefit of a people with whom we have a former sympathy and whose reunification will be the main element of the future European balance. We con-

³⁰ K. Kumaniecki, op. cit., p. 52.

³¹ It presents this issue in more detail J. Pajewski, *Wokół sprawy polskiej. Paryż–Lozanna–Londyn 1914–1918*, Poznań 1970, p. 51–54.

³² K. Kumaniecki, op. cit., p. 52.

II. The Act of November 5 in the perspective of international law

*sider ourselves happy that we can declare our total solidarity with the views of the imperial government, which has seen the happiness of the noble Polish nation*³³.

The Italian prime minister Boseli also sent a telegram to the Russian prime minister in which he joined the declaration of the English and French governments on behalf of his government "on the occasion of the boldness of Germany and Austria–Hungary, creating a new state on the temporarily occupied Polish territory".

The Italian Prime Minister further stated:

*"The Italian people have always had lively sympathy for the Polish nation and we fully trust that the victory of allied weapons will destroy the illusory plan laid out by our enemies (...). The royal government can only applaud the statement already made by the imperial government, which guarantees the autonomy of all united Polish peoples, which for a hundred years was the former ideal of this noble nation*³⁴.

It is hardly surprising that the reaction of allied countries to the initiative of central states in Poland was negative. Questioning was based on international law norms. In the opinion of Western countries (which at that time faced Germany with the greatest difficulty), irritating Russia with the necessity to resolve the Polish issue could have led to its agreement with Germany. This, in turn, would mean the possibility of a final blow to them by the Germans freed from the fight against the Russians in the east.

Of course, the German–Austrian initiative allowed the allies, in a more decisive and official way, to raise the need for Russia to introduce fundamental changes in its policy towards Poland. For allies, regardless of the assessment of the formal grounds for the decisions of Germany and Austria, were aware that it actually meant internationalization with all the force of the Polish cause. This matter therefore became one of the main problems that had to be resolved after the war. An emphatic confirmation of a fundamental change in the state of affairs was the raising by the US President W. Wilson in his address on the conditions of peace of January 22, 1917, the issue according to which "a united, independent and autonomous Poland should arise"³⁵.

³³ Ibidem, p. 52–53.

³⁴ Ibidem.

³⁵ *Foreign Relations of the United States 1917*, Supl. I, Washington 1931, p. 27.

Only after the next few months did the situation change. When the tsarist rule was overthrown in Russia in February and March 1917, the newly formed interim government considered the current Russian policy towards Poland completely wrong. Hence, Western countries could more definitely join in efforts to resolve the Polish issue. This event also freed Western countries from their addiction in this matter to the position of the Russian ally.

German response to the allied position

However, in November 1916, the situation was not as optimistic from the Polish point of view. After a firm expression of the position of the Russian and coalition states on the act of November 5, the German side took the floor. She did so through the semi-official "Norddeutsche Allgemeine Zeitung" which issued a statement stating:

"The imperial-Russian government (...) protested against the resurrection of the Kingdom of Poland and calls this fact a violation of international treaties solemnly sworn in by Germany and Austria-Hungary.

We do not know this kind of treaty (...). The Russian government probably wanted to point to the treaties of the Congress of Vienna in this way (...). (...) a direct allusion to the Congress of Vienna would evoke in every historically educated reader a reminder that the Polish country was not joined to the Russian state there as a new province, but on the contrary, with the unity of votes of all European powers, the Kingdom of Poland was created and the crown was entrusted tsar.

Rosya then absorbed independent Poland, using her military advantage, and by no means on the basis of any European treaties (...) – and going further, step by step robbed her independence so that eventually the name of Poland was lost and only the Vistula Governorate remained. So, both imperial powers, again establishing the Polish Kingdom, did not act in violation of the Vienna Treaties of 1815, but on the contrary, they restored the legal principles of 1815 destroyed by Russia"³⁶.

³⁶ K. Kumaniecki, op. cit., p. 53.

The statement above was obviously not the official position of the German and Austrian authorities, but the fact is that its content from today's point of view must have been astonishing.

The arguments contained in the statement seem to have affected the cessation of allegations of violation of international law by Germany and Austria–Hungary, at least in the official enunciations of the Allies. In any case, in the later period we no longer meet such reservations, although of course other factors had an impact.

Duchy of Warsaw and the establishment of the Kingdom of Poland

The above text rightly indicates that it is primarily Russia that has violated its international obligations in the past. To properly understand the arguments contained in the statement, you need to go back to 1807.

In that year, a new state was created under two treaties. On July 7, 1807, the Franco–Russian Treaty was signed, which a new course of the border between Prussia and Russia in the lands of the Polish state. On July 9, 1807, the Franco–Prussian Treaty was signed. In his article XIII, Prussia renounced

*"forever the possessions of all provinces, which once made up the Kingdom of Poland, after January 1, 1779, came under Prussian rule at various times"*³⁷.

In the next article, 14th, it was decided that these provinces would take the name of the Duchy of Warsaw and

*"they will have ownership and sovereignty by the Saxon king and will be governed by the Constitution, which secures the freedom and privilege of the peoples of this principality and agrees with the peace of neighboring countries"*³⁸.

After over two years, on October 14, 1809 another French treaty, this time with Austria concluded in Vienna, was the basis for the transfer of the so-

³⁷ Fr. Skarbek, *Dzieje Księstwa Warszawskiego*, Vol. I, p. 7.

³⁸ *Ibidem*, p. 8.

called Western Galicia (i.e. the Polish territories of the Austrian Partition III). The land was attached to the Duchy of Warsaw by the King of Saxony³⁹.

In this way, the powers that partitioned and dismantled the Polish state agreed to its specific restitution. Of course, from the legal point of view, the Duchy of Warsaw was not a continuation of Polish statehood – it was a new entity of the international community and its legal continuity with the Republic of Poland did not occur.

In this way it was treated by Tsar Alexander I, who at the head of his troops entered the Duchy in 1813 after defeating the Napoleonic coalition. And from this point of view, the problem of resolving the fate of the Principality as a state separate from the Commonwealth was considered during the Congress of Vienna. In this context, the problem of restitution of the Kingdom of Poland appeared during these debates.

As a result of a complicated diplomatic game, on May 3, 1815, a treaty of friendship was signed between the Russian emperor, Austrian emperor and King of Prussia, which, among others re-regulated the division of the lands of the *"former Kingdom of Poland"*.

Pursuant to art. 3 and 5 of the treaty, the lands of the Duchy of Warsaw without those parts of it, which were received by Prussia and Austria, were to be connected *"inevitably"* with the Russian Empire *"by its constitution"* and *"possessed forever"* by the Tsar, who assumed the title of King of Poland. In addition, the Tsar undertook to give *"this country"* a separate administration.

Following this agreement, on May 18, Alexander I as King of Poland signed a treaty of peace and friendship with Frederick August as the Prince of Warsaw. By virtue of this arrangement, the Saxon ruler renounced his title to the Warsaw throne and accepted the division of the country's territory. After four days, on May 22, Frederick August issued a manifesto in which he released his subjects from the oath of allegiance and pledged to obey the new monarchs.

On July 9, 1815, all these findings were confirmed by the parties of the Congress of Vienna in the so-called The Final Act and became one of the elements of the European order for the next hundred years.

As you can see, treaty regulations avoided wording from which it could follow that there was a restitution of the Polish state. The adopted formula actually meant the takeover of sovereign power over the Duchy of Warsaw

³⁹ Ibidem, Vol. II, p. 7.

from the hands of the King of Saxony by the Tsar of Russia. Logically, therefore, *"the Country"* as the systems determined, was still to be the Duchy, except that from now on its ruler was to be titled King of Poland. The tsar's rule, however, was conditioned primarily by the constitution, which was to be the basis for the union of two formally separate states. It was through the constitutional provisions that the Tsar of Russia, as the king of Poland, was to exercise sovereign power in *"this Country"*.

"This Country" actually became the Kingdom of Poland, when it was given by the Tsar on November 27, 1815, to the Constitution, which in its title used such a term⁴⁰. However, from a legal point of view, there were no elements of state continuity between this state organism and the Commonwealth which collapsed in 1795.

This relationship was also of a special nature on the Russian side. This was not only due to the practical state separation of the Kingdom. Granting him a constitution was, after all, an unusual experiment in the political system of Russia, which – importantly – formed the basis of this separateness.

This is how the status of so-called Of the Kingdom of Poland, and the nature of its relationship with the Russian Empire. And this was the subject of a broader European consensus regarding the solution of the "Polish issue" at that time.

So what happened to the legal situation of the Kingdom of Poland and its relations with Russia between 1815 and 1914? What caused that in 1916 Russia and its allies believed that the decisions of central states regarding the "Russian province" violated international law? On what basis did the sovereign – at least formally – state, become "a certain part of Russian territory"?

As part of the constitutional provisions, Alexander I made decisions that clearly indicated a tendency to limit the separateness of the Kingdom. He deleted a provision from the prepared draft constitution that it was the constitution that "would be the main and sacred node" connecting the Kingdom with the Empire⁴¹. He did not make a separate coronation act, which was another expression of reluctance to uphold Vienna's promises and obligations. However, despite the controversial Russian policy, especially the Grand Duke Constantine (brother of the Tsar) established by the

⁴⁰ Dziennik Praw Królestwa Polskiego (then: Dz. P. K. P.), Vol. I, p. 1–103 (Journal of Laws of the Polish Kingdom).

⁴¹ K. Bartoszewicz, *Utworzenie Królestwa Kongresowego*, Kraków 1916, p. 229.

Polish Army commander, the Kingdom remained a very high degree of separation from the Empire. Her formal expression was also the coronation of Alexander's successor, Nicholas I, the King of Poland, carried out in Warsaw separately from the imperial coronation in Moscow in 1825.

How Russia destroyed the Kingdom of Poland

A fundamental change occurred after the fall of the November Uprising. Nicholas I suspended the constitution until the issue of the Organic Statute on February 26, 1832⁴². It is worth noting here, however, that the Constitution provided for the possibility of issuing such legal acts as an extension of its provisions. However, in order for them to be issued independently by the King, it had to take place "immediately after the constitution" (Article 161). In other situations, any changes to the Constitution could be made by the King only in cooperation with the Council of State and the two chambers of the Sejm, which resulted explicitly from Articles 31, 90, and 163 sentence 2, Constitution. It is therefore obvious that from a formal point of view, the act issued was unconstitutional.

However, it is worth pointing out two important elements related to the issue of this unconstitutional Statute. First of all, the strong pressure of international opinion, at that time very favorable to Poland, caused, however, that Nicholas I nevertheless made an effort to keep his decisions within certain constitutional frameworks. In addition, although again explicitly in violation of the provisions of Art. 90 of the Constitution, he abolished both chambers of the Sejm without obtaining the opinion of that Sejm, but he formally left all other separate Polish institutions⁴³. Secondly, however, such a procedure for introducing changes, obviously in violation of constitutional provisions and the state of affairs in Poland, guaranteed by international agreements, was also an attempt to prepare a European opinion that the Tsar may break the law in Poland and no one can

⁴² Dz. P. K. P., T. 14, p. 161–249.

⁴³ The Polish Army was also liquidated, but given the actual lack of sovereignty of the Kingdom arising from the provisions of the Congress of Vienna and the Constitution, it would be difficult to consider this liquidation as a violation of law.

basically prevent him from doing so. It was therefore a very important precedent for the future.

In January 1832, the Russians falsely claimed that the Vienna provisions "only provided for giving Poles national institutions, without specifying their form"⁴⁴. Therefore, in the first article of the unconstitutional statute issued in February 1832, contrary to the Vienna findings, they stated that "the Kingdom of Poland [is] permanently attached to the Russian state, it is an inseparable part of this state." Therefore, it was also – in yet another dimension – the beginning of getting used to European opinion to unilaterally reinterpret significant findings from 1815.

Later practice, clearly focused on the gradual liquidation of this separateness, was undoubtedly a systematic violation of the Congress's findings and confirms, as it seems, such logic of the Russian authorities. This was certainly the nature of the liquidation of the Council of State in 1841, or the unification of administrative divisions made in 1837 by renaming the provinces into governorates, and thus like in Russia.

The fundamental departure from the Vienna regulations, however, took place after 1864, that is after the suppression of the January Uprising. At that time, notwithstanding their international obligations and the formally binding provisions of the Constitution and Statute of 1832, changes were introduced that led to the full incorporation of Kingdom lands into the Empire.

All ministerial Government Commissions were gradually liquidated, the briefly reactivated Council of State and Administrative Council of Kingdom of Poland were abolished, the institution of the Governor was abolished, all practically state structures in the Kingdom were subordinated to the central authorities in Russia, and finally the field administration was fully unified with the system functioning in the empire. In 1871, the publication of the separate Kingdom's "Journal of Rights" was discontinued and it can be said that along with this the Kingdom's separateness was finally annihilated.

In this way, between 1864 and 1871, Russia – let us repeat this – breaking its treaty obligations, transformed the initially separate state into one of its provinces. This happened with the tacit acceptance of the other signatories of the Final Act of the Vienna Congress of 1815, including those already united by Prussia, Germany and Austria–Hungary.

⁴⁴ *Historia Państwa i Prawa Polski*, Warszawa 1981, Vol. III, p. 233.

Conclusion

Therefore, the German agency was right when it reminded the Russian side that in 1815 "the Kingdom of Poland was created", which later "Russia devoured" so that "even the name of Poland was lost." However, she was wrong when she stated that the Act of November 5 "brought the Kingdom of Poland back to life" and as such did not violate the Viennese provisions. This was clear from the statements in the November Declaration, which stated "the creation of an independent state" and "the new Kingdom".

There was therefore no question of restitution of the state created in 1807, and in 1815 subjected to the power of the Russian tsar, and there was talk of creating a new state. In this sense, Germany and Austria–Hungary could not stand strictly on the basis of Vienna decisions. This was also reflected in the terms used in the territories used by the authorities of both countries. Initially, they called them "the occupation area", after November 5 it was already an "administrative area", but in practice they exercised their occupant rights under the Hague Convention⁴⁵.

Of course, these formal problems were not so significant at that time, because the policy of *fait accompli* dominated. At the time, Germany, with its overwhelming advantage over Russia, could basically not worry about its and its allies' protests. However, these nuances could have been important in the perspective of the future peace treaty. Perhaps that is why the Germans did not want to formally refer to the status of the Kingdom defined in Vienna, so as not to tie their hands to the future, and merely demonstrated the violations of this treaty by Russia.

However, as I pointed out above, the unofficial German position expressed in the news agency's communication caused that neither Russia nor its Western allies raised the argument that Germany and Austria–Hungary argued that the decisions proclaimed on November 5, 1916 were contrary to international law regulations. Thus, premises were created for the "Polish problem" to become one of the most important points regarding the creation of a new post-war European order.

III.

The beginnings of the Polish Underground State

Introduction

The Polish Underground State (PUS) was a political form of the Polish state in the territories of the Commonwealth overrun by Germany and the Soviet Union during World War II. Poland was defeated in September 1939 by these two countries and they divided each other in about half of its territory.

The vast majority of Polish society did not accept the re-destruction of their country and was determined to take an active fight with both invaders. From the first days of the occupation, underground organizations were established in virtually every Polish town, the goal of which was to undertake actions aimed at rebuilding the independent Polish state.

It should be emphasized that both invaders in the Polish territories they occupied implemented a similar policy of mass extermination of Polish citizens. Mass executions, mass deportations involving a total of about 2 million people, mass deprivation of Poles' property, almost complete destruction of any form of cultural life, destruction of the Polish educational system – these are only some of the forms of uncompromising battle conducted by invaders.

Both invaders represented the same goal – it was not only about the destruction of Polish statehood, but even about the destruction of Poles as a separate nation capable of independent existence.

This is why Poles correctly reading the criminal intentions of both invaders, from the first days of occupation were forced to fight for survival, one of which was the creation of underground organizations.

Yet in spring 1939 Polish General Staff started with preparations to the war with Germany⁴⁶. In March 1939 The Chief of Staff gen. Stachiewicz proposed to General Inspector marshal Śmigły-Rydz composing special groups, operating on the territories which, as they expected, could stay – in the first phase of war – under German occupation. These groups would be operating in cooperation with Polish intelligence, as well as realize diversion and sabotage against German troops. They planned, that these

⁴⁶ W. Stachiewicz, *Wierności dochować żołnierskiej*, Warszawa 1998, p. 438.

groups should operate specially in Pomerania and Silesia. Major Edmund Galinat was nominated⁴⁷ as the coordinator of this action.

At the same time Commander of the Corps (*Dowódca Okręgu Korpusu*) in Toruń (Pomerania) – gen. Karaszewicz-Tokarzewski, started with similar attempts⁴⁸ in his region. He undertook cooperation with various social organizations that were to be the natural basis for future underground conspiracy in Pomerania.

Just gen. Tokarzewski in the first days of the war met in Toruń with a group of officers to discuss precisely, how Pomeranian conspiracy should work⁴⁹. While we don't know clearly about the discussion at this meeting, it is important, that three of its participants soon started the organization of conspiracy in various places of the country.

Gen. Tokarzewski created Service for Poland's Victory (then SZP) [*Służba Zwycięstwu Polski*] in Warsaw, Ludwik Muzyczka created Organization of White Eagle (then OOB) [*Organizacja Orła Białego*] in Kraków and Józef Dambek *Gryf Kaszubski* in Pomerania. What is characteristic all three organizations had very similar structures. The model of the unique military – civil organization, was probably discussed and accepted at the Toruń's meeting.

After about two weeks gen. Tokarzewski reached Warsaw with the rest of Pomeranian troops of Polish Army. He became a close cooperator of gen. Juliusz Rómmel, who was the Commander of Warsaw's defense. Tokarzewski also closely worked with politicians present in Warsaw, because he represented gen. Rómmel in the Council of Warsaw's Defense (*Rada Obrony Warszawy*). Among them were the president of Warsaw Stefan Starzyński, Mieczysław Niedziałkowski (one of the socialist party leaders) and Wacław Lipiński (important politician of *Sanacja* camp)⁵⁰. This group discussed and formulated basic ideas for the future conspiracy – we can

⁴⁷ Ibidem.

⁴⁸ About these preparations see book: *Organizacje paramilitarne i pokrewne na Pomorzu w przededniu II Wojny Światowej*, Toruń 1996.

⁴⁹ About this meeting S. Salmonowicz, *Relacja L. Muzyczki. Przyczynek do genezy ruchu oporu na Pomorzu Gdańskim na jesieni 1939 r.*, *Zapiski Historyczne*, nr 3–4, Toruń 1988.

⁵⁰ K. Pluta-Czachowski, *Faza inicjatyw początkowych. Wrzesień–Październik 1939*, Warszawa 1961 (In Collection of Historical Institute of Polish Academy of Sciences, Warsaw), pp. 10–11.

say the foundations of PUS⁵¹. Let us review their visions discussed during the last days of Warsaw's defense.

Intellectual foundations of the PUS concept

It was obvious for them that Poland had lost the September campaign and that Versailles order in Europe was finally destroyed. It was rather impossible in their opinion to rebuild this order in the future. But for Poland it was important that two of its Allies, Great Britain and France, were at war with Germany. It gave hope that war crash didn't mean the final solution for Poland, as the German and Soviet aggressors declared, but that determination of Poland's future would be done after victorious end of the war.

For that reason it was extremely important that Polish authorities still operated in France, and that there was a constitutional continuity of these structures, because they operated on the legal constitutional foundations. This fact gave them not only internal mandate but also strengthened their position in relations with the Allies. Finally, it helped to sustain the position of Poland in its international relations. For that reason the presence of Polish authorities in the West, their ability to influence directly on the Allies' policy, played fundamental role.

On the other hand, the above mentioned group concluded the complete collapse of Polish pre-war political, social and administrative order. The aggressors totally destroyed Polish state and its structures and elites. It was a great challenge to rebuild these values in such extreme conditions. But it was necessary for at least three reasons.

Firstly it was the necessity of reconstruction in conspiracy of state's institutions to show to the Poles, that the Polish state was still alive. We have to remember, that Poland was reborn in 1918 after more than 100 years of absence on Europe's map. For great part of society it was quite a normal status and there were fears, that they could passively accept new situation as some kind of return to the previous reality. PUS in this idea was some manifestation how valuable for the Poles a state as an institution was.

⁵¹ Presenting it we are basing on the work mentioned above Pluta-Czachowski relation, pp. 11–16.

The second reason was the will to prove to the aggressors, that their declarations about destroying Poland were not true. The aggressors' will to sustain such a situation in this context, would have no perspective. PUS through active fight for independence would express undefeated desire of independence.

Finally, PUS was supposed to strongly support the position of Polish authorities in their relations with the Allies. However, they knew, that the Polish Army reconstructed in France would play important role in military operations in the West, and also underlined the importance of active resistance on the rear of German troops. Strong anti-German conspiracy would importantly strengthen the role of Polish Ally. To this end, PUS and the authorities in France were to cooperate closely according to these assumptions.

In this context it was important how conspiracy would be organized. Specially as a result of prewar political relations, the model of relations between politicians (and political parties) and officers elite in PUS structures was important. In Tokarzewski's idea PUS was to be composed of two pillars: military and civil.

For military pillar the aim was to continue active military fight against both aggressors and to coordinate its operations with military operations of Western Allies and activity of Polish Army in France.

Civil pillar should fight for the protection of national values, and to maintain foundation and recourses for military operations and Polish authorities. Here they underlined the necessity of maintaining in conspiracy structures of governmental and self-governmental administration, administration of education, economy and other fields.

Both pillars should be functioning in unique, military – political structure, which would be recognized by Polish authorities as their imminent part.

Beginnings of the underground

Staying on such position Tokarzewski started practical preparations to work in conspiracy still during the Warsaw's defense. Similarly under the military administration during the war campaign on all occupied territories wide anti-German and anti-Soviet resistance quickly arose.

There were various forms of these actions – military, political, charity, even cultural organizations were organized. For all these initiatives it was obvious, that German and Russian declaration about destroying Polish state could not stop its existence. Almost all Poles believed that Poland would gain its independence again. This massive movement was the foundation for the future development of the Polish Underground State.

But the crucial role in the process of forming PUS was connected with the above mentioned initiative of gen. Tokarzewski. In the evening of September 26th, the day before the capitulation of Warsaw, gen. Rómmel met with gen. Tokarzewski, who presented his initiative of continuing the fight with the occupants. During this meeting of two generals they received information, that an emissary of Supreme Commander marshal Śmigły-Rydz had just come to Warsaw. Major Galinat, who had stolen a plane in Romania, sent to gen. Rómmel marshal's nomination on the position of the commander of all still fighting Polish troops. Major Galinat also told them, that he was appointed by Supreme Commander to organize underground resistance.

After this meeting gen. Rómmel decided to transfer this nomination to gen. Tokarzewski with an order to continue the fight against the occupants in conspiracy⁵². He also ordered major Galinat to work under Tokarzewski's command.

Having such an authorization gen. Tokarzewski, parallel to capitulation of Polish troops in Warsaw, started to create his SZP. For his initiative the mandate from the Supreme Commander played a crucial role.

For that reason and in the context of above mentioned ideas discussed by Tokarzewski and his cooperators, SZP was planned as all-nation organization with two pillars – military structure and civil structure. Militarized part of the organization was to sustain active fight with occupant forces in strict cooperation with the Western Allies, while civil part was responsible for the protection of national values and independent state idea. Civil part should also sustain foundations for military attempts and for authorities in

⁵² In this document he wrote: "Authorization to command of all Polish troops on all Polish territory given by Supreme Commander, I've passed to gen. Michał Karaszewicz-Tokarzewski with an order for continuing fight to maintain independence and territorial integrity". S. Korboński, *The Polish Underground State: A Guide to the Underground, 1939–1945* (1991), pp. 32–33.

exile. Here he underlined the necessity of continuing in conspiracy pre-war administrative structures⁵³.

SZP's founders saw this organization as a unique structure. Structure which was recognized by them as a straight continuation of prewar, legal state structures and in this context we clearly understand, how important was the authorization gained by Tokarzewski from the Supreme Commander. In Tokarzewski's opinion, it was not only the authorization for continuing military struggle against occupants.

Basing on the prewar legal regulations, authorized army commanders were responsible during military campaigns for sustaining activity in the civil administration area automatically. It had happened because civil authorities didn't establish their authorized representatives.

Because of that Gen. Tokarzewski found himself as a person responsible for all military and civil actions of official structures of the Polish state in conspiracy. But it is important to say, that such a dictatorship power was against his will. From the first moments the general aimed to share this responsibility with main political centers which were continuing their activity in conspiracy.

But the political atmosphere in Poland and in the exile in the end of 1939 and in first months of 1940, was extremely hot. Almost all political centers recognized *Sanacja* camp as totally responsible for September collapse.

Gen. Tokarzewski became one of the first victims of this atmosphere. He was one of the most influential army officers directly after May 1926 *coup d'état*⁵⁴. But then, although Tokarzewski was also one of the most talented Polish officers⁵⁵, he was sent to administrative functions⁵⁶. One of the reasons of these problems was his sympathy for Masonic movement

⁵³ K. Pluta-Czachowski, *Faza inicjatyw początkowych. Wrzesień–Październik 1939*, Warszawa 1961 (In Collection of Historical Institute of Polish Academy of Sciences, Warsaw), p. 16.

⁵⁴ Piłsudski nominated him on the position of the chief of personal office in Ministry of Military Affairs. A lot of officers dismissed from the army after *coup*, saw Tokarzewski as responsible for "clearing" of Army. Tokarzewski during WWI was one of the commanders of *Polska Organizacja Wojskowa POW (Polish Military Organization)* and for that he was not only very well experienced in conspiracy. Most of *Sanacja* camp members trusted him very strongly.

⁵⁵ In 1919 he led a spectacular action of support for Lwów defenders. Then during the Bolshevik War he participated in other important campaigns.

⁵⁶ He became a Commander of Corps in Lwów and then in Toruń. On this positions he was practically outside important army matters.

and occultism⁵⁷. On the other hand, he had a lot of contacts with politicians from the centre and centre-left parties. Specially during his service in Lwów he found a lot of sympathy from the peasant and socialist movements⁵⁸. However, national camp, the strongest political movement in Poland, didn't trust him for the reasons mentioned above. These facts were of great importance for the first period of PUS and specially for SZP functioning.

Gen. Tokarzewski proved very soon that his loyal relation to legal Polish authorities was stronger, than his political sympathy to *Sanacja* camp. On the of October 2, 1939 he met in City Hall with Warsaw's president S. Starzyński, M. Niedziałkowski and W. Lipiński. The meeting took place just when they received information about the formation of the new Polish Government in France with Gen. Sikorski as the Prime Minister, and replacing the President by Władysław Raczkiewicz and Supreme Commander by Gen. Sikorski.

The main conclusion of the meeting was, that in the result of these changes

*"constitutional continuity of the State and governing was sustained. These are fundamental facts with internal and international importance.(...) In democratic systems people who finished activity with collapse are leaving their offices. In Polish situation it is obvious, that people responsible for September collapse have to leave their offices"*⁵⁹.

We will not find among *Sanacja* camp members and supporters in this time, conclusions similar to these that were made by Tokarzewski and his partners.

We should also remember that politicians united around gen. Tokarzewski represented ideas and visions rather far from those dominating among *Sanacja* politicians. M. Niedziałkowski *"political mind of SZP"*⁶⁰, was one of the most influential politician of Socialist Party (PPS) and one

⁵⁷ We have to remember that about 1935 Polish authorities started with the policy against Masonic organizations and other secret quasi-Masonic structures. Tokarzewski's sympathies and connections with them in fact closed his career in army.

⁵⁸ It was during the wave of peasant strikes in Małopolska region when Tokarzewski as the Corps Commander in Lwów supported these actions.

⁵⁹ K. Pluta-Czachowski, *Faza organizacyjna SZP (Wrzesień 1939–Styczeń 1940)*. (In Collection of Historical Institute of Polish Academy of Sciences, Warsaw), pp. 1–2.

⁶⁰ M. Karaszewicz-Tokarzewski, *Jak powstała Armia Krajowa?*, Zeszyty Historyczne, Paryż 1966, Vol. 6, p. 35.

of the leaders of anti-regime opposition before the war. Kazimierz Pużak was another leader of PPS and – like Niedziałkowski – important opposition leader. Zygmunt Zaremba (also from PPS) prepared a radical "Program of People's Poland" – the first manifesto of the underground. Maciej Rataj was in fact the leader of Peasant Party and was recognized as the one of the most influential opposition leaders. Mieczysław Michałowicz was the leader of Democratic Party, which united radical anti-*Sanacja* intelligentsia. These are only some examples of politicians who had worked with gen. Tokarzewski since the beginning of his initiative and it is impossible to say, that they all made a mistake or couldn't understand the real nature of general's attempts.

They accepted his vision of fight against the occupants and the model of organization suggested by him. They also understood that the occupants were aiming to destroy the Polish state definitely and for that reason Tokarzewski's proposals were an only adequate answer.

SZP as a new version of the POW

The model of SZP was quite similar to the organization known from the period of World War I. *Polska Organizacja Wojskowa* (*Polish Military Organization – POW*), was established by J. Piłsudski for secret fight for independence. POW played extremely important role in the struggle for the freedom of Poland. But then it was recognized as one of the crucial foundations of Piłsudski's camp (then *Sanacja* camp). This is why a lot of oppositionists around new Prime Minister gen. W. Sikorski acknowledged people from POW or had positive opinion about it, as a suspected *Sanacja* camp members⁶¹.

Gen. Tokarzewski ("*Doktor*", "*Torwid*") started organizational works yet before the capitulation of Warsaw. On September 25th he met with a group of officers who decided to continue their fight in conspiracy. They established the first structures for organizing conspiracy communication, legalization of conspirators, and securing weapons and ammunition⁶². On

⁶¹ It was quite funny to suspect that Niedziałkowski or Rataj were secret members of *Sanacja* camp but in very heated political atmosphere in France in the end of 1939 such absurd suppositions could play important role in governmental decisions.

⁶² K. Pluta-Czachowski, *Faza inicjatyw początkowych...*, p. 21.

the same day the President of Warsaw, S. Starzyński, established a secret structure for supporting SZP, inside City's Executive⁶³.

After the night meeting with gen. Rómmel and E. Galinat on the day of the capitulation of Warsaw, gen. Tokarzewski had in hand a special authorization for continuing resistance from the Supreme Commander and a foundation of staff of SZP composed by about 15 officers⁶⁴. In the middle of October 1939 col. Stefan Rowecki came to Warsaw and started cooperation with SZP. It was a very important fact for the development of military part of the organization.

Gen. Tokarzewski started also preparations for developing regional structures of SZP. On October 3rd, 1939 emissaries of SZP moved from Warsaw to almost all provinces (*województwa*) to establish such structures⁶⁵.

As it was mentioned above Colonel Stefan Rowecki who came to Warsaw and joined SZP staff, became the Chief of Staff of the organization. From this moment on he conducted over the whole military part of the organization, while Tokarzewski could concentrate on development of its civil part⁶⁶.

Initial PUS structure

For SZP it was important to have the statute, which precisely described its structure. The final document was adopted about October 10th 1939⁶⁷. *Statute*⁶⁸ was not only a kind of internal constitution of SZP but also a warm manifesto to the whole nation. Tokarzewski declared strong will of fighting for independence but also for democracy and freedom. He described two most important aims of organization as follows:

⁶³ See more about it in J. Kulski, *Zarząd Miejski Warszawy*, Warszawa 1964.

⁶⁴ S. Korboński, *The Polish Underground State: A Guide to the Underground, 1939–1945*, Boulder 1978.

⁶⁵ K. Malinowski, *Żołnierze łączności konspiracyjnej Warszawy*, Warszawa 1983, p. 19.

⁶⁶ K. Pluta-Czachowski, *Faza organizacyjna SZP*, p. 20.

⁶⁷ J. Karasiówna, *Pierwsze półrocze Armii Podziemnej. Niepodległość*, Londyn 1948, Vol. 1, p. 267.

⁶⁸ Whole *Statute* in: *Armia Krajowa w dokumentach 1939–1945*, Vol. 1, London 1970, pp. 31–37. (Further see this publication as: AK I. Next volumes of this edition: AK II, London 1973; AK III, London 1976; AK IV, London 1979; AK V, London 1981; and AK VI, London 1989).

- "a) to continue decisive and tenacious fight with occupants on all fields of their activity by all possible means up to liberate Poland in borders from before the beginning of the war,
- b) reorganization of personal value of our army and strengthening its moral and physical abilities,
- c) creation of the centers of temporary national authorities which are united hierarchically and harmonically cooperating".

He planned to establish the Council of National Defense (*Rada Obrony Narodowej – RON*), which was to have "political directory of SZP activity (...) in full loyalty to Polish Government".

In the second part of the statute the structure of SZP was described. On the top of it was the Main Commander (*Dowódca Główny*) with two Deputies. The first was also the Chief of Staff and coordinated military pillar, the second was the Main (Civil) Commissioner (*Komisarz Główny or Cywilny*) – who coordinated the civil pillar and stayed as a president of mentioned RON.

Military staff of SZP was to be composed of six Divisions (*Oddziały*) with chiefs on the top.

In districts District Commander (*Dowódca Wojewódzki*) was the chief of SZP structures. He also was to have two deputies – chief of staff and District Commissioner (*Komisarz Wojewódzki*), who was also the president of Province Council of National Defense (*Rada Wojewódzka Obrony Narodowej*). The same structure was planned for the County (*powiat*) level. In the lowest level Picket (*Placówka*) was planned as a basic structure.

It is rather impossible to say how far these statutory stipulations have been realized in practice. We have to remember, that SZP could operate in planned structures only till the end of 1939. Hence we can't expect that all its structures were functioning precisely like the statutory regulations determined.

It is obvious that the position of the Main Commander was taken by general Tokarzewski. His deputy, the Chief of Staff became the mentioned above col. Rowecki. Yet in October Rowecki presented to Tokarzewski the plan of action till June 1940 (the expected date of war in the West). The most important topics were:

1. The necessity of organizing the whole Staff,
2. The organizing of all district commandments,
3. The establishing of internal communication and
4. permanent communication with the Supreme Commander in France⁶⁹.

⁶⁹ K. Pluta-Czachowski, *Faza organizacyjna SZP*, pp. 20–21.

In the beginning of December 1939 gen. Tokarzewski had informed the Supreme Commander, that the Main Staff of SZP is completely organized and all its Divisions were in actions⁷⁰. It is necessary to add, that for SZP Commanders:

*"Divisions and bureaus in Staff (...) after development could become expositions of former departments of Ministry of Military Affairs, divisions of Main Staff and military bureaus in civil ministries in the country, and also realize their tasks, up to creation of real structures"*⁷¹.

Let us present some brief information about the organization of staff's divisions.

1st Division – Organizational – had been headed by major Antoni Sanojca ("Knapik") since the end of September. Trough this division all territorial commandments were directed by Main Commander. There were also Religious Service with rev. Stefan Kowalczyk ("Biblia") and Women's Military Service (Wojskowa Służba Kobiet) with Maria Wittekówna ("Pani Maria").

Also in the end of September 1939 started the creation of the 2nd Division – Intelligence. It was headed by major Wacław Berka ("Brodowicz").

In the middle of October, after his coming to Warsaw, Col. Janusz Albrecht started the organization of the 3rd Division – Operations. In this division were three parts: III A of general planning with J. Albrecht, III B of training with Col. Kazimierz Bąbiński ("Krzysztof"), III C – of diversion with Col. Franciszek Niepokólczycki ("Franek"). There were also the special staff for conducting diversion actions composed of at least 10 officers⁷².

Probably in the middle of November 1939 the 4th Division – Logistics started to be organized by Col. Adam Świtalski.

Crucial role for effective conspiracy was played by the 5th Division – Communication, called also Bureau of Main Quarter. Since September 1939 major Janina Karaś ("Bronka") had stayed at its top. She headed the branch of the internal communication. Cpt. Leon Chendyński ("Gruda") headed the branch of internal security, and Lt. Konrad Bogucki ("Zaremba") headed the branch of radio communication.

Political and Propaganda activity was concentrated in the 6th Division headed since October 1939 by major Tadeusz Kruk-Strzelecki ("Dyrektor").

⁷⁰ AK I, p. 22 – information from December 7th 1939.

⁷¹ K. Pluta-Czachowski, *Faza organizacyjna SZP*, p. 31.

⁷² T. Strzembosz, *Oddziały szturmowe konspiracyjnej Warszawy*, Warszawa 1983, p. 22.

Finally, since October 1939 major Stanisław Thun ("Nawrot") had created the 7th Division – Financial.

Only in the end of 1939 Ludwik Muzyczka started with the organization of the 8th Division – Military Bureaus.

The development of the SZP structures was broken by the decision of Polish authorities in France, which established new military organization – Związek Walki Zbrojnej (The Union of Armed Struggle). The greatest success of SZP was, that its staff

*"just till the end of the 1940 was the only institution in the country, which was able to prepare for all Polish centers, synthesis of the situation basing on wide and truthfully materials"*⁷³.

Forming PUS civil structures

Since the middle of October 1939 gen. Tokarzewski had concentrated his activity in SZP on organizing the civil part, while Col. Rowecki was responsible for the military part of the organization.

In October all military commandments in central Poland were organized (in Warsaw, Lublin, Kraków, Kielce and Łódź). In the next month structures in the districts gained by Reich were established. It was extremely hard to organize structures on territories gained by Bolsheviks. The development of the SZP military structures advanced much faster than the civil ones.

Gen. Tokarzewski, as we have mentioned before, was in a strict contact with a lot of politicians. After the first discussions they agreed to create political representation of underground movement composed by M. Niedziałkowski (PPS), M. Rataj (SL) and Leon Nowodworski (SN – National Party). But they also agreed that this group should be enlarged by representatives of other political parties⁷⁴. Tokarzewski declared to Niedziałkowski, that

"the only principle for such a representation is to accept that it should be composed of representatives of all political parties present till September 1939, and also these arose in conspiracy, including Sanacja, if

⁷³ K. Pluta-Czachowski, *Faza organizacyjna SZP*.

⁷⁴ M. Karaszewicz-Tokarzewski, op. cit., p. 24.

they would accept political program commonly confirmed by PPS, SN, SD and SL."⁷⁵

Basing on this idea gen. Tokarzewski met with Józef Chaciński from Stronnictwo Pracy (Labour Party), Kazimierz Stamirowski from various *Sa-nacja* groups, with activists from Polish Red Cross, teachers' unions, trade unions, peasant organizations, Union of Polish Scouts and many others⁷⁶.

Probably on October 7th 1939 in Radość near Warsaw, gen. Tokarzewski met M. Niedziałkowski and Z. Zaremba from PPS, and M. Rataj and Stefan Korboński from SL⁷⁷. He presented to them basic principles of the projected SZP.

Two days later, on October 9th, he discussed about it with S. Starzyński, M. Niedziałkowski and S. Rowecki⁷⁸.

Finally, the following day, October 10th, he met again with a group of politicians: M. Niedziałkowski, K. Pużak, Z. Zaremba from PPS, M. Rataj, S. Korboński from SL, L. Nowodworski from SN and M. Michałowicz from SD⁷⁹. They probably accepted concept of SZP *Statute*, M. Niedziałkowski and L. Nowodworski as candidates for the positions of Civil Commissioners and his Deputy. Finally, the commission composed of Niedziałkowski, Nowodworski and Rataj was appointed to prepare the creation of the composition of RGON, "General Declaration" of the fighting country and regulations for secret administrative structures⁸⁰.

Gen. Tokarzewski could expect, that the organization of civil pillar of his underground SZP was heading in a very good direction. But affairs of the next weeks destroyed his attempts.

Firstly, newly established, in the middle of October 1939, authorities of SN declared, that they would continue cooperation with SZP only if gen. Tokarzewski finished his cooperation with SD. They also disavowed L. Nowodworski as a representative of their party⁸¹.

⁷⁵ Ibidem.

⁷⁶ K. Pluta-Czachowski, *Faza organizacyjna SZP*, pp. 8–9.

⁷⁷ M. Karaszewicz-Tokarzewski, op. cit., p. 22; S. Korboński, *Polskie państwo podziemne...*, p. 25. There was also Col. Rowecki as a participant at the meeting.

⁷⁸ K. Pluta-Czachowski, *Faza organizacyjna SZP*, p. 9; S. Korboński, *Polskie państwo podziemne...*, p. 25.

⁷⁹ Ibidem.

⁸⁰ Ibidem.

⁸¹ J. J. Terej, *Rzeczywistość i polityka. Ze studiów nad dziejami najnowszymi Narodowej Demokracji*, Warszawa 1979, p. 128; M. Karaszewicz-Tokarzewski, op. cit., p. 33.

Another serious blow was a visit in Warsaw of the first emissary from Polish authorities in France. Jerzy Szymański ("Konarski") didn't communicate with gen. Tokarzewski, because governmental officials banned him to do so. In fact, the mission of Szymański was very limited only to making some review of the climate after the September collapse among politicians in the country⁸². It is rather obvious that Szymański's interlocutors presented Tokarzewski's initiative in the darkest colors⁸³.

However, until the arrest of M. Rataj and M. Niedziałkowski by the Germans, it was not easy to present SZP as an organization of Sanacja. But when they were eliminated from SZP on the break of 1939/1940, strong attacks on gen. Tokarzewski's initiative started with new power.

Parallel, another initiative developed intensive activity. It was Political Bureau which was established by Ryszard Świętochowski. Świętochowski had closely cooperated before the war with gen. Sikorski. During September campaign he spent some days together with gen. Sikorski in the village Osmolice. They discussed about their future activity in the event of failure in the war with Germany.

Basing on these discussions, Świętochowski started in October conspiracy among *Front Morges* politicians. He presented himself as a representative of Prime Minister gen. Sikorski. However, he didn't receive any authorization from the new government in France. But in very heated political atmosphere in the end of 1939, Świętochowski could organize concurrent with SZP political center. He had founded the Central Committee of Organizations fighting for Independence (*Centralny Komitet Organizacji Niepodległościowych – CKON*) but there were no serious political organizations except Stronnictwo Pracy.

However, for governmental centers in France it was at this time an attractive alternative for Tokarzewski's initiative. That's why they engaged a lot of sources in Świętochowski's group and tried to avoid the existence of SZP.

But it was practically impossible because in the end of 1939 SZP was the only initiative, which operated in all the areas of occupied country. SZP had not only a very proficient central structure but also effective structures

⁸² E. Duraczyński, *Kontrowersje i konflikty 1939–1941*, Warszawa 1977, pp. 119–123.

⁸³ There were N. Barlicki, S. Mierzwa, F. Kwieciński, R. Świętochowski and others – all connected with *Front Morges*. They were in very strong opposition against *Sanacja* and recognized SZP as the initiative of this political camp.

in almost all provinces. It also cooperated with the most important political and social organizations in the country. After some months, in the middle of 1940, even gen. Sikorski and his supporters would accept it.

Conclusion

Regardless of the lack of significant progress in creating the civil division of the SZP, it was this organization that became the foundation of the first structures of the Polish Underground State. It was here that the first overall concept of continuing resistance to German and Soviet invaders was formulated. This concept assumed a kind of transfer to the underground of state institutions, while being aware of the limitations resulting from the operating conditions. This basic direction of building underground structures, despite various political disputes, was a constant vector of the operation of the main political centers in the country and the Polish authorities in exile. Over the next five years, consecutive elements of Polish statehood were rebuilt in the underground. It can be said that without the effort of the first three months of underground activity, this would certainly not be possible.

IV.

Polish Underground State as a Unique Element of European Resistance Movement during WW II

Introduction

The years of World War II brought a series of extraordinary events and phenomena⁸⁴. Among them one must mention the European Resistance Movement (ERM), a phenomenon of unprecedented scale. Its development, which reached its culmination in 1944, was a symbol of strength, organization and opposition from the societies and nations of our continent who were subjected to foreign – mostly German and Soviet – occupations.

Organizing resistance against foreign occupations or colonial rule was known earlier and not only in Europe. However, it was only during World War II that the resistance became such a phenomenon that had huge political, social, economic and military consequences on a European scale. One could venture to say that the consequences of ERM functioning went far beyond its military significance. In many cases they influenced post-war events, sometimes for many years.

It is not my goal in this study to analyze such a wide phenomenon as the European Resistance during World War II. After the war, this phenomenon was subjected to comprehensive scientific studies and is relatively well known today⁸⁵. Against this background, however, a broader European opinion does not understand the essence of the phenomenon, which was the Polish Underground State (PUS).

This is of course primarily the fault of Polish researchers who for several decades could not accurately outline the phenomenon of the PUS against the background of the European Resistance⁸⁶. And even such a simple

⁸⁴ It is essential to emphasize first of all mass – planned out and organized – homicide, unprecedented in scale, aimed at physical extermination of whole nations. Certainly, from this perspective other phenomena of that period have incomparable scale, take the notion of "total war" for instance or resistance movement, which we are interested in.

⁸⁵ The evidence of it can be a great number of publications, both general and detailed, devoted to resistance movement, discussing its functioning practically in all European countries.

⁸⁶ An important number of foreign publications devoted to PUS proves that point. S. Korboński *op. cit.*, J. Garliński (*The Polish Underground State (1939–1945)*), *Journal of Contemporary History* 1975 No 2, S. Salmonowicz (*L'Etat polonais clandestin dans les années 1939–1945. Un aperçu général*, [in:] *De la Res Publica a los estados modernos*, Bilbao 1992) wrote about PUS itself. See also: S. Salmonowicz, M. Ney – Krwawicz, G. Górski, *Polskie Państwo Podziemne – Polish Underground State*, Warszawa 1999. The last two, however, was the only one who pointed to elements, in system

combination of these two phenomena shows the scale of differences between them. I would like to devote my considerations to this issue.

Political and historical conditions determining PUS' concept

To fully understand the political circumstances of the PUS operation, we must go back to the pre-war years.

Poland, which in November 1918 regained independence along with several other nations, benefited from a unique number of international events. As a result of war disasters and internal revolutionary movements, all three superpowers – which at the turn of the 18th and 19th centuries deprived Poland of independence: Germany, the Austro–Hungarian Monarchy and Russia – fell. One should also take into account the great determination and commitment of Poles in the reconstruction of the state.

This was best expressed after regaining independence, when the newly reborn state had to face a great and devastating confrontation with Russian Bolshevism. It must be remembered that Poland was the first country to successfully oppose the Soviet revolution and was the only country to win the armed conflict with communist Russia (later the USSR)⁸⁷.

However, between two Great Wars a considerable part of the international public opinion treated Poland as a "seasonal state"⁸⁸. For Poland, which was experiencing large problems with the reunification of the three very different social and economic organisms during a time of particular hardship in the

and law, which distinguished PUS. An extremely important study on Polish issues during World War II was presented by R. C. Lucas, *Forgotten Holocaust. The Poles Under German Occupation, 1939–1944* (1986). The problems of international activities of the government of the Polish Republic in France and in England were more fully presented, and the fullest presentation had matters connected with extermination of Jewish population. As a paradox a lot of studies, particularly those in English, present PUS as a participant of the genocide committed by Germans. Finally I've to mention my publication: G. Górski, *Ustrój Polskiego Państwa Podziemnego 1939–1945. Studium historyczno-prawne*, Lublin 1995; English edition G. Górski, *Polish Underground State 1939–1945*, Lublin 2012. This is unique study about PUS from the perspective of constitutional law.

⁸⁷ Poland defeated Bolshevik Russia in the war 1920 and the Warsaw Battle in August 1920 was one of the most important confrontations in the World's History. Lord D'Abernon declared this battle as one of seventh deciding in the history.

⁸⁸ Originally the German propaganda used the term "Season state" for Poland, however a lot of European leader on this time supported this description.

Great Crisis⁸⁹, only after 1935 began to catch up at a satisfying pace with the rest of Europe after centuries of backwardness. The hard economic situation in Poland made easy the task of creating the propaganda picture of Poland which presented it as a needless element on the map of Europe. Particularly German politicians excelled in it and interestingly those of the Weimar Republic excelled to a much greater extent than the politicians of the Nazi Reich. It was supported with great zeal by the propaganda of numerous, influential leftist circles in the 1930s in Western Europe and the USA which were inspired by the Soviet government in Moscow⁹⁰.

We have to remember this atmosphere to see Poland's defeat in the right perspective during the meeting with Nazi Germany and Stalinist Russia at the end of 1939. Until the spectacular defeat of France and England in the summer of 1940, the fall of Poland was in a sense the death of the "bastard of the Versailles Treaty"⁹¹, anticipated by a large part of international opinion. Only resolute, though still underestimated in the autumn of 1939, Polish resistance against the aggressors caused a different perception of Polish determination than it did before with regard to Czechoslovakia or Albania.

Although both aggressors claimed for propaganda purposes that the Polish state eventually ceased to exist, the Polish Republic survived the most difficult period from a formal point of view. The regulations contained in the 1935 Constitution made it possible to preserve the legal continuity of the highest authorities, and thus, their recognition by the vast majority of the international community.

This was the first fact deciding about the future PUS phenomenon, which we will return soon. However, to fully understand this phenome-

⁸⁹ We have to also mention, that the most of the Polish territories during WWI were subject of exceptional exploration by German, Austrian and Russian Armies and great number of battles took place. In a consequence Poland started independent existence having completely destroyed country. See more about it in: W. Kołodziej, *Gospodarka wojenna w Królestwie Polskim w latach 1914–1918*, Warszawa 1918.

⁹⁰ Let us mention here as a classic example a shameful activity of Walter Duranty (Pulitzer awarded journalist of *New York Times* in Moscow) who has played outrages role in justification of the lies of the Soviet propaganda during the great homicide at Ukraine. The same role Duranty and similar guided by Soviets "journalists" played in defamating of Poland in Western countries.

⁹¹ This term was used by the Soviet Commissioner of Foreign Affairs during the October session of the Supreme Council of the Soviet Union. In his speech V. Mołotov justified Soviet aggression on Poland on September 17th, 1939.

non, we must devote some time to the political reality of the Second Polish Republic, especially after the May coup in 1926⁹².

The main political camp focused on Marshal J. Piłsudski, who then took over the leadership of the country and maintained power until the outbreak of WWII. Until the death of Marshal Piłsudski in 1935, this camp, commonly known as "sanacja", remained unity. Later, despite growing internal diversification, it was possible to prevent the influence of other centers on state policy. It should be noted that the camp was very successful: it helped stabilize Poland's international position, fueled rapid economic growth, and thus significantly improved the standard of living of Poles, and finally helped stabilize the situation of state institutions. All this significantly strengthened his position in the nation. Piłsudski's camp reached its peak of influence in the autumn of 1938, when as a result of regaining Cieszyn Silesia at the expense of Czechoslovakia⁹³, it achieved enormous success in the parliamentary elections⁹⁴.

At the same time, the opposition consolidation process, previously divided into many groups, took place in the period preceding the outbreak of WWII. Opposition formations gathered around three main political groups:

- national democratic camp – centered around the National Party (Stronnictwo Narodowe – SN), which became the strongest opposition group
- the peasant movement became more socially radical and evolved towards the center-left, grouping around the People's Party (Stronnictwo Ludowe – SL),

⁹² On May 12th, 1926 victorious commander in 1920 War Marshall Józef Piłsudski made a military *coup d'état*. This intervention was however supported by majority of political forces and vast majority of society.

⁹³ During the Czechoslovakian crisis in September 1938, shortly after Munich Settlement Polish authorities decided to press Prague for cession of Cieszyn Silesia for Poland. This part of Silesia was inhabited by vast majority of Poles. In 1920 this part of land was inside the Polish borders. However, during the Soviet offensive on Warsaw in July 1920 Czechoslovakian Army invaded Poland and gained this part of Silesia. Poland under the French pressure finally accepted this Czechoslovakian illegal action. The is why Polish authorities used Czechoslovakian crisis for regaining Cieszyn Silesia in October 1938.

⁹⁴ The expression of it was the result of general elections to the Sejm and the Senate in the autumn of 1938. Regardless of the appeal from the opposition to boycott the elections, over 60% of the eligible took part. Also in the local elections in several cities taking place a few weeks after the general elections, this time with the opposition's participation, the ruling party had 30 to 40% of the vote. This was unquestionable success of the May coup d'état group.

– the independence left centered around the Polish Socialist Party (Polish Socialist Party – PPS).

When it turned out that the consolidating parties were too weak to break the monopoly of the ruling *sanacja* camp, at the turn of 1937 and 1938, another idea emerged to create a new center, concentrated around some of the outstanding personalities of the anti-*Sanacja* opposition. It was the so-called *Front Morges* personified by I. J. Paderewski⁹⁵ and – more importantly – General Władysław Sikorski⁹⁶. This group was play a key role after the outbreak of war. The measurable effect of this undertaking was, however, the foundation of the rapidly developing Labor Party (Stronnictwo Pracy – SP). This party, being a centrist Catholic and social formation, became one of the most important centers of crystallization of the anti-*sanacja* opposition, and after the outbreak of war, it became one of the key groups of PUS.

Formation of the PUS in Autumn 1939

The above-mentioned conditions had a major impact on the functioning of PUS during the war. Despite the mutual tensions between the opposition parties (PPS-SN, SN-SP), everyone was actively involved in combating all manifestations of revival in the conspiracy of the *sanacja* camp. This caused serious friction between the military underground, which was widely considered a cover for the "sanacja regime" for a long time, and national civil centers and the authorities in exile. This state would last until the beginning of 1943, when, under the influence of growing tensions in relations with the Soviet Union, there was a far-reaching approximation of the positions of all political centers in the country.

On September 17, 1939, when the Polish authorities were waiting for England and France to fulfill their allied commitments, the Soviet attack

⁹⁵ I. J. Paderewski was a great Polish pianist and politician who played extremely important role for regaining Poland's independence during the WWI. However after 1919 he wasn't engaged in Polish political life. In the thirty years he lived in Switzerland in Morges. His residence became a place of formation of a new Polish political center.

⁹⁶ Gen. Sikorski was one of the heroes of 1920 War. Before 1926 he was engaged in political life, he was Minister of Defense. He was in conflict with marshall Pilsudski in this time in the field of the relations between civil and military authorities in the country.

on Poland began. In carrying out his secret agreements with Hitler, Stalin dealt a decisive blow to Poland⁹⁷.

The Polish authorities, recognizing the fact that further military resistance can only be of a symbolic nature, decided to go to France to continue the fight on the basis of agreements concluded with that country. External pressure exerted by the French authorities together with the pressure of Polish anti-*Sanacja* centers caused that the Polish president, prime minister and Council of Ministers as well as the commander in chief of Romania were interned. However, as I mentioned, new authorities were established on the basis of constitutional provisions – the President, the Prime Minister together with the government and the Commander-in-Chief⁹⁸.

In this way, Poland saved its status as a full member of the international community, limited only by the occupation of its territory. However, this, according to recognized international customs and regulations, had no impact on Poland's formal position, except that they were not recognized by Germany, the USSR and their allies. This was, as I mentioned, the first and fundamental distinguishing feature of Poland's and in turn PUS's position as being different in comparison to ERM. The above facilitated such establishment of the PUS structures so that they enjoyed almost exceptional legitimacy. The basis of their functioning was namely pre-war legal order and the decisions of the legal Polish authorities which had the constitutional mandate to modify the regulations depending on the external occupational conditions and the necessity of acting underground.

German and Soviet occupations in Europe

Let us see now what the situation of other occupied States was like in this perspective.

⁹⁷ The Soviet aggression was a result of Soviet–German Pact from August 23rd, 1939. Both aggressors agreed in a secret protocol added to that settlement to divide Poland between themselves on the line of Narew–Wisła–San rivers.

⁹⁸ More about this problems see in: W. Rostockiego, *Stosowanie Konstytucji kwietniowej w okresie II wojny światowej*, Lublin 1988; M. Hułas, *Gość czy intruz. Rząd polski na uchodźstwie wrzesień 1939–lipiec 1943*, Warszawa 1996; G. Górski, *Ustrój...*

In the case of Austria, after the German ultimatum of March 11, 1938 and the deposition of the Chancellor Schuschnigg, the President Miklas were forced to appoint Seyss-Inquart the new Chancellor. On March 13 the new government handed a document to Hitler recognizing Austria as part of the Reich. It was confirmed by the Reich through an Incorporation Act and approved in the plebiscite on April 10, 1938. Thereby, although in the very incorporation process the pressure of force was apparent and the Austrian authorities did not have the freedom to make decisions, formally in accordance with the internal laws the process of annihilating the State was completed successfully. Therefore any anti-Hitler regime actions in Austria were of quite a different nature than in Poland, but on the other hand the scale of the underground resistance in that country was not impressive.

Czechoslovakia succumbed to the Munich Pact of late September 1938 and, as a consequence, agreed to assign significant areas to Germany, Hungary and Poland. In result, this state became vulnerable to further German pressure. Therefore, Czechoslovakian authorities were not able to oppose the formation of Slovakia, inspired by the Berlin initiative. On March 14, 1939, the Slovak parliament declared secession in Czechoslovakia and appointed Prime Minister J. Tiso. On March 14 and 15, German troops occupied the rest of Bohemia and Moravia. Then Hitler announced the founding of the Protectorate of Bohemia and Moravia as part of the Great Reich, maintaining its autonomy and its own administration.

In the Protectorate, Germany left the possibility of functioning and managing this country to the relatively autonomous Czech government and its central and local administration. German authorities were appointed to perform supervisory functions towards the Czech government.

What is certain is that German actions violated the Munich Pact, under which Germany was obliged to respect that country's independence. However, the lack of reaction from the other signatories to this agreement meant that Germany implemented the policy of *fait accompli* here without precondition.

One can discuss how the autonomous Czech authorities should be seen from a legal point of view. Certainly they were not the authorities of the Czechoslovak state, because in practice it ceased to exist. On the other hand, it cannot be accepted that Czechoslovak émigré centers under the leadership of J. Beneš had the status of legal authorities of the Czechoslo-

vak Republic. Therefore, in this case the situation in Poland was fundamentally different.

A few weeks after the annihilation of Czechoslovakia, Italy denounced Albania. On April 7, 1939, the Italian Army entered Albania, presenting the ultimatum to the authorities of that country. After two days, the Albanian king fled to Greece. On April 12, a constitutional assembly convened by the Italians dethroned the king, entrusting the throne of Albania to the Italian king.

In this way Albania found itself in a state of personal inter-state union with Italy. In June 1939, the Italian king introduced a new constitution on the basis of which the new Albanian authorities were elected. However, the Albanian government was subject to the control of Italian institutions. This continued until September 1943, when, after Italy's surrender, German troops entered Albania. Then Germany declared independence of Albania, however, installing its subordinate authorities. In the light of the above observations, it is formally difficult to compare the situation of Poland with the situation of Albania.

In the Winter 1939/1940 Soviet Army invaded Finland. After some weeks of war a part of Finnish territory was gained by Soviet Union. Soviets established there new "Republic" which became a part of Soviet "federation". The same solution was made then with part of Romanian territory called Besarabia.

On April 9, 1940, German forces conquered Denmark in just one day. However, Germany only introduced general supervision over the functioning of the Danish constitutional authorities. In 1943, a state of emergency was imposed following a general strike in Denmark. Consequently, the German military administration took full control over the country. Again, it is difficult to talk about similarities between Poland and Denmark.

The same day, on April 9 of 1940, the German troops began the invasion of Norway. After two months of fighting, on June 7, 1940 Administrative Council for Occupied Territories was established, which, in the face of the king's departure from the country, was recognized by the Supreme Court as the highest executive organ. Then, on September 10, 1940 the Norwegian parliament passed the bill suspending the king till a peace treaty was signed, at the same time transferring his entitlements to the State Council. Thus, in the constitutional manner, the monarch was deprived his authority, and taking into consideration that the parliament in practice ceased to exist, the State Council started to play the key role. Taking into account the

above-mentioned circumstances, bearing in mind that, after all, the German pressure on the Norwegian parliament was relatively limited, the position of the Norwegian emigration authorities appointed by the suspended king, in the light of the constitutional standards, was dubious.

Another country conquered by Germany was Holland, which gave up after a few days of fighting which began on May 10, 1940. On May 13 the Queen fled the country along with the government and after two days the Dutch commandment signed their capitulation. The ministers fleeing the country authorized the General Secretaries of their departments/ministries to manage their offices.

The Germans installed the occupational government, which undertook collaboration with the Dutch administrative structures. Both houses of the Dutch parliament were dissolved.

Abroad, in emigration, the Queen acted as the head of state and the government. When in the autumn of 1940 the prime minister of the emigration government returned to the country, a crucial formal problem arose. The newly appointed prime minister, however was already acting but without the necessary acceptance of the parliament. The nonexistence of the parliament limited also considerably the emigration authorities not only in performing constitutional function, but in exerting influence on the situation in the occupied country as well. From that perspective, however the situation of the Dutch authorities was similar to a certain extent to that of the Polish authorities though their constitutional possibilities were much more limited and amounted in fact to them being a sort of provisional institution.

Also on May 10 the German army attacked Belgium and the fighting finished when the capitulation act was signed on the king's recommendation. In the meantime, the Belgian government fled to France where it was isolated in a so-called free zone till the October of 1940. Only after finding its way to England the cabinet headed by prime minister Pierlot adopted anti-German course. In the meantime, however, the King questioned the legality of that cabinet in the light of the Belgian constitutional standards. In reply the prime minister stated that the King has no freedom to act – which reflected the truth – and cannot fulfill his functions.

One should note that the government's influence on the situation in the country, at least till the end of 1943 was in fact slight. We must add that formally the Belgian parliament was not dissolved but anyway it did not perform its functions. However, there were General Secretaries in the country

who played the key role along with the Belgian King, managing the country together with provisional German offices. The power of the Belgian secretaries reached further than their Dutch counterparts, since their right to issue decrees with the force of a legislative act was recognized.

Simultaneously to the attack on Belgium and Holland, the German army commenced an assault on France. On June 21, as a result of a dramatic collapse of the French army, an armistice was signed. Consequently the western and northern territories of the country were seized by the aggressor. The French authorities, which preserved a limited freedom, moved to Vichy. On July 9 and 10 the French parliament amended the constitution giving marshal P. Petain practically unlimited power.

Thus, up till the moment the German troops seized the so-called Free Zone in 1943 the French state preserved its continuity and was represented by the authorities headed by marchall Petain.

Therefore anti-German structures being formed in emigration and partially in the colonies, under generals de Gaulle and Giraud (National Committee for the Free France and then French Committee of National Liberation) did not enjoy the status of constitutional organs.

Using the interest of world public opinion in the conflict between Germany and France and the Benelux countries, the Soviet Union in June and July 1940, thanks to its gigantic advantage, included Lithuania, Latvia and Estonia in its borders. First, the Soviet authorities forced a change of government in these countries. As a result, communist agents in these countries seized power, and then new parliaments were elected in elections similar to the plebiscite. These newly emerged bodies, essentially devoid of true democratic legitimacy, asked the Soviet Supreme Council to include their states in the USSR. The acceptance of the highest authorities of the USSR for these "requests" led to the virtual annihilation of these countries, and the quasi-legal mode of this operation prevented any continuity of the state.

After the attack on Yugoslavia on April 6, 1941, German troops quickly gained a decisive advantage. On April 17, representatives of the military command of Yugoslavia signed unconditionally surrendered to the German army. At that time, the king and government left the country for Greece and then for London.

The emigre authorities had solid constitutional foundations, all the more so because the constitution in force significantly limited the role of parliament in this political system. From this perspective, the situation of

the Yugoslav authorities was similar to that of Poland. There was a major difference, however.

The Yugoslav state was multiethnic as early as the outbreak of war, the Germans inspired its destruction by using ethnic tensions. In Croatia, an independent state was declared, all of Slovenia was incorporated into the Reich, and some territories of Yugoslavia were occupied by Italy, Hungary, Albania and Bulgaria. Serbia, under the control of pro-German groups, was also declared a separate state. The truth is that the emigre authorities (and allies) did not recognize such fait accompli, but the Yugoslav government, as a result of the above, had limited capacity to exercise effective influence over all state affairs.

The Greek-Italian war broke out on October 28, 1940, but for almost half a year the Greek army resisted aggression. Only when on April 6, 1941 Italian aggressors gained German support did the fate of this war be resolved. On April 21, the Greek army surrendered, and on April 29 the Greek king and the government left the country. From then on, most of the country was occupied by Italy, although a small part came under German occupation, as well as occupation by Bulgaria and Albania.

As in the case of Yugoslavia, just before the war in Greece constitutional solutions were introduced to limit the role of parliament. That is why the emigration center had a strong, constitutional position. However, this center had to compete with the "Greek government" established in the country by the occupiers, which was completely subordinated to the occupiers.

Formation of the ERM

This inevitably, a very general comparative analysis of the legal foundations of various administrative centers in the occupied countries allows us to assume that the most similarities occurred between Poland and Yugoslavia and Greece. However, we cannot say that the legal situation of the authorities of all three countries was fully consistent. For the other countries presented, the differences were much more serious.

Therefore, only in this perspective, being aware of the serious differences in the legal situation of the centers fighting against the occupiers, can we analyze legal and organizational solutions related to the creation

of structures conducting underground war. Let's look at how the structure of PUS has been shaped to track the situation in individual countries.

Despite the persisting controversies particularly in the first stages of the occupation, eventually PUS adopted the structures with two, independent from each other, areas.

In the military area there functioned Union for Armed Struggle (ZWZ – Związek Walki Zbrojnej), then Home Army (AK – Armia Krajowa). As early as mid of January 1940 ZWZ was considered to be a part of the military forces under the commandment of Commander-in-chief, and the service in that army was considered to be a continuation of constitutional Citizen duty. This status of ZWZ-AK was confirmed at the turn of 1941 and 1942.

In the civil area the highest was the office of the Government Delegate for Home (Delegat Rządu RP na Kraj), who acted as the governments representative for the country and was a superior of the underground administration. In 1944 he became the government member and its deputy prime minister. Together with his raised to the rank of ministers deputies, in July of 1944, they formed Home Ministers' Council (Krajowa Rada Ministrów) being a part of the government functioning underground.

The most representative Polish political parties formed the Political Coordinating Committee (Polityczny Komitet Porozumiewawczy) which was transformed later into the National Political Representation (Krajowa Reprezentacja Polityczna). On that basis, at the beginning of 1944 the National Unity Council (Rada Jedności Narodowej) was established, which was representative for the vast majority of the political opinion in the country.

The supplementation of that structure was finally the judicial branch also functioning underground, which comprised of special criminal courts managed by both civil and military departments.

All the above-mentioned structures were created on the basis of decisions of the constitutional organs of the Republic of Poland. These authorities, acting in accordance with constitutional regulations, modified the legal order, taking into account the consequences resulting from the fact that the aggressors occupied the territory of the country.

It should be remembered that this was not solely motivated by practical reasons. Perhaps above all it was a form of manifestation of strong opposition to attempts by the aggressors to convince Polish and international public opinion that the Polish state was destroyed. That is why the consti-

tutional decisions of the Republic of Poland were to emphasize the legal continuity and functioning of underground structures in the form and on the basis of pre-war regulations⁹⁹.

One more thing should be noted. From the point of view of international law, the occupation of a foreign state or part of it is a strictly defined category¹⁰⁰. This is a state that is a consequence of military operations and the surrender of one of the parties, and the consequence of the seizure of the territory (or part of the territory) of the other party by the winning party. Then, when administering this occupied territory, it is necessary to adhere to certain rules, especially those related to the well-being of people living in this territory (of course, this population also has special obligations to fulfill) and the other state structures of the opponent.

With this in mind, the situation of Polish territory did not fit into these categories at all. First of all, no capitulation took place on the Polish side. In addition, both German and Soviet aggressors consistently represented the view that Polish territory was conquered, and at the same time declared that the Polish state ceased to exist. Therefore, their administration of the Polish territories, which were actually an occupation, was not an occupation from the point of view of international law standards.

In the case of the Soviet aggressor, it was understandable because the Soviet Union was a party that did not accept the 1907 Hague Convention. Formally speaking, it did not have to comply with these provisions.

However, in the case of the German occupier, disrespect for the conventions they ratified could only be intentional and could not release them from subsequent liability for failure to comply with their international obligations. At the time that interests us, the German occupation of the Polish land was formally a different category than the actual occupation of the conquered countries.

⁹⁹ G. Górski, *Początki Polskiego Państwa Podziemnego*, [in:] *Niepodległość i Pamięć*, Warszawa 1999, No. 2 (15).

¹⁰⁰ In this time the crucial legal regulations of this question were in The Hague Convention No 4 from 1907. More about this in: Zygmunt Cybichowski, "Wartime and Peacetime Occupation", [in:] *Encyklopedia podręczna prawa publicznego* (Concise Encyclopedia of Public Law), Instytut Wydawniczy "Biblioteka Polska", Warsaw (no publication date). See also: *Prawo międzynarodowe publiczne i prywatne* (Public and Private International Law), 3rd edition, Warsaw 1928; Wojciech Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, Warsaw 1995 and F. de Mulinen, *Podręcznik prawa wojennego dla sił zbrojnych* (Handbook of the Law of War for the Military), Warsaw 1994.

IV. Polish Underground State as a Unique Element of European Resistance...

Based on the elements formulated above, we can be tempted to present some comparative conclusions.

The starting point is the analysis of the situation of military structures operating in individual countries against the background of the PUS military area.

As I have already mentioned, the ZWZ military organization formed by the Polish authorities in mid-January 1940 was recognized as part of the Polish armed forces under the command of the Supreme Commander. A similar solution was adopted:

- in September 1941, when the emigre authorities granted this status to the Norwegian Military Organization (Milorg),
- in January 1942, when this solution was applied in the case of the Yugoslav Home Army (JVO),
- in October 1943, when the Belgian army (AB, later Secret Army – AS) was recognized as part of the armed forces of this country and finally
- in September 1944, when a similar formula was used to form the Dutch Internal Armed Forces.

Because, as I have already mentioned, the constitutional possibilities of the emigration authorities of Norway, Belgium and the Netherlands, which applied these solutions, were, to put it mildly, doubtful, therefore the significance for the Polish situation can be seen only in the case of Yugoslavia. It can also be added that the JVO commander also became the head of the Yugoslav Ministry of Defense in exile. At the same time, however, it should be remembered that the Polish underground armed forces operated and planned their activities on the basis of the Polish legal order to an extent incomparable with the Yugoslav formation¹⁰¹.

Underground military organizations have also been established in other occupied countries on the basis of decisions taken by emigre authorities. However, due to the legal situation mentioned above, there are no similarities to the situation in Poland¹⁰².

While in relation to the organizational forms of the military underground structures in European countries, we can talk about certain simi-

¹⁰¹ This was primarily due to the aforementioned actual breakdown of the Yugoslav state into several independent state organisms.

¹⁰² The Greek center, being in the situation similar to that of Poland and Yugoslavia, did not lead to granting their home military organizations a status corresponding to that of the Polish and Yugoslav organizations.

larities between the PUS and several countries, we do not find such similarities in practice with regard to the civilian underground.

The creation of underground administrative structures in Poland, in addition to the above-mentioned desire to emphasize the continuity of the existence of Polish public institutions, was the result of the thorough elimination by the occupiers of Polish authorities at almost all levels. This phenomenon has not occurred in any occupied country on such a scale. In the Czechoslovakia, Denmark, Norway, Belgium, the Netherlands, Greece and France, the old administrative bodies operated practically in pre-war form along with the central level. Administrative bodies at all levels were created in Slovakia, Croatia and Serbia, which were subordinated to the occupiers.

Surrogates of underground administrative structures began to appear in the form of different quasi-governmental bodies only in the face of allied or Soviet forces entering their territory. Then, however, the main function of those undertakings was to create specific *faits accomplis*, aimed at facilitating the involved forces to gain key political positions after the occupation ends.

We should pay attention to one more, very characteristic element of ERM in the light of the above observations. It concerns namely the attitude towards it and the place of the communist formations. This problem arose only after the German – Soviet conflict had broken out. Up to that time the Moscow headquarters successfully banned any anti-German initiatives within the servile parties of Comintern. In the several years of underground activities, the communists managed to break their political isolation in the majority of the occupied countries¹⁰³. It happened so in Austria, France, Denmark, The Czech Republic, Holland, Italy, Bulgaria, Romania and Hungary¹⁰⁴ and to some degree, in Belgium. There was no similar "National Fronts" in Norway, Greece, Yugoslavia, and in Poland.

It is extremely characteristic that the similarity of the situation concerns those countries, in which the formal situation of the emigration authorities was relatively similar. In countries where there were strong ele-

¹⁰³ The reason for this isolation and, in most cases, virtual delegalization, was consistently negating of so-called bourgeois statehood attitude of all communist parties.

¹⁰⁴ Italy, Bulgaria, Romania and Hungary were not, of course, occupied countries in the same understanding as the rest of the analyzed here countries were. Nonetheless in those countries too the resistance movement against the fascist or authoritarian regimes was developing and a considerable element of those movements were communist parties.

ments of constitutional continuity of the authorities functioning in exile, the "Uniform Fronts" were not formed. It happened so not because the constitutional authorities, let us call them, lacked willingness to build such "Front" with communists. It was not a matter of coincidence that in those countries the communist movement (perhaps excluding Norway) contested the pre-war constitutional order.

It is hard to resist the impression that such attitude was planned precisely and its aim was the explicit questioning of the constitutional continuity of the authorities, and by doing that, other home agencies. This way, being faithful to their ideological principles, ways were sought to create underground the basis of the new "revolutionary state order".

This is why in other countries, where there was no constitutional continuity, the communist parties were so flexible and so easily concluded agreements. Based on those agreements, according to the revolutionary doctrine, severing with the discredited as it was claimed, pre-war reality, this new order was to be built.

Conclusion

I tried to outline the main, in my opinion, similar elements and differences between PUS and ERM. Along with these, by their nature, quite general considerations, we can definitely say that PUS was a unique phenomenon compared to ERM. The most significant similarities were found in the situation of the Yugoslav resistance. Paradoxically, the history of the emigre authorities of both countries and their national representations was very similar. However, you can still see the differences:

- the government's exile position was not entirely appropriate
- the strength of the communist party was totally incomparable (in Yugoslavia gradually taking over, in Poland, until the Soviet liberation, weak and marginal)
- the course of the occupation was also fundamentally different, characterized by a strong guerrilla war in Yugoslavia, while in Poland it was generally focused on sabotage and subversive activities.

We can once again emphasize the exceptionality of PUS both as a political and legal phenomenon in the years 1939–1945. It would not be

an exaggeration to say that PUS has been a phenomenon of unprecedented scale up to now. Saying this justifies my attempts to present it in a broader light.

V.

**Council of Nationalities
in the Polish Underground
State 1943–1944**

Introduction

The Polish Underground State was an exceptional experience in European resistance against German and Russian occupations during World War II (also before and after the war).¹⁰⁵ Although its structure was shaped in a conspiracy but it was rooted in Polish constitutional law rules. Between September 1939 and June 1945, PUS's authority was recognized by a majority of Polish population in both German and Soviet occupation zones¹⁰⁶.

One of the most important problems for PUS authorities (the same for Polish Government on Exile in England) was an issue of the loyalty of national minorities living in the territory of the Republic of Poland. Poland, regaining its independence in 1918, was a country with a big non-Polish population. About 35% of the country's population were national minorities: Ukrainians (10%), Jews (10%), German (5%), Belarussians (5%), Lithuanians (2%), Russians (2%) and others (1%). Germans, Ukrainians and Lithuanians generally refused to accept Polish state. Therefore, more or less openly these minorities tended to join the areas they inhabited with Germany and Lithuania or to create their own state – Ukraine. Although Jews came to accept the rebirth of a Polish statehood, they preferred not to assimilate with Polish society¹⁰⁷.

Also there was no consensus among the strongest Polish political camps on how to carry on a common policy with respect to this question. As a result, there was no clear line and Polish authorities made lots of mistakes dealing with the minorities in a pre-war period.

¹⁰⁵ More about it in my article: G. Górski *The Polish Underground State and The European Resistance Movement in the years from 1939 to 1945*, Review of Comparative Law, Lublin 2002, Vol. 7, 11–26 and S. Salmonowicz, *The Polish Underground State and its Civil Structures* [in:] S. Salmonowicz, M. Ney-Krwawicz, G. Górski, *op. cit.*

¹⁰⁶ This aspect of PUS activity was analyzed by T. Strzembosz, *Rzeczpospolita Podziemna (The Underground Commonwealth)*, Warszawa 2001.

¹⁰⁷ Great number of Jewish population, located mostly in the cities in central and eastern Poland (Most of the cities had approximately 50 % and more of Jewish inhabitants. Living in close environments with relative freedom, most of Jews preferred traditional model of their existence.

The beginnings of German and Soviet occupation for the attitude of national minorities towards the Commonwealth

With the beginning of World War II (September 1st, 1939) Germans and Russians took over and occupied Polish state, situation got dramatic. Polish territories possessed illegally by Germany witnessed a strong anti-Polish policy coming into force. That policy was supported by former Polish citizens of a German origin¹⁰⁸.

The same scale of repressions to the Polish population was made on Polish territories gained by Soviet Russia¹⁰⁹. To illustrate a scale of repressions against Polish citizens, it is important to remind that about 6.000.000 of them were killed during the war (pre-war population was 35.000.000 inhabitants). Of these, about half were Poles of Jewish descent.

One of the greatest problems for German and Russian policy in occupied Poland was their relation to the Ukrainian population in so-called Western Galicia (Małopolska Wschodnia) and in Wołyń. Russians between 17th of September 1939 and 22nd of June 1941 persecuted national movement but accepted anti-Polish attitude of Soviet Ukrainian authorities. When German – Russian war started, German authorities manipulated Ukrainian hopes for independent state. In result strong anti – Polish, anti – Russian and anti – German movement dominated in Ukraine in 1943–1944. One of the clearest results of this domination was starting with mass persecutions of Polish population on four pre-war Polish voivodships in Eastern Galicia and Wołyń. In consequence Polish underground army – Union for Armed Struggle/Home Army – reacted, defending Polish population and persecuting Ukrainians who supported radical

¹⁰⁸ During the war in gained provinces Germans killed almost 200.000 Polish citizens, more than 1.000.000 were compulsory transfer to central Poland (so-called General Government – GG). About 3.000.000 Poles were forced to declare German nationality, about 1.000.000 were forced to work as slaves in German industry and agriculture. Germans killed in Holocaust almost 95% of Polish citizens of Jewish origin.

¹⁰⁹ Russians compulsory transfer more than 1.000.000 Polish citizens and killed about 100.000 During only less than two years occupation.

Ukrainian organizations. Conflict forced PUS authorities and non-radical Ukrainian circles to dialogue.

PUS structures responsible for policy towards national minorities

Before these negotiations, in PUS was not a clear centre for determining policy directed to minorities. In the Office of Government Delegate¹¹⁰ was Press and Propaganda Department¹¹¹, where Eastern Section interested in minorities questions as one of a lot others. In Home Army Supreme Headquarter, Information and Propaganda Office had similar Section.

In the beginning of 1942¹¹² in Internal Affairs Department in Delegate's Office new centre was established – Eastern Office (*Biuro Wschodnie*). While two first structures generally collected information from eastern provinces and organized propaganda actions for Polish population there, last structure started with other kind of activity. Delegate vested organization of this Office to politicians from National Party (*Stronnictwo Narodowe*). Office was responsible for preparation of Polish administration for eastern voivodships – first they were located in Warsaw¹¹³, then in these provinces. Office aspired also to determining Delegate's policy to minorities. In 1942–1943 Office played important role in rebuilding of Polish administration for eastern territories. In the middle of 1943 almost all voivodships had its Regional Delegates (*Okręgowy Delegat Rządu*) with their

¹¹⁰ This Office was composed by Departments, mostly as a continuation of pre-war institutions of Ministries.

¹¹¹ This Department was one of those that had not an adequate ministry before war.

¹¹² Saved files informing us that this Office was established in the beginning of 1942. But a lot of Financial documents suggests that some activity started in the end of 1941 – see *Archiwum Akt Nowych* (New Records Archive) – AAN 202/XVI, Vol. I, ch. 7–11.

¹¹³ As long as in eastern voivodships situation were too hard for conspiracy (because of occupant Persecutions, lack of prepared activists, communication problems) each region had its administrative center in Warsaw.

offices and a lot of Polish administration worked in conspiracy in the lower level¹¹⁴.

Since the end of 1942 Eastern Office was engaged in conflict with Government Delegate Advisor for National Minorities Stanislaw Piotrowski¹¹⁵. His role quickly grew when in February 1943 Jan St. Jankowski became in fact Government Delegate¹¹⁶. Jankowski and Piotrowski represented different views on main directions in minorities' policy than nationalistic leaders of Eastern Office. For that conflict grew.

Establishment of the Council of Nationalities

Piotrowski – in the name of Delegate and indirectly of Polish Government – started negotiations with moderate Ukrainian leaders. For that in the middle of 1943 Delegate Jankowski decided to concentrate all responsibility in minorities question under his direct authority. In result new structure was established in October 4, 1943 – Council of Nationalities.

In document titled *Nationalities question. Rules for work's organization*¹¹⁷, composition of new Council was determined. As a chairman of the Council worked Government Delegate (in fact his Deputy replaced him). In Council were four representatives of four main political parties of PUS¹¹⁸, representative of Home Army and finally director of new established Nationalities Office. Under Delegate authority Council was responsible for concentrating *all works with national minorities questions*. Coun-

¹¹⁴ There were delegates on the level of Powiat (County), Miasto (Town) and Gmina (Commune).

¹¹⁵ AAN 2027/XVI, Vol. I–II, ch. 269–271.

¹¹⁶ J. St. Jankowski was a Deputy Government Delegate to Prof. Jan Piekalkiewicz. Germans in the middle of February 1943 arrested Piekalkiewicz and since this moment Jankowski actually became an acting Delegate. His nomination from Government in London was sent to country in April 1943.

¹¹⁷ AAN 202/I, Vol. XXXVI, ch. 52–53.

¹¹⁸ These parties were: Polish Socialist Party, Nationalistic Party, Peasant Party and Labor Party – All composed Political representation of the Country, since January 1944 enlarged on other political groups and called as Council of national unity.

cil was also responsible for *looking ways for solutions of question of Polish Nation relations to other nations settled on Commonwealth lands.*

Council quickly became real centre of creation of this policy. For the most firing, Ukrainian question, council accepted direction specified in fall 1939 by Ministers Committee for Country's Questions (in this time residing in France, then in Britain). In this document dispositions for negotiations with Ukrainian representation were accepted. Among them were:

1. *Independent Ukrainian state would be established. In the question of eastern borders of this state Polish side will accept each, the farthest reaching expectations proposed by Ukrainian side,*
2. *Independent Ukrainian state will be federated with Commonwealth as equal part. Border between Poland and Ukraine will depend to the level of strictness of federation,*
3. *Ukrainian minority in Poland and Polish minority in Ukraine will use all national and cultural rights basing on the principle of mutuality¹¹⁹.*

This document was not welcomed by all Polish circles on Exile and in the country with enthusiasm. Also Ukrainian circles in exile didn't welcome it friendly because they generally expected for unconditional acceptance of their independent state.

When in the begin of 1943 Polish-Ukrainian conflict fired with dramatic growth, all PUS authorities called Government in London for clear instructions. After Government deliberations Ministers Political Committee and Ministers Committee for Country jointly accepted in March 1943 new instruction. In stipulations in this new document Polish Government obliged himself to:

1. *Guarantee to Ukrainian population in Poland real and legal protection and equality in political, cultural, language, economic and social life, specially through the same like in other provinces of Poland widely developed self-government including self-government of voivodship level with legislative authority in local problems (...),*
2. *[guarantee] to Ukrainians cultural protection by state trough necessary donations, specially establishing Ukrainian university in Lviv,*
3. *[guarantee] to all religious freedom for greeco – catholic church and for orthodox church,*

¹¹⁹ General Sikorski Museum and Institute in London (IS), PRM 5/2.

4. *To carry out agriculture reconstructing basing on social and national justice principle, including needs of local polish and Ukrainian peasants*¹²⁰.

Polish Government gave also instructions for PUS authorities for looking common Polish – Ukrainian position against Soviet Russia and mutual position against enemy's acts in Galicia and Wołyń.

Activity of the Council of Nationalities 1943–1944

These decisions didn't resulted in changing situation in Polish–Ukrainian relations in Galicia and Wołyń. In the opinion of the most Polish centers in the country, Polish Government declared too much to Ukrainians. We have to remember that before September 1939 Polish authorities never declared to Ukrainians and other minorities even part of this what we can find in March 1943 declaration. But on the other side, for Ukrainians who openly tended to establish their independent state, Polish Government's offer was not interesting.

Nevertheless Council of Nationalities between October 1943 and July 1944 tried to shape PUS authorities policy to national minorities. In this time council was undoubtedly decisions and instructions centre for all PUS activities in this field.

First, Council's meeting was hold on October 12, 1943. As a chairman acted Adam Bien, first Deputy of Government Delegate and he stayed at this position till July 1944. At this meeting Council agreed that *because of Soviet threat for Eastern lands of Poland Polish raison d'état expecting for disclosure there determined Polish force*.¹²¹

On November 15th Polish–Ukrainian and Polish–Lithuanian relations become a subject for a review. Members of the Council concluded that these relations were function of Polish – Soviet relations. Council recognized that the most important aim of national minorities policy was to keep the Eastern territories with Poland and to unify Lithuania with Poland. The Council suggested to strengthen a dialogue with both Ukrainian

¹²⁰ AAN 202/II – 50, Vol. I, ch. 1.

¹²¹ AAN 202/XVI, Vol. I, ch. 1.

and Lithuanian representations.¹²² In result breakthrough of 1943 and 1944 was a period of the most intensive dialogue with representatives of both nations.

Next save protocol from Council's meetings on December 13th 1943 informing us about project of proclamation directed to Ukrainians. It was reaction on the July 1943 proclamation of Political Representation of Country (*Krajowa Reprezentacja Polityczna*). In July's document Polish political leaders strongly reacted on Ukrainian crimes. For that Ukrainian representation stiffed her position in dialogue with Delegate's representatives. Council expected that this new proclamation could change Ukrainian position. Council declared:

Poland protecting for Ukrainian population whole, independent national, Cultural and economic development, specially:

- 1. Self-government on all administrative levels,*
- 2. National education on all levels including university,*
- 3. Equal rights for Ukrainian language in public administration and judiciary,*
- 4. Liquidation of all limitations for service of Ukrainians in public administration and judiciary,*
- 5. Equal and fair participation in agriculture reconstruction,*
- 6. Economic development in the same conditions with Polish population¹²³.*

Polish expectations were however groundless. On December 22, 1943 Organization of Ukrainian Nationals – R (OUN – R) declared, that Polish position definitely closing possibility of any agreement¹²⁴.

Lack of progress in negotiations with Ukrainians and intensification of Polish – Ukrainian struggles in Galicia and Wołyń in result strengthen radical groups and leaders on both sides. On January 27, 1944 Council's decisions we can find reflection of this on Polish side. Council declared on this day that Poland support Ukrainian aims to establishing independent state. Council noticed that Ukrainian state would support Poland's position and the same strong Poland would support Ukraine. But in the Council opinion *there would not be a strong Poland without south-eastern voivodships.*

¹²² AAN 202/XVI, Vol. I, ch. 2.

¹²³ AAN 202/XVI, Vol. III, ch. 3.

¹²⁴ AAN 203/XV–43, ch. 56–56a.

Council also underlined, directing these words undoubtedly to the Ukrainian leaders, that their state should be build *first of all on territories with nationally uniform population* and if they want to establish state, they should develop in their own society no elements of crimes and anarchy but values serving for creation state. Council uphold offer précised on December 13th.¹²⁵

On February 10 and February 24, 1944 two Council's meetings concentrated on Ukrainian case. Polish negotiators related their conversations with Central Ukrainian Council (*Główna Rada Ukraińska*). Both declared in result that all aggressive actions among polish and Ukrainian population would be stopped. But there was no implementation of these decisions¹²⁶.

In consequence on May 11, 1944 director of Internal Affairs Department L. Rutkowski said, that it is necessary to strengthen Polish self-defence in southeastern provinces¹²⁷. On May 24 even moderate A. Bien pointed that it is necessary to precise aims of Polish eastern policy. Progress of Soviet Army in Eastern Poland in June and July 1944 made discussion about Polish–Ukrainian question out-of-date¹²⁸.

But Polish–Ukrainian problems were not concentrated all Council's activity. On June 9 Polish–Lithuanian question was discussed and general declaration was accepted¹²⁹.

Polish–Belarussian relations were discussed on June 29, 1943. Council accepted that for Belarussian population the same declaration like for Ukrainians on December 13, 1943 and January 27, 1944 would be offered. Council also discussed proposition of establishing an autonomic Vilnius Province for Polish, Lithuanian and Belarussian population¹³⁰.

The last Council's meeting took place on July 20, 1944. But Council's members concentrated themselves on Nationalities Office activity, especially in the perspective of possible soviet occupation¹³¹.

¹²⁵ AAN 202/XVI, Vol. I, ch. 3.

¹²⁶ Ibidem.

¹²⁷ AAN 202/XVI, Vol. III, ch. 13.

¹²⁸ AAN 202/XVI, Vol. III, ch. 9–10.

¹²⁹ AAN 202/XVI, Vol. III, ch. 4.

¹³⁰ AAN 202/XVI, Vol. III, ch. 25.

¹³¹ AAN 202/XVI, Vol. III, ch. 17.

Conclusion

It is hard to summarize Council's achievements. In the most dramatic question – Polish–Ukrainian relations – Council prepared far reaching for Polish side suggestions. Ukrainians generally refused them and there were no important progress in this dialogue. Council's activity did not stop a spiral of crimes in Galicia and Volyn, because her Ukrainian partners did not represent most influential extremist Ukrainian groups, responsible for these crimes.

It would be unjustly to say that all that activity has not left any positive result. In this very dramatic period Polish, Ukrainian and Belarussians moderate leaders continued dialogue, tried to break mutual distrust and made some positive foundations for the future cooperation. In 1944 they couldn't do anything more.

VI.

**Constitutional
foundations
of the communist
Poland 1944–1945**

Introduction

In 1959 one of the most eminent Polish constitutional experts in exile, professor J. A. Gawenda, while describing the constitutional basis for the functioning of the Polish authorities in London, based on the Constitution of Poland from 1935, formed the terms of legal continuity and the continuity of law. These terms are of great significance for the further discussion.

Professor Gawenda demonstrated that the legal continuity means the restoration of the rightful system of law of a state. It is the state in which the legal continuity is established due to the act of restoration of the statehood. Thus, it is more significant than the continuity of law, which is merely the continuation of certain rules and institutions originating from this system of law¹³².

Year 1989 and following years, up to the enactment of the Constitution in 1997, brought for Poland a number of essential changes, including the system ones. However, it was neither then nor until today that clear and distinct determination of what kind of state the so called *3rd Republic of Poland* established after 1989 is, or what its legal characteristic is when it comes to the relation with the *2nd Republic of Poland*, especially in the context of the doubtless legal and system continuation of communist *Polish People's Republic (Polska Rzeczpospolita Ludowa – PRL)* by the *3rd Republic*.

Indeed, by the derogation of the communistic Constitution of 1952 and no reference to the Constitution of 1935, the Constitution of 1997 had confirmed the system and legal bonds between the *3rd Republic* and *PRL*. This bears significant legal consequences for modern times. Taking the above under consideration, the discussion over the creation of the political foundations of *PRL* in 1944 and later on, results in accepting their consequences for the *3rd Republic*.

While analyzing the events that took place between 1943 and 1947 one should be aware of their direct effects on the political reality of the *3rd Re-*

¹³² J. A. Gawenda, *Legalizm Polski w świetle prawa publicznego*, Londyn 1959.

public. The problem of creation constitutional foundations of PRL has been generally discussed in my text, published in 2004 in "Palestra"¹³³. Yet the issue is worth mentioning, since it presents new stands and elements.

While analyzing the issues in question, two essential political institutions of the newly created by communists Polish state deserve, in my view, closer attention. They are so called *Krajowa Rada Narodowa* (State National Council – KRN) and *Polski Komitet Wyzwolenia Narodowego* (Polish Committee of National Liberation – PKWN). Those institutions established a particular legal and political state in 1944, which actually has been respected up to now. What were the most important elements of this new "political order".

The most essential question, which should be mentioned at the beginning, is the fact that this "new order" was being established in a complete chaos, the lack of any coherent political vision, by sheer coincidence. During the times of PRL historians and constitutional experts explained this chaos and disorder proving that those are the characteristic features of a revolutionary breakthrough. In one of the most important studies describing the constitutional system of PRL and its origins, the meaning of the revolutionary breakthrough was emphasized in the context of the relation of the new authorities towards the Constitution of 1921 by saying that "*the people's power came into existence as a result of revolutionary changes and as such was in no way associated with legal rules of the overthrown system*"¹³⁴.

The above statement, a dogma for the constitutional experts of PRL on the revolutionary breakthrough¹³⁵, conveyed the comprehension of the period in question, by 1989. Therefore, in 1944 and 1945 (and probably later on, although the chronological braces of the revolutionary period have never been stated) **the revolution took place in Poland, as a result of which the old system had been invalidated, and the new state of the people, had come into existence.**

¹³³ G. Górski, *Podstawy ustrojowe PRL (1944–1947)*, "Palestra", Warszawa 2004, No. 9–10, p. 126–134. This article was also published in: G. Górski, *Wokół genezy PRL. Rozważania historyczno-prawne*, Lublin 2004.

¹³⁴ Z. Jarosz, S. Zawadzki, *Prawo konstytucyjne*, Warszawa 1980, p. 34.

¹³⁵ F. Siemieński, *Prawo konstytucyjne*, Warszawa–Poznań 1980. This prominent communist scientist wrote at page 43: "*PKWN manifesto and other documents passed by KRN and PKWN declared revolutionary origins of the new authorities. That authority didn't based on the [constitutional] law but on the will of people and in that will found its justification.(...). For that reason we can say that in the years 1944–1947 we have process of the revolution done by new group of the people without respect for the obliged constitutional law*".

The revolutionary period was to account for not only the problems resulting from the lack of constitution, which could be the basis for the activities of the new authorities, but also a kind of compromise with the old order, shown by the referring to the Constitution of 1921 by the new authorities. This reference arose from the international conditions of that period. It was implied that the Warsaw authorities were made to refer to the Constitution of 1921 regarding the external opinions.

However, as the above quoted authors pointed out, "the whole legislative practice at that time and the practice of the state organs in general indicates that the people's power had been shaping the political institutions, as well as social and economic ones, in a new way since the beginning, basing mainly on new legal acts, in no way corresponding to the liberal regulations included in the Constitution of 1921¹³⁶.

It seems though, that this chaos and disarray of the first months and years of PRL originated from somewhere else. In my previously expressed opinion¹³⁷ I formulated a view that coming to Poland in the summer of 1944 the communists were convinced that "taking over" of the country would be made according to the model that had been used in the Eastern territories of Poland gained by J. Stalin in September and October 1939. They had no knowledge on the Stalin's intentions concerning the future status of Poland, of whether it was supposed to be an "independent" state according to the Mongolian pattern, or just the 17th republic of the USSR. They were convinced, however, both the circles of *Centralne Biuro Komunistów Polskich* (*Central Office of Polish Communists – CBKP*) and *Związek Patriotów Polskich* (*Union of Polish Patriots – ZPP*) both in Moscow, and the centre in Poland namely *Polska Partia Robotnicza* (*Polish Workers Party – PPR*¹³⁸) and *KRN*, that in any case on Polish territories Soviet legal order would be transferred by them, as the executors of Stalin's orders.

There were no reasons for that preparations, or creation of Polish institutions still in Moscow, since everything was to be "installed" according to the Soviet pattern. Yet, when the international situation forced shamming of the Polish state under their rule, it resulted in making use of the Consti-

¹³⁶ Ibidem, p. 33.

¹³⁷ G. Górski, *Wokół genezy PRL...*, p. 90, footnote 5.

¹³⁸ Party of Polish communists established by Komintern (International Communist Parties organization) in 1942 in occupied Poland. It replaced former Polish Communist Party destroyed by Stalin in 1938.

tution of 1921 or the adapting of the pre-war legal system in numerous fields of social and economic life, and especially chaotic establishing of new institutions and experiments on new legal order.

After the introductory remarks let us proceed to the analysis of the legal aspects of establishing, functioning, and creation of political regulations by the above mentioned *KRN* and *PKWN*.

Homeland National Council (Krajowa Rada Narodowa – KRN)

Firstly, I would like to express a couple of remarks referring to the circumstances of the establishment of *KRN*, which was a key institution of the revolutionary legitimism.

Nobody doubts it that the initiative to establish *KRN* came from Władysław Gomułka, at that time a member of the Central Committee of *PPR*¹³⁹. Another thing that seems to be doubtless, is the fact that the last member of the first managing "threesome", the real leader of *PPR* Paweł Finder, was rather sceptic towards the idea of *KRN*. It is also of significance that during the serious discussion over *KRN* P. Finder and his main associate, M. Fornalska (both were activists came to occupied Poland from Russia with strong Stalin's blessing) were arrested by the Germans who occupied Poland. The circumstances of this event, especially in the context of entirely incredible in this question memories of W. Gomułka, have stayed unclear up to now.

In his mentioned post-war memories W. Gomułka presented the conviction, that at the assembly of the Central Committee on 7th of November 1943, P. Finder based his agreement to set up *KRN* on some kind of approval for this initiative from Moscow center¹⁴⁰.

As a result of the arresting of Finder and Fornalska the leadership of *PPR* was taken over by Gomułka's group, forcing the establishment of *KRN*. However, this group didn't deserve Stalin's trust, or the support of *CBKP*.

¹³⁹ W. Gomułka, *Pamiętniki*, Warszawa 1994, Vol. II, p. 336.

¹⁴⁰ W. Gomułka, op. cit., p. 363–364. The similar opinion expressed in the fundamental study about history of the communist party (published after 1989) P. Gontarczyk, *Polska Partia Robotnicza. Droga do władzy 1941–1944*, Warszawa 2003, pp. 306–308.

The fact that Moscow broke off all the bonds with this centre and didn't approve of *KRN*, was the expression of aversion. The level of the aversion was so high that the combat group of L. Kasman was sent to Poland with the orders to isolate and/or (?) eliminate the leaders of *PPR* and *KRN*¹⁴¹.

Nevertheless, it was symptomatic that even the creator of *KRN* concept, the body which was supposed to be "political representation of the Polish nation", was not able to imagine even the initial stages of its formation without the approval of the external factor – Soviet authorities. This element itself, presenting the dependence of the *KRN* creators on the external – Soviet factors, put into question the right of this institution to become "the leadership, representing the will, aspirations and interests of the broadest masses of the Polish society"¹⁴².

When it comes to the actual character of the institution, which was established at night of 31st December 1943 to 1st January 1944, even Gomułka himself had no doubts. He wrote, that apart from *PPR*, *Gwardia Ludowa* (*People's Guard – GL*), and *Związek Walki Młodych* (*Union of Youth Struggle – ZWM*), "the other organizations (...) were entirely fictional, since they were represented by the members of *PPR*, who in the pre-war period participated in their activities or were their members"¹⁴³.

These remarks correspond to the regulations included in the documents that were signed that night. It was neither in the quoted "Deklaracja Programowa *KRN*" (The Declarations of Program) nor in "Statut Rad Narodowych" (The Statute of National Councils) that the sovereign establishing *KRN* was defined.

In article 1 of the Statute¹⁴⁴ it was written that:

"the will of masses expressed by the self-sacrificing struggle of Polish people against the occupant is the moral and legal basis on which national councils are created".

¹⁴¹ Such aim of Kasman's and his group mission clearly presenting former communist leader W. Gomułka in his memoirs. It is hard to interpreting his opinion in the different way. W. Gomułka, op. cit., p. 403.

¹⁴² See it in the declaration of the *KRN* passed at its first meeting January 1st, 1944 r., [in:] *Protokół pierwszego plenarnego posiedzenia KRN*, p. 37.

¹⁴³ W. Gomułka, op. cit., p. 342. Gomułka also mentioned in the other circumstances, that that during this first meeting (without his presence) big part of participants didn't know what was the aim of the organizers. One of them tried, when he found this aim, wanted to leave the meeting, but the rest stopped him "by force" because of "conspiracy principles".

¹⁴⁴ *Protokół pierwszego plenarnego posiedzenia KRN*, bmdw, p. 30.

It is obvious, that even taking the existing conditions and the revolutionary language into consideration, the terms included in the quoted article in no way could be perceived as the statement of will of the Polish nation, however anybody would wish to comprehend this term. Anyway, the use of the formula "broad masses" and indication that "Polish people" only by self-sacrificing struggle "express" the will of these, undefined in this context masses, proves that "Polish people" or "the working people of cities and the country" were not the sovereign of the country. The latter term is the classic one for the soviet concept of constitutional sovereign. Thus, KRN was set up as the expression of the will of "broad masses" as the "management" unifying "the whole nation for the struggle against the occupant and hastening the victory".

The above mentioned "Statute", whose authenticity in the version known after 1945 and the content are doubtful, in article 9 defined "particular entitlements" of this body. According to this regulation KRN was to represent "the Polish nation externally until the Temporary Government is formed" (point 1) and was to appoint the Temporary Government "the moment it chooses as the necessary for the interests of Poland" (point 3). After the appointment of the government, KRN was to provide it with authorization "to perform the power".

At the same time the article 3 of the Statute defined the rules of establishing councils, including KRN, set the rules of delegating representatives as well as the rules of co-optation "of especially worthy individuals representing democratic and progressive views".

One could presume, that this document produced in difficult conditions of conspiracy, a kind of the expression of "revolutionary will of the people", should be the foundation of all the other actions of the new state authorities, developing in a revolutionary way. It is difficult to comprehend why this document, the controversial "Statute", was not referred to in any of the decisions made or documents produced either in July and August 1944, or later. The fact that the political circumstances were favorable and the awareness of the importance of legal foundations of the newly created institutions, in revolutionary conditions, however little, was present, makes the situation even harder to understand.

The situation looks strange, since according to Gomułka the materials from the first meeting of KRN were sent through mentioned L. Kasman to

Moscow still in January 1944¹⁴⁵. They were to get to Moscow also through two delegations of KRN. Was it possible that while in Moscow in July 1944 the most important decisions were made and settling the issue of institutions, which had the crucial meaning took place, the ones having at disposal such a document¹⁴⁶, solid when it comes to revolutionary legitimacy, passed it over entirely?

The dubious issues presented above make one ponder on the fact whether the document was familiar to Moscow, or even if it existed in 1944 in the form known later on.

The opinion seems to be confirmed by the way the process of the construction of the new state was given an account of by the constitutional experts of PRL.

The above mentioned professors Jarosz and Zawadzki had referred to this fundamental meeting of KRN in merely two sentences ("*The Temporary Statute only indicated that in due course it would appoint the Temporary Government. It also anticipated the appointing of the National Assembly in independent Poland in five-adjecive elections*"¹⁴⁷). However, according to them the so called *manifesto* of PKWN from 22nd of July 1944 was, "the first, most general and fundamental act" of the creation period of "legal basis of the new system" ¹⁴⁸. Such a point of view is also presented by two others prominent communist constitutional experts W. Skrzydło¹⁴⁹ and A. Gwiżdż in their fundamental studies on constitutional law of PRL¹⁵⁰.

In another crucial study on the history of KRN edited in 1976 by professor A. Burda, he as one of the main constitutional experts of PRL, the meaning of the Temporary Statute was presented as of marginal significance. Although, it is discussed on three pages, it is entirely passed over in the description of actions associated with the establishing of PKWN (page

¹⁴⁵ W. Gomułka, op. cit., p. 379.

¹⁴⁶ A. Burda, *Odbudowa państwowości polskiej. Zasady prawne nowego ustroju*, [in:] *Krajowa Rada Narodowa*, A. Burda (ed.), Wrocław–Warszawa–Kraków–Gdańsk 1976, pp. 32–33.

¹⁴⁷ Z. Jarosz, S. Zawadzki, op. cit., p. 31.

¹⁴⁸ Ibidem, p. 32.

¹⁴⁹ W. Skrzydło, *Charakter i znaczenie polityczno-prawne Manifestu Lipcowego PKWN*, "Czasopismo Prawno-Historyczne", Poznań 1959, Vol. XII.

¹⁵⁰ A. Gwiżdż, *Manifest Lipcowy i analogiczne akty proklamacyjne władzy ludowej*, "Państwo i Prawo", Warszawa 1969, No. 7.

49 and the following). In fact, the document was inexistent from the point of view of constitution experts in *PRL*.

It seems that for them this open disregard towards the existence of KRN document was the only way out of problems, created by Stalin and his Polish subordinates with their chaotic actions carried out in Moscow between 19th and 22nd July 1944.

In his already quoted work, A. Burda wrote: "On 22nd July 1944 the members of KRN delegation in Moscow, along with the representatives of ZG ZPP created the branch office of KRN for the Liberated Territories. In the evening the decision was made to transform the Branch into PKWN. On 21st July 1944 PKWN undertook its activity. A day later the historic text of PKWN Manifesto was announced, which had become **the political foundation of the new state**"¹⁵¹. Making his statements more specific, Burda wrote:

"On 21st July 1944 KRN passes an act establishing PKWN"¹⁵². However in the footnotes he clarifies, "Actually, the act establishing PKWN wasn't passed by KRN, but by its Delegatura (Branch) in Moscow, and prepared along with the members of the Executive Committee of ZPP. The document was then approved by KRN and issued in nr 1 Dziennik Ustaw RP published in Lublin"¹⁵³.

It is only the quoting of these contradictory statements that presents the image of a complete legal chaos, which even after 30 or 40 years of studies, hasn't been cleared up or interpreted in any rational or coherent way. It is due to the fact that by the means of various stylistic and pseudo-legal figures the attempts were made to create quasi legalistic foundation for the activities which resulted in making the basis of the PRL system. At the same time the attempts were being made to pass over, or present inconvenient facts in a variety of ways. Let's have a look at them, then, and judge them by the means of allegedly existing then legal regulations.

The Branch of *KRN* established on 20th July 1944 in Moscow, had no formal basis in the above mentioned "Statut Tymczasowy Rad Narodowych" ("*The Temporary Statute of National Councils*"). "The Statute" in its known version didn't anticipate the establishing of any "representation"

¹⁵¹ A. Burda, p. 49.

¹⁵² Ibidem, pp. 64–65.

¹⁵³ Ibidem, p. 65, footnote 4.

or branch of *KRN* in order to make decisions concerning the appointment of the temporary government (not to mention *PKWN*), although there was a position to describe the shape of a seal which was to be used by this body.

One should remember, that only four of the delegates of *KRN* sent to Moscow were its members (Żymierski, Spychalski, Litwin and Osóbka-Morawski). The other four didn't formally belong to this body.

On the other hand, out of the eleven members of the Branch, which was established on 20th July, only three were the members of *KRN*. The "election" of *KRN* made in Moscow, obviously behind the back of *KRN* in Poland, was by the way performed by Prezydium (Executive Committee) of *ZPP*, at the assembly in which *KRN* members participated¹⁵⁴.

In no moment during the assembly creating the Branch, did the participants refer to the text of "The Statute".

Yet, the most important in this context is the fact that on 21st July 1944 there was no assembly of *KRN* in any of the cities – Warsaw, Lublin, or Chełm, not to mention in Moscow. Hence, no "KRN act" could have been passed that day, as A. Burda claims¹⁵⁵.

It is obvious that the document published in the first issue of *Dziennik Ustaw RP* [The Journal of Laws of the Republic of Poland] from 15th August 1944, which was passed in Lublin under the title "Ustawa z dnia 21 lipca 1944 o utworzeniu Polskiego Komitetu Wyzwolenia Narodowego" (The Act on the establishing of *PKWN*), signed by Bolesław Bierut, was a mystification.

¹⁵⁴ More about the process of formation *KRN* i *PKWN* see: T. Żeńczykowski, *Dwa komitety 1920–1944. Polska w planach Lenina i Stalina*, Paryż 1983, p. 106 and next.

¹⁵⁵ In the quasi official publication *Krajowa Rada Narodowa: informator* published in Warsaw in 1983 edited by the prominent communist scientist A. Gwiżdż, all information concerning *KRN* sessions were published. Among them we can only find the general information, that the second session of *KRN* took place in still occupied by Germans Warsaw on January 2–23, 1944, and the third one "in Lublin after the Germans collapse on August 15th 1944" (p. 5).

Polish Committee of National Liberation (Polski Komitet Wyzwolenia Narodowego – PKWN)

The situation was similar when it comes to the establishing of *PKWN*. As it was pointed out above, legally its establishment resulted from "the *KRN* act" from 21st July 1944. As we already know *KRN* didn't pass any act that day.

As I have mentioned, on 20th July 1944 in Moscow, so called Branch of *KRN* appointed on the basis of Stalin's inspiration in the morning, was in the evening transformed into *PKWN* as the result of Stalin's orders¹⁵⁶. This was confirmed by the leading historians of *PPR*, when they wrote that on 20th July "in the evening, following the counsel of the Soviet government, the name Branch of *KRN* was replaced to *PKWN*, without any changes concerning the members"¹⁵⁷.

Like in the case of *KRN* it was the will of Soviet authorities, and actually Stalin himself, that was a decisive factor in establishing this body. Also the alleged representation of broad masses, in other words *Polish working people*, the core of *KRN*, had found out about the establishment of *PKWN* from the Soviet radio.

The communist activists in Poland had learnt that, "five members of *PKWN* remain under the German occupation, where they are leading the struggle for freedom and provide the communication with *KRN*. The names of those five must not be revealed".

What is interesting, even B. Bierut didn't know them, although in the next verse he was mentioned among the signing ones of the act, in which these false statements were placed.

Nevertheless, if *KRN* was really to make decisions and assuming they were to be in accordance with "The Statute", allegedly approved of at the first *KRN* meeting, then on the basis of regulation of paragraph 9 point 3, the Temporary Government should have been appointed. Moreover, the

¹⁵⁶ A. Burda, op. cit., p. 49.

¹⁵⁷ N. Kołomejczyk, M. Malinowski, *Polska Partia Robotnicza 1942–1948*, Warszawa 1986, p. 213.

second sentence of this regulation stated that *KRN* was entitled to provide "*this government with the authorization to perform the power*".

However, at its third session in Lublin on 15th of August 1944, *KRN* passed *the act on the temporary procedure to pass decrees having the force of law*¹⁵⁸, yet there was no invoking to the text of "the Statute".

It is also worth emphasizing, that there was no reference to this kind of "constitution" of national councils, as the Statute issued on 1st January 1944 may be called, in either *the decree of PKWN from 21st August 1944 on the procedure of appointing general administration of the first and second instance*¹⁵⁹, or in *the act from 11th September 1944 on the organization and the scope of actions of national councils*¹⁶⁰.

Conclusion

The above presented analysis puts forward the facts of great significance for the way the 3rd Republic is perceived today, also as the legal and political continuation of *PRL*, seen as the democratic system of law:

1. Both *KRN* and *PKWN* as the institutional foundations of the political system of *PRL*, were established with the direct agreement and with complete approval of the Soviet authorities. Without the approval, communists in Poland as well as in the USSR wouldn't have dared to set up the bodies as the representation of will of even the smallest group of Polish society.
2. The legal act, which had never been passed by the body indicated in it, and additionally containing blatant lie (the signature of Bierut and the five members on the occupied territories), is the formal basis for the formation of political institutions of *PRL*.
3. Chaotic actions carried out by communists in 1944 resulted in creation of a legal void, filled as chaotically and without any plan, which

¹⁵⁸ Ustawa Krajowej Rady Narodowej z dnia 15 sierpnia 1944 r. o tymczasowym trybie wydawania dekretów z mocą ustawy, Dz. U. z 1944 r. Nr 1, poz. 3 [J.L. of 1944 No. 1, item 3].

¹⁵⁹ Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 21 sierpnia 1944 r. o trybie powołania władz administracji ogólnej I-ej i II-ej instancji, Dz. U. z 1944 r. Nr 2, poz. 8 [J. L. of 1944 No. 2, item 8].

¹⁶⁰ Ustawa z dnia 11 września 1944 r. o organizacji i zakresie działania rad narodowych, Dz. U. z 1944 r. Nr 5, poz. 22 [J.L. of 1944 No. 5, item 22].

resulted in constitutional chaos in the creation phase of *PRL*. The results of this legal chaos have been present in many fields up to now.

It is another question how the insistence to stay loyal to this political and legal heritage presented by the political elites of the *3rd Republic* should be judged, as well as how to assess the legal "achievements" and the problems left over from the previous times, in the context of acknowledging the rule of "democratic state of law" as the fundamental one in the *3rd Republic*. In my view this problem will yet bear unexpected fruit.

VII.

**Constitutionalism
of Soviet Type
in Poland after 1944
and the "socialistic"
rule of law concept**

Introduction

On May 17, 1922 in his letter to Dmitry Kurski, the People's Commissar of Justice, Vladimir Lenin determined a place of the system of justice in the newly forming model of a state – so-called socialist state. He wrote:

"The Court should not renounce terror, promising that would mean cheating either ourselves or others – it should, however, justify it and legalize it as a matter of principle, clearly, with no falsity and with no embellishing"¹⁶¹.

It was not the only statement of Lenin in the matter, which is of interest to us, and one might add tens of similar notions presented in the later years by the appropriate creator of the Soviet model of state and the Soviet legal system, Stalin. Out of sheer respect for my listeners I will not quote them here. I will limit myself to illustrate them with a statement of the notorious Stalinist prosecutor, chaser of all anti-Soviet actions, Andriej Wyszynski. He taught that:

"The task of the Soviet, socialist state is to break the resistance of class enemies and their representations, to secure the forming of socialism, to reinforce new, socialist society and the whole Soviet legal system"¹⁶².

Formation of Soviet Poland in 1944

In 1944 Stalin installed fully subordinated to him government consisting of Polish communists in the areas of Poland taken over by the Soviet army¹⁶³. Under the protection of the Soviet army those authorities, against

¹⁶¹ W. I. Lenin, *All Works*, Vol. XXXIII, Warszawa 1957, p. 368.

¹⁶² A. Wyszynski, *Teoria dowodów sądowych w prawie radzieckim*, Warszawa 1949, p. 27.

¹⁶³ In June 1944, the Soviet army entered the Eastern Borderlands, which until September 1, 1939, was part of the Commonwealth, but after September 17, 1939, they were illegally incorporated into the USSR. In July 1944, the Soviets crossed the so-called Curzon line and by October they took over the territory of the Commonwealth around the Vistula River. In these areas, they began to install subordinate, mainly composed of communist agents.

the will of the Polish Nation, began implementing Soviet model of the state, society and economy¹⁶⁴.

In 1945, Great Britain and the United States practically accepted Soviet domination over Poland. Following the agreement of the Yalta conference in February 1945, and then the Moscow conference in June 1945, the Allies obtained key guarantees from Stalin. The Soviet dictator agreed that the foundations of the future model of the state and the direction of the country's evolution would be decided by the parliament elected in democratic elections.¹⁶⁵ Following the arrangements adopted in Moscow, a so-called The Provisional Government of National Unity consisting mainly of communist agents. It also included (in a proportion of 1 : 4) several politicians who had been co-forming the legal Government of the Republic of Poland residing in exile since 1939 (in London in 1940).

These elections took place only at the beginning of 1947. This already constituted a breach of the Moscow arrangements in the light of which the Allies expected the elections to take place within 3-4 months. Before the parliamentary elections took place, in mid-1946 a referendum was organized to test social preferences. The results of this referendum were catastrophic for the communists and unprecedented counterfeiting was carried out.

At the same time, terror was launched on an unknown scale in Poland and elections were held in such an atmosphere. Also their results, giving victory to anti-communist groups, were radically falsified.¹⁶⁶

As a consequence of the election, communist centers subordinate to Stalin formed a new government. Continuing the growing terror against all manifestations of the opposition, this government led to the murder or arrest for many years of hundreds of thousands of opponents of communism.

¹⁶⁴ Already in July 1944 the so-called land reform. As a consequence, hundreds of thousands of landowners, including Polish peasants, were deprived of their property. Tens of thousands of Poles, even in breach of the provisions of this regulation, have been deprived of their property. Under the guise of removing the effects of the war, the communist authorities introduced the Soviet model of economic control.

¹⁶⁵ Detailed arrangements of the conference in Yalta see: *Foreign relations of the United States. Conferences at Malta and Yalta, 1945* (available: <http://digicoll.library.wisc.edu/cgi-bin/FRUS/FRUS-idx?id=FRUS.FRUS19450>). For Conference in Moscow see: N. Davies, *op. cit.*

¹⁶⁶ More about 1946 referendum and 1947 elections see: Czesław Osękowski, *Referendum 30 czerwca 1946 roku w Polsce*, Warszawa 2000; Czesław Osękowski, *Wybory do sejmu z 19 stycznia 1947 roku w Polsce*, Poznań 2000; Arthur Bliss Lane, *Widziałem Polskę zdradzoną*, Warszawa 2008.

Constitutional foundation of communistic republic

From that moment on, without any limits¹⁶⁷, pro-Soviet and communist authorities were also able to form new model of state based on the Soviet model. The crowning of that process of building new order in Poland was the constitution of 1952 passed by the parliament dominated, as a result of the rigged elections, by communists¹⁶⁸.

For the constitution of the Polish People's Republic from 1952, the Soviet constitution of 1936 was the only and only reference point. It summarized the changes made to the political, social and economic system of the Soviet Union. These changes were accompanied by terrible crimes and the blood sacrifice of millions of citizens of this country. In practice, the new document opened up an even greater wave of terror and genocide against Soviet citizens, named after years "Great Terror".

The Soviet constitution constituted the ideological basis for this criminal regime, and although its form did not diverge from many of the existing constitutions, in reality it was only a collection of insignificant practical declarations¹⁶⁹.

After 1945, this Soviet regulation became the reference point for constitutional documents implemented by communist agents in all countries of Central and Eastern Europe¹⁷⁰.

¹⁶⁷ Basing on the Moscow settlement between Stalin and UK and US representatives in June 1945 new Government of National Unity was formed in Poland. This government was composed mostly by Polish communists and their satellites, however some Polish politicians (with former Prime Minister S. Mikołajczyk) from the legal Polish Government in Exile (operating in France/London since September 1939) joined the new body. Although real importance of these politicians was limited, on the other hand it was impossible for communists to realize their true program till the end of 1946.

¹⁶⁸ For more on the circumstances of the constitution of the Polish People's Republic see in: G. Górski, *Polonia Restituta. Ustrój państwa polskiego w XX wieku*, Toruń 2018 (II edition) available on – line version: <http://kj.edu.pl/wp-content/uploads/2017/04/Polonia-Restituta-Ustrój-Państwa-Polskiego-w-XX-wieku.pdf>.

¹⁶⁹ On the nature of the solutions contained in the 1936 constitution, see in: *Ustanowienie rieżyma licznoj włości Stalina*, [in:] I. S. Ratkowski, M. W. Chodiakow, *Istoriya Sowietskoj Rossii*, St. Petersburg 2001.

¹⁷⁰ The Soviet Constitution from 1936 – constitution of the socialist state – was the model solution for Poland and also for other European countries under Soviet occupation after 1945 (Czechoslovakia, Hungary, Romania, Bulgaria and finally German Democratic Republic).

Ideological foundation of the new Constitution

It is impossible not to talk about the notion of rule of law in the legal and political system of socialist countries in isolation from the basic constitutional principles. If we are to consider the manner in which we attempted to abandon the then existing and binding models in Poland after 1989 we must take a closer look at how certain basic notions were defined in the period before 1989. The problem is in the fact that these notions used in that time were similar to those used in the Western civilizations, but their content was totally different. Let me illustrate my point with an anecdote, which best captures those differences.

"What is the difference between democracy and the socialist democracy? The same as between a chair and the electric chair".

Let us first take a look at what that Soviet model of the political system consisted in. Among others, the basic distinguishing features of the so-called socialist constitutionalism we can recognize four principles:

- a) sovereignty of the working people of cities and villages,
- b) the leading role of the communist party,
- c) form of concentrated government,
- d) public ownership of means of production¹⁷¹.

The first of the principles mentioned was a peculiar adaptation, for the needs of the Soviet type of constitutionalism, of the generally accepted rule of sovereignty of the nation or of the people. Peculiar, because they stated that:

"The principle of sovereignty of the working people of cities and villages in its substance different, therefore in contradiction to the principle of sovereignty of the nation as it clearly indicates class character of the state and it gives basis for application of limitations to political rights of certain groups of citizens".¹⁷²

¹⁷¹ F. Siemieński, *Prawo konstytucyjne*, Warszawa–Poznań 1980. To illustrate the "content" of constitutional principles, I adopted Siemieński's study, which in a sense was a peak interpretation achievement in the study of constitutional law in the late 1970s. To the greatest extent, this study transposed the Polish "achievements" of Soviet science into Polish conditions.

¹⁷² F. Siemieński, op. cit., p. 77–78.

The necessary supplement of this formula was creation of the so-called "scientific notion of proletariat dictatorship". It was defined on the base of Lenin's directives.

*"Dictatorship means unlimited power, based on the force, not on law. (...) The scientific notion of dictatorship does not mean anything else but power with no restraints, not limited by any laws, by any regulations, based on violence"*¹⁷³.

Before this issue was included in the textbook in this "scientific" way, it was more explicitly characterized in the heat of parliamentary discussion by the absolute political principle of the Soviet model, probably the most important PPR "ideologist" in this respect, MP Gross. In the spring of 1946 he said:

*"We do not understand democracy in such a way that it is to be the creation of conditions of unlimited freedom of action for those who consider the key of their attitude towards Polish reality - general negation and would like to make democracy free as a tool to cross the foundations of people's democracy. We do not understand freedom and freedom in such a way that it is to be freedom for those centers that would like to undercut the foundations on which the world of work in Poland wants to base social freedom and justice"*¹⁷⁴.

The principle of sovereignty of the working people of cities and villages understood in this way was the necessary condition for another two principles to be formulated. They were defined as follows:

*"The principle of the leading role of the communist party (workers' party) in the process of formation of the socialist system, both regarding other public and political organizations as well as regarding the state authorities, stems essentially from the principle of sovereignty of the working people of cities and villages.(...) Without preserving the leading role of the communist party (...) the power of the people cannot be either captured or then executed"*¹⁷⁵.

¹⁷³ W. I. Lenin, Przyczynek do historii zagadnienia dyktatury. All Works Vol. 31, quote for: F. Siemiński, op. cit., pp. 72-73.

¹⁷⁴ Sprawozdanie stenograficzne z posiedzeń 11 sesji KRN, tom 443.

¹⁷⁵ F. Siemiński, op. cit., pp. 86-87.

However

"The representative form government of the people, generally speaking, consists in people governing not indirectly but through their representative bodies. It means that:

1. *representative bodies i.e. those recognized as such by the constitution, in order to be such in reality, not only formally, should express interests and will of the people;*
2. *they should, at the same time, be institutions of the state power i.e. so situated in the state machinery to be its core, to form its political base, to form a crucial group of institutions;*
3. *Decisions made by the organs recognized by the constitution as representative of the people, should be treated by citizens and other state institutions as the decisions of the people themselves*¹⁷⁶.

In 1947 during the discussion in Sejm elected in false election about the new constitutional regulations, one of the top communistic ideologist declared, that "new government" representing "people" should concentrate/unite legislative, executive and judicial authority. Justifying the need to establish the so-called Council of State Jerzy Jodłowski said:

*"The lawyers from the PSL do not like the fact that the Marshal and Vice-Marshals as representatives of the legislative power enter the Council of State and that there has been a confusion between the legislative power and the executive power. We know what's going on. It's about the purity of so-called Montesquieu's concept of separation of powers. If the gentlemen are not much worried and raise such arguments, then we regret that you are still in the Montesquieu era, when we went further."*¹⁷⁷

The last of the above-mentioned principles was, of course, of utmost importance from the point of view of laying the foundations under a brand new political-economic system. The principle of domination of public property, and in fact state-owned property, had been obviously one of the essential postulates of Marxist-Leninist parties since the beginning of their formation¹⁷⁸.

¹⁷⁶ Ibidem, p. 97.

¹⁷⁷ Sprawozdanie stenograficzne z 6 posiedzenia Sejmu Ustawodawczego, columns 55–56.

¹⁷⁸ In practice, as a consequence of the aforementioned regulation on agricultural reform of 1944 and the act adopted in 1946 on the nationalization of other areas of the economy, private property remained only to a very limited extent until the end of the 1940s.

Soviet type of state versus rule of law concept

It is only in the light of the above-mentioned basic principles of Soviet-type constitutionalism that we can try to understand what the principle of the rule of law in a socialist state was about. And there is no doubt that at least until the mid-1950s, the understanding of the rule of law remained in full coincidence with the views of Lenin and Wyszyński quoted at the beginning.

Thus, the rule of law in the Soviet model is characterized by unprecedented terror and tens of millions of victims. Through mass extermination and genocide, efforts were made to build the foundations of a so-called classless society¹⁷⁹. What is very characteristic, the concept of "socialist rule of law" thus understood did not go down in history with the collapse of the Soviet Union in 1991. Similar criminal experiences with "socialist rule of law" can be found in many countries of Latin America, Africa and Asia. From this perspective, it is clear that this concept is recognized in the same way in different types of socialist states at different times.

In communist Poland in later years, the methods of exercising power and persecution of those who think differently than the prescribed ideology became more subtle. Also in the entire Soviet bloc, the scientific interpretation of the concept of the rule of law has also become more subtle than in the writings of the genus cited by A. Wyszyński. However, even Marxist theorists did not get rid of a kind of "ideological blade".

Let us remind you that in the opinion of these Marxist scholars, the condition for true equality in the socialist system must be *"taking action that destroys the dominant class and which prefers the development of previously discriminated classes"*.

These words, ordering *"the destruction of the dominant class"*, were written in 1981 in Poland. They were written after almost 40 years in the power of the communist agents. It was their rule that led to the elimination – including physical – of all private owners of the means of production. During this period, the communist party exercised power as an al-

¹⁷⁹ A summary of the "achievements" of the "Soviet rule of law" is an excellent study edited by S. Courtois, *Black Book of Communism*, Cambridge, Mass. US, 1999. This work provides a synthetic overview of the criminal activities of communist regimes around the world.

leged "working-class vanguard". The same scholars also maintained that *"the entire strategy of this process is not (and cannot be) based on the free play of political parties"*. Similarly, it was necessary in their assessment to maintain *"all restrictions on the scope and form of freedom that were adapted to the system based on private ownership of the means of production and the free play of political parties"*.

In this context, the key observation was the acceptance of the thesis in the light of which, in the conditions of the existence of antagonistic social classes, the realization of the true rule of law was never possible. Only in the socialist model were the conditions to be realized to ensure the implementation of this principle.

Conclusion

There seems to be no significant need to analyze further elements that Marxist constitutionalists considered typical of socialist rule of law. Most of them, as I pointed out in the introduction, nominally corresponded to the concept of "rule of law" in democratic countries. It is only by showing these theoretical phrases in the context of the real "achievements" of communist governments that one can understand that there was no connection and similarity between the rule of law and the "socialist rule of law".

Finally, it is great joy to express that the intention to build a classless society based on the rule of Soviet-type law has never been fully realized and that this problem can now be analyzed only as a nightmare past.

VIII.

**Constitutional
changes in Poland
between 1989
and 1997**

Introduction

Between 1987 and 1988 the communist elite in Poland that held the power had become aware of the fact that the significant changes in both system and economic model were necessary. It resulted from the influence of both external factors, i.e. the general dismantling of the system and paralysis of the Soviet state, as well as the internal ones, such as the growing threat of economic disaster¹⁸⁰. The growing social resistance and gradual self-organization of the society¹⁸¹ made the pretended changes, like the ones made in 1956 and 1970, pointless. It was obvious that the next change of the party and state leaders, introducing another "reform", or the policy of "further improvement" of socialist system would be no more than indifferent for the society.

Therefore, the Warsaw regime decided, after the initial agreement with the group of the "Solidarność" leaders at the break of 1988 and 1989¹⁸² to make significant concessions. The leadership of PZPR accepted the fact that it was necessary to share some power with the group

¹⁸⁰ It is necessary to point out, that apart from the well known weaknesses of the Soviet model of economy, it was the complete inability to cope with the competition resulting from the technological revolution of the 1980s that contributed to the economic disaster of the PRL. While during so called Gierek era the technological distance between Polish and the world economy wasn't that big, the rapid development of new technologies (especially IT) caused that in relatively short time there appeared an abyss between the two of them. Evidently, it was the effect of marshal law and the shut off as the result of the policy of Jaruzelski's team from the access to technology. At the end of the 1980s Polish economy could be perceived as a sort of a museum of completely different times.

¹⁸¹ When still in 1987 organized structures of the opposition, mainly "Solidarność", were very weak, in 1988 (after the second pilgrimage of John Paul II during "war" period) the real "explosion" had place. Not only the structures of "Solidarność" started to be rebuilt intensely, including some attempts to make it legal, or other social organizations, but also even legal political organizations. This was the form adopted by political clubs, and what is more historical political parties undertook their activities officially (Polska Partia Socjalistyczna or Stronnictwo Pracy), and Konfederacja Polski Niepodległej had *de facto* abandoned the underground existence.

¹⁸² At the break of 1988 and 1989 in Magdalenka (the conference centre of security authorities) the minister of internal affairs Czesław Kiszczak started secret negotiations with Lech Wałęsa and a group of his co-workers on behalf of the communist authorities. It was during these talks that the preliminary conditions of the agreement between the authorities and the oppositions had been agreed on. The meetings were continued also during the period of negotiations of "the round table".

of opposition. The communist authorities hoped to hold full control in the key areas of the state, such as foreign affairs, army, secret services, strategic areas of economy. Whereas in other areas the selected groups of the opposition were to be in charge. In this way the regime intended to acquire legitimization to implement deep reforms in economy, which were to be also the responsibility of solidarity opposition¹⁸³.

The Round Table Agreement and the first free elections

In such circumstances in the spring of 1989 a breakthrough event took place, the negotiations of so called round table began, in which representatives of part of the opposition took part. They were organized in so called **Citizens' Committee at the side of the leader of "Solidarność" Lech Wałęsa**. What was important was the fact that the negotiations, in which the shape of the system transformation was being decided on, were broadcast by mass media, at that time monopolized by the regime.

The character of both simultaneous negotiation processes is still a matter of discussion, especially the content of restricted decisions made in Magdalenka.¹⁸⁴ Anyway, after two months the initial draft of the project concerning the system reestablishment of the state was agreed on, and the changes in the Constitution were to be a significant element of the project.

The changes were passed on the parliament assembly on 7th April 1989¹⁸⁵. They meant actually the dismantling of the former system model of the state.

¹⁸³ More on it at: A. Dudek, *Pierwsze lata III Rzeczypospolitej 1989–1995. Zarys historii politycznej Polski*, Kraków 1997.

¹⁸⁴ It should be added that representatives of the Catholic clergy were important participants of the negotiations in Magdalenka. They were pretty reserved about the official meeting at the "round table". The discussion concerning the character of the decisions made in Magdalenka results from the fact that all the participants, despite the apparent logics of the events, are still very secretive about the course of the negotiations, and the decisions made there, and are trying to reduce their sense to meaningless social meetings. Such an attitude leaves the space for interpretations, which actually prove that the restricted decisions of Magdalenka had determined in fact the whole political and economic life in Poland till the end of A.Kwaśniewski's presidency. More on this at A. Dudek, *loc. cit.*

¹⁸⁵ Ustawa z dnia 7 kwietnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Dz. U. z 1989 r. Nr 19, poz. 101).

In the new regulations of the constitution the new, reestablished institutions could be found, i.e. **the President of PRL** and **Senate of PRL**. The president of PRL was to be appointed in indirect elections. To appoint him both chambers (Sejm and Senat) were to make up **Zgromadzenie Narodowe** (the National Assembly). The reestablishment of the presidency meant the decommissioning of the Council of the State. The regulations concerning the foundations of election rights were to be changed, and developed in the democratic directions in the new electoral regulations to Sejm and Senat. The post of the **Ombudsman**, existing previously, got the rank of the constitutional institution.

Moreover, the resolutions concerning constitutional guarantees of the independence of judiciary system and judges were introduced, and a new organ was established **Krajowa Rada Sądownictwa** (the State Council of Judiciary), which was to overtake a significant range of entitlements in the process of appointing judges. New solutions were to guarantee the independence of the appointing of judges from the influence of the communist party.

Apart from the already described system changes, the most important decision of the "round table" were to be parliamentary elections. They were supposed to be free, however not fully democratic. Only the elections to the new chamber, Senat, were to be fully free. However, this chamber wasn't important enough to decide on the new character of PRL. It was Sejm that was to preserve the basic role and functions (the burden of legislation, as well as the exclusive influence on appointing and controlling the work of the government). The agreement was made, as a result of political contract, that the elections would be of curial character. In consequence, the existing authorities were to keep 65% seats in the parliament, while the opposition 35%. 60% of seats kept by the authorities were to be divided between the communist party PZPR and its satellites, whereas the remaining 5% were to be held by catholic organizations (PAX, Chrześcijańskie Stowarzyszenie Społeczne, Polski Związek Katolicko-Społeczny) Within electoral regulations, which constituted single-member districts for the elections, the seats were divided in such a way that it was known in advance how many seats each party would acquire.

Making the decision on free elections, which meant the realization of the decisions of Yalta after 44 years, the communist authorities counted on preserving the existing balance of power. Curial electoral regulations was to guarantee their advantage. Moreover, the authorities counted on two favorable elements. The elections were to be held shortly after the ne-

gotiations of the "round table", less than two months. It was thought that the opposition wouldn't have enough time to organize for the elections. What is more, the authorities preserved its dominant role in mass media, which was to guarantee their advantage. Finally, the authorities "delegated" a lot of relatively known people as independent candidates, who were supposed to take over seats from the opposition part of 35%. The elections were, thus, a part of plan to involve a part of opposition to take responsibility for unpopular economic reforms, while the foundations of the system were to stay unchanged, as the range of constitutional changes proved¹⁸⁶.

The elections, which took place on 4th June 1989, put an end to the plans of the communist regime. In the elections to Senat, which might have been less important as a matter of fact, yet were of symbolic significance, the opposition acquired 99 out of 100 seats. This clearly proved the complete defeat of the authorities.

Yet, their defeat was also visible in the elections to Sejm. In oppositional curia, the candidates supported by "Solidarność" won in the first¹⁸⁷ round of the elections in almost all constituencies. Whereas almost all the candidates of the regime curia had to take part in the second round. Thanks to that the opposition got the opportunity to support in the second round those representatives of the authorities, who were declaring the themselves not so attached to the management of their own parties¹⁸⁸.

However, it was the collapse of so called "country list" that was the final stroke.¹⁸⁹ Additionally, there appeared a difficult legal problem, since such a situation wasn't taken into consideration in electoral regulations, and Sejm couldn't start working without the constitutional composition of 460 MPs.

It was the first situation in which the round table order was under a significant test of sustainability. However, it was also the test for the opposition. After the first shock after the defeat in the elections had passed, the

¹⁸⁶ Among the constitutional changes from April 1989 only two significantly breach the system principles, i.e. approving both the independence of judges and the independence of judiciary system, and acknowledgement that the elections were to be free and democratic.

¹⁸⁷ The electoral regulations provided for the second round if the candidate didn't acquire absolute majority in the first one.

¹⁸⁸ Thanks to the support of the local structures of "Solidarność" in the second round over 50 MPS of authorities curia acquired seats *de facto* against the will of the management of their parties.

¹⁸⁹ According to electoral regulations the country list of 33 candidates, the members of the management of regime parties, was voted separately. However, to get a seat the people from the list also had to acquire the absolute majority of votes. Only two people from the list got seats.

authorities started to blackmail the opposition. They pointed out that the lack of its agreement on so called constructive solution of the country list crisis would mean abandoning the previous political arrangement.

Facing the unexpected social support (as well as expectations and trust) on the one hand, and the brutal regime, which in December 1981 proved capable of disgracefully violent solutions on the other, the leaders of the opposition, agreed on such a change of electoral regulations which would allow the authorities save their eats. Appropriate decisions were passed by Rada Państwa in emergency procedure which additionally irritated the society well remembering the decrees of this body from 13th December 1981. It was an unusual precedence, since the electoral procedure was changed during the elections in progress.

Thus, both the authorities and Solidarność opposition gave away their attitudes towards the law, as a tool serving to achieve particular interests. This common standpoint has been the dominating one not only for the political elites but also legal circles for the next years.

T. Mazowiecki government

Sejm and Senat emerged in such elections were to appoint the president of PRL. General W.Jaruzelski was an obvious and actually the only candidate for this post. The new office was supposed to be a kind of a guarantee of immutability of basic elements of the balance of powers in the state. Therefore, this appointment was of fundamental meaning for the authorities.

It turned out, however, that the authorities might not have enough votes in Zgromadzenie Narodowe to make the appointment effectively. It happened because some group of MPs elected in the authorities curia, but supported by "Solidarność", wouldn't vote for general Jaruzelski.

The appointment of the President was to be the second, in the short time, serious test for the opposition. Many members of the opposition pointed out that in such a situation the communist authorities should be made to choose another candidate, and clearly show the society that serious, and not superficial, changes were to be performed.

Yet, again the leaders of Solidarność gave way. In dramatic circumstance, just by one vote, general Jaruzelski was elected the President of

PRL. It happened because a group of the opposition MPs didn't take part in voting and decreased quorum.

The election of general Jaruzelski, and especially the circumstances in which it took place, were a serious stroke for the society believing in possibility of real changes. It considerably lowered the credibility of the opposition, whose actions were perceived as procrastinating, despite the visible power of the social support.

Yet, there was the third confrontation to come. General Jaruzelski, most probably fulfilling the previous agreement with the opposition, appointed general Czesław Kiszczak for the post of the Prime Minister. Kiszczak used to be the head of the secret services, which played the key part preparing the agreement with the opposition.

This time, the opposition, fearing the ultimate loss of its credibility among the society, openly questioned this candidate. Nevertheless, general Kiszczak made some attempt to form the government, even inviting the opposition members to join it.

In such a situation, part of the parliamentary management of "Solidarność"¹⁹⁰ forwarded the initiative to force through a member of the opposition for the post of Prime Minister. The idea was reflected in the text that appeared in the oppositional newspaper "Gazeta Wyborcza" by its editor-in-chief Adam Michnik titled "Your President, our Prime Minister". Michnik and the politicians around him, however, wanted this "our Prime Minister" to be supported by the authorities, especially the management of PZPR.

Many politicians associated with Lech Wałęsa didn't agree with this concept. They managed to convince the leader of "Solidarność" that the only way of sustaining the social trust was by proving that the opposition really desired to influence the functioning of the state.

Therefore, authorized by L. Wałęsa actions were taken to set up a political background for the new government beyond PZPR. Jarosław Kaczyński undertook the realization of this task, and quickly managed to build up a surprising coalition between "Solidarność", ZSL, and SD. The votes of these three organizations provided the necessary majority to appoint the government, whose Prime Minister was to be pointed to by L. Wałęsa.

L. Wałęsa pointed to Tadeusz Mazowiecki, who approved by Sejm took over the office on 12 September 1989. Although, the key positions were

¹⁹⁰ It was so called Obywatelski Klub Parlamentarny.

held in the government by the closest coworkers of general Jaruzelski¹⁹¹, it seemed that the government managed by the first non-communist Prime Minister would quickly make deep system transformations. Great hopes of the society for the breakthrough weren't disturbed even by the declared by the Prime Minister will of cutting off the past with the "thick line", which was perceived as the lack of willingness to come to terms with the communist crimes of the past.

The "round table" and June elections, as well as the taking over the office by T. Mazowiecki, attracted the attention of the whole world, which was surprised to see the peaceful dismantling of communism in Poland. Which was even more puzzling, since on the day of Polish elections the communist authorities of China ordered the massacre of rebellious students at the Tienanmen Square.

However, it was just after a few weeks of co-governing of the opposition and communists that the situation in the Middle-East Europe had completely changed. As a result of so called autumn of nations, the regimes in Hungary, Czechoslovakia, Bulgaria, and East Germany collapsed, as well as in Romania, but there it was after bloody struggle. Under the pressure of the societies, the opposition organizations got the power, after free and democratic elections. Moreover, new constitutions were being quickly passed as the symbol of the pursuit to break any ties with the communist past as soon as possible.

At the end of 1989 instead of being the pioneer of the transformation, Poland had become their outsider. Undemocratic curial Sejm, the old constitution from the times of Stalin and the government including communist generals, were surprising from the outside observers, and irritate the Polish society. What is more, Poland was still, even when it comes to its name, PRL.

Changes of the Constitution

It was in such atmosphere that next change of the July Constitution took place. On 29th December 1989¹⁹² Sejm reestablished the traditional

¹⁹¹ E.g. general Kiszczak became the minister of internal affairs, and general F. Siwicki the minister of defense.

¹⁹² Ustawa z dnia 29 grudnia 1989 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Dz. U. z 1989 r. Nr 75, poz. 444).

name of the state, Rzeczpospolita Polska (the Republic of Poland) and the Polish symbol, the white eagle, was given back its gold crown. More important, however, was removing from the Constitution its preamble and stating in the new version of art. 1 that Rzeczpospolita is, "**a democratic state of law realizing the rules of social justice**". The following, art. 2 of the Constitution stated that, "**the highest authority belongs to the nation**", while the next ones guaranteed political plurality and economic freedom.

The above mentioned changes in the Constitution meant rejecting the concept of a socialist state and the previous system model of PRL was becoming the thing of the past. The III Rzeczpospolita was born.

Yet, III RP was emerging as the legal continuation of PRL. This legal heritage resulted from the fact that III RP was to function basing on however modernized, but still valid Constitution of 1952. When on 29th December 1989 Sejm initiated amendments of the Constitution, in no way did it refer to the legal continuity of III RP with II RP. On the contrary, the fact of unbroken existence of II RP reflected by the institutions of the President and the government as well as Rada Narodowa (the National Council) in London, had been entirely ignored

Therefore, in my opinion the statement that, "III Rzeczpospolita is the continuation of II Rzeczpospolita preserving the identity and continuity of the state being"¹⁹³ is completely unsubstantiated.

The changes introduced at the end of 1989 in the July Constitution, however going in the right direction, didn't solve the basic system questions of the Polish state. The existing solutions resulted in the functioning of the hybrid model, in which the attempts were being made to join the inviolability of system and legal continuity of PRL with the establishing of the foundations of a democratic state of law. In reality, such a situation could in no way be successful.

Moreover, the above mentioned role of Poland as a pioneer in overthrowing communism, had already been the thing of the past at the beginning of 1990. During this time virtually almost all of the countries of the former Soviet block, had already had the parliaments emerged in fully democratic elections, as well as new constitutions, breaking up completely with the communist past. Additionally, some activities of T. Mazowiecki's government concerning international matters brought about

¹⁹³ M. Kallas, A. Lityński, *Historia ustroju i prawa Polski Ludowej*, Warszawa 2000, p. 195.

anxiety. The government was incompetent in issues concerning the re-union of Germany, strongly supported the idea of not only preserving the Warsaw Pact, but also remaining the Soviet army on Polish territory, and was against the dismantling of Conecom. When in the middle of 1990 the negative consequences of the deep economic transformations of the vice Prime Minister L. Balcerowicz began to accumulate, the situation got ripe for the deep political crisis.

Then the project to enact the new Constitution quickly had appeared, which was withheld by the opinions that undemocratic Sejm had no moral right to pass the Basic Law. Therefore, the works on the project were focused in Senat. This chamber, in which the constitutional commission was led by Senator Alicja Grześkowiak, in less than a year passed the most coherent and referring to Polish traditions project of the Constitution, when compared to the ones presented in the 1990s.

However, it was the initiative of a change in the post of the president, that had been an attempt to solve the growing tensions. To make it successful, a determined political campaign was necessary, which was initiated by L. Wałęsa and the people around him.

Again, the leadership in this enterprise was taken by J. Kaczyński, who also began establishing the political background of Wałęsa's camp, i.e. *Porozumienie Centrum* (PC).

Extremely strong political pressure caused that general Jaruzelski accepted the need of dismissal. At the same time as a result of changes in the Constitution¹⁹⁴ it was agreed that the new president would be elected in general elections, and not by *Zgromadzenie Narodowe*.

The new way of election was to provide the president with a much stronger legitimacy, however it wasn't followed by the changes in the Constitution, which would reflect the fundamental modernization of the system. Soon it was to be the cause of numerous conflicts, yet the state has practically survived till the current regulations.

¹⁹⁴ Ustawa z dnia 27 września 1990 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Dz. U. z 1990 r. Nr 67, poz. 397).

Presidential elections of 1990

The presidential elections of 1990 were the first fully free and democratic ones in Poland after 1939.¹⁹⁵ Eventually, L. Wałęsa defeated in the second round S. Tymiński, who in the first round had eliminated unexpectedly T. Mazowiecki¹⁹⁶ running for the post of the Prime minister.

The President elect took the office on 23rd December 1990. Before it happened, as I have mentioned in chapter seven, on the same day L. Wałęsa received the symbols of II RP from the President in Exile, Ryszard Kaczorowski. In this way the work of the authorities of RP based on the regulations of the April Constitution ended, and so did the duality of the highest authorities of the Polish state.

Taking the office by Wałęsa started the long lasting period of arguments over the position of the president in the constitutional system of the state organs, especially his relations with the parliament and the government. The existing regulations, the amendments to which were introduced in the spring of 1989 the July Constitution, didn't correspond to the completely new political situation, and abstracted from the fact that the president was appointed in the general elections. Such a strong legitimacy had undoubtedly given the ones in the office the grounds for serious demands (no matter who they might have been), to acquire real competences to rule the state. The existing constitutional regulations, however, had seriously limited these rights.

The quick introduction of free and democratic elections to both chambers of the parliament was to be the initial point to change this situation. However, to a great surprise of the observers, president Wałęsa didn't make any attempts to dissolve Sejm ridiculing Poland at that time. On the con-

¹⁹⁵ It should be mentioned that in the spring of 1990 the elections were held at the local administration level (wybory gminne). They were obviously fully free and democratic, and played a great part in the process of the state transformation, however their significance could in no way be compared with the presidential or parliamentary elections.

¹⁹⁶ T. Mazowiecki as the Prime Minister in the office had strong social support, but due to disastrous campaign got the image of the one disloyal to L. Wałęsa. Because of this and over-zealous exposing in his campaign of L. Balcerowicz and his "successes", in the last phase of the campaign before the first round he was outrun by an unknown Polish emigrant from Canada, Stanisław Tymiński. The other candidates, W. Cimoszewicz from SLD, R. Bartoszcze from PSL, and L. Moczulski didn't really count.

trary, checkmating in a way Sejm with such a possibility¹⁹⁷, forced through supported by himself government of Jan K. Bielecki, which was a submissive tool of fulfilling the president's political goals.

The existence of this setup was putting off the real work on the constitution. Only the gradually deteriorating social situation which was the consequence of the results of economic reforms and the crisis in the state budget¹⁹⁸, as well as unpredictable consequences of the attempts made in Moscow to reestablish the old Soviet model, and next the destruction of the Soviet Union, made the president to initiate the dissolving of the parliament.

In October 1991 the first fully free and democratic elections to both chambers of the parliament took place. However, instead of helping to stabilize the political situation in the country and emerging the effective government, they initiated the period of the biggest destabilization of the political stage in Poland. It was the result of passed electoral regulations to Sejm, which were of extremely proportional character.

In consequence, a fragmented Sejm emerged, including at first ten clubs, yet at the end of the cadency in 1993 there were over twenty. The strongest one of Unia Demokratyczna¹⁹⁹ had just 62 members.

Such a shape of electoral regulations, and as a result of Sejm, was the effect of president Wałęsa's aspirations, who was to be the arbiter deciding on everything in the situation of such fragmented political scene. It was also to provide the president with the decisive influence on the process of forming of the government (which according to the Constitution he didn't actually have), as well as its functioning.

¹⁹⁷ It is worth remembering that the strongly represented in Sejm parties of the former authorities (overall still 60%) – PZPR (and later on the parties that were established on its foundations SdRP, and Polska Unia Socjaldemokratyczna), ZSL (transformed in PSL) and SD, being aware that in regular elections they had no chance to get even the part of representation they had, strongly opposed the shortening of the cadency.

¹⁹⁸ It should be reminded that during 1991 the negative effects of the work of Bielecki's government, in which L. Balcerowicz was still in charge of reforms, had deepened. The economic recession was growing, and so was the unemployment, stimulated by the inappropriate social policy started by the minister of labour in Mazowiecki's government, J. Kuroń. In addition, there were plenty of economic scandals, presented as the necessary element of so called system transformation. The financial consequences of these (and many other) factors were tragic. At the end of 1991 the minister of finance, L. Balcerowicz, wasn't even able to assess the deficit of the state budget.

¹⁹⁹ A party set up by the followers of T. Mazowiecki.

In fact, however, as the result of yet another political initiative of the leader of Porozumienie Centrum (PC) Jarosław Kaczyński, a coalition emerged in Sejm, which managed, practically against the president's will, to force through the government of Jan Olszewski.

The half year long period of the functioning of this cabinet was full of tensions and arguments with both the president and Sejm²⁰⁰. Eventually at night 4th/5th June 1992 the government of Jan Olszewski was overthrown by use of emergency procedure²⁰¹.

W. Pawlak from PSL designed to the post of the Prime Minister wasn't able to form the government that could get the trust of the majority in the parliament, though. Therefore, the majority formed in Sejm, with Unia Demokratyczna and ZChN as its core, which with the support of the president had emerged the government with Hanna Suchocka from UD as its leader. Again, it was Wałęsa's attitude that was the key factor, and it was he, who by peculiar interpretation of the constitutional regulations²⁰², created the practice heading clearly towards the increase of his government's competences.

Nevertheless, almost permanent political crisis under the rule of the July Constitution, had induced the political elites to make some attempts to modernize the existing regulations. During the work on amendments, the concept of accepting the constitutional bill appeared, which would establish the relations between the most significant organs of the state, i.e. the President, Sejm, and the Government.

²⁰⁰ The government was supported in Sejm by an informal coalition of PC, ZChN, Porozumienie Ludowe, PSL, and groups of some smaller clubs which all in all guaranteed around 170 votes. Additionally, KPN with around 50 MPs was in favor of the government, which provided it with about the half of votes in Sejm, yet made it constantly seek the support of each of the political group.

²⁰¹ The night voting on the president's motion to remove the government by emergency procedures was full of the breaches of statutory procedures. However, the *ad hoc* coalition hostile to the government, established as a result of the execution of the lustration resolution by Sejm, forced its will ignoring this.

²⁰² The special role was played here by the minister of the President's Office, Lech Falandysz, discovering all the time new interpretation formulas for the general regulations of the Constitution. This kind activity was named by journalists "falandyzacja of law". Yet, from the president's perspective it was the creation of favorable constitutional practice.

Small Constitution of 1992 and forming the government

This led to passing on 17th October 1992 a regulation²⁰³ which according to the Polish tradition was called Small Constitution. The new solution overruling the validity of this regulations of the July Constitution, which established the status and functioning of the legislative and executive, as well as the relations between them. The main intention of the creators of this model, was to record the procedures concerning the formation of the government and its relations with both the President and Sejm, more clearly. The main idea behind it was to reestablish the tripartite system, as well as the balance between them.

However, in reality Small Constitution was a step towards the increase of the president's influence on the government, and in addition strengthening the executive in relation to Sejm. It was reflected in at least three kinds of solutions.

The procedure of forming the government, anyway meant to consist of five subsequent phases, gave clear advantage of the president's initiative and the tools to force through his will. The right to dissolve the parliament if it didn't eventually provide the president's candidate with trust, was an ultimate argument.

The president also acquired the right to dissolve the parliament, if Sejm expressed motion of no confidence to the government (the establishing of a new government was an alternative).

Finally, appointing and removing ministers depended on the president's decision, after the motion of the Prime Minister. It should be mentioned, that in case of the ministers of foreign affairs, internal affairs, and national defense, the new regulation forced the Prime Minister to ask for opinion before he presented a candidate. In practice, the president's office imposed the rule according to which the president "suggested" appointing his candidates for these posts.

Such a model of relations was strengthened in president's favor when Sejm was politically fragmented. However, as it later turned out, president

²⁰³ Ustawa Konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym (Dz. U. z 1992 r. Nr 84, poz. 426).

Wałęsa was applying the broadening interpretation of Small Constitution also toward Sejm consisting of different groups.

In May 1993 Sejm passed motion of no confidence towards the government of H. Suchocka, and president Wałęsa decided that it was necessary to dissolve the parliament. The following elections took place in September 1993 under the rule of a completely changed electoral regulations. The election threshold (5% of votes in the whole of the country) was a fundamental novelty, as well as such a method of counting votes (d'Hont's) which was clearly in favor of the strongest parties.

This project was forced through by President Wałęsa, who counted on the success of *Bezpartyjny Blok Wspierania Reform (BBWR)*, which he was the patron of. However, this organization had barely passed the election threshold, which was a great defeat of Wałęsa's. What is more, although the centre-right groups taking part in the elections got 46% of votes altogether, only the two of them, the above mentioned BBWR and KPN, had also barely passed the threshold. The others didn't enter the parliament.

On the other hand, the triumphant SLD and PSL thanks to that had almost doubled the number of seats in relation to the received votes²⁰⁴. The coalition of SLD-PSL formed in effect of the elections didn't, however, appoint the leader of SLD, Aleksander Kwaśniewski, as its candidate for the post of the Prime Minister. As a result L. Wałęsa's initiative, W. Pawlak from PSL for the second time got the mission to form the cabinet. Thanks to this President Wałęsa acquired significant influence on the shape of his cabinet, especially so called presidential departments. A similar practice formed after the next political crisis, when the SLD-PSL coalition pointed J. Oleksy from SLD in place of W. Pawlak. In this case, as well, the coalition partners despite a significant power in Sejm, didn't risk the confrontation with the president in the issue of manning "president's departments".

The situation was to change while A. Kwasniewski became the president. It happened at the time when the cabinet of J. Oleksy was dismissed²⁰⁵, the coalition chose Włodzimierz Cimoszewicz in his place. Then, A. Kwaśniewski declared that in his view constitutional regulations

²⁰⁴ The support at the level of 43% meant almost 80% of seats in Sejm, It was followed by an overwhelming dominance of SLD and PSL in Senat (altogether 73 seats).

²⁰⁵ Just before passing the president's office the minister of internal affairs in Oleksy's cabinet, A. Milczanowski, who was nominated from Wałęsa's initiative, accused the Prime Minister of having been (and still being) the spy of KGB. In the tense atmosphere Oleksy forwarded his dismissal, but it was after Kwaśniewski had taken over the office.

didn't give the right to impose the candidates to resorty prez on the Prime Minister²⁰⁶ and by doing this he ended up the practice of L. Wałęsa. By the time the new Constitution started to work, the issue hadn't been the matter of debates or arguments.

Presidential elections of 1995

It is necessary now to return to the problem of the president's elections in 1995, especially the precedent decision of the Supreme Court referring to their validity.

In the second tour of the elections L. Wałęsa and A. Kwaśniewski were the opponents. In dramatic circumstances, the latter one had won by just around 600 thousand votes. Soon afterwards, however, the Supreme Court received almost 600 thousands complaints from citizens. The basis of the protests was an accusation that A. Kwaśniewski had lied saying that he had graduated from university. It was an important thing, since for many voters the fact that one of the candidates was better educated than the other was a decisive factor in voting.

On 5th December 1995, however, the Supreme Court decided that the result of the elections was valid. The Court pointed out that even though the candidate had blatantly lied presenting the untrue information on his education, which meant breaking the law, "it wasn't recognized that the stated breach of electoral regulations had calculable and proven influence on the outcome of the elections"²⁰⁷.

In conclusion the Court stated that its resolution: "is merely stating the lack of basis resulting in questioning the validity of the elections. **It is beyond the competence of the Supreme Court to assess the personal virtues as well as morality of the individual elected for the post of the President**".

This legal judgment wasn't shared by a considerable part of the Chamber, which showed in the unprecedented number of separate votes. How-

²⁰⁶ It was just a tactical move, since the prime minister and the president, as well as their political background agreed on the candidates. The case was, however, used as a symbolic cutting off the style presented by the former president.

²⁰⁷ The resolution of the whole of Administrative, Labour and Social Security Chambers of the Supreme Court from 5th December 1995.

ever, there is no place here to analyze it in detail²⁰⁸. What is important, however, is the fact that the Supreme Court by its resolution accepted the situation when the highest office of the state, established to "watch over the realization of the Polish Constitution" (art. 28 ust 1 of the Small Constitution), was held by a person who fighting for the post had intentionally broken this law. The Court had released itself from the moral judgment.

The decision of the Supreme Court had shown that in III RP, law perceived in particular way was an entirely relative phenomenon, and might be a tool used to realize different aims, without the need to obey any rules, and the people perceiving the law in such a way could get the protection from the highest judiciary organ of the state. The decision of the Supreme Court had thus made a very deep erosion of the Polish legal system permanent, and made the rules of a democratic state of law a meaningless cliché.

Conclusions

Small Constitution passed on 17th October 1992, was to put in order Polish constitutional system before the new Constitution was enacted, which was believed to happen very quickly. However, Sejm that emerged in the elections in 1991 hadn't managed to make any progress in its work on the regulations by the time it was dissolved in May 1993.

Sejm elected in the autumn of 1993 took more decisive steps towards the preparation of the new Basic Law, which was conditioned politically. A. Kwaśniewski became the head of the Constitutional Commission. Since due to the opposition of L. Wałęsa he didn't manage to take the post of the Prime Minister, his participation in preparation works for the new Constitution was to be a significant part in his presidential campaign. However, when at the break of 1994 and 1995 the confrontation before the elections was visibly more intense the work of the Commission led by A. Kwaśniewski had practically become non-existent. After he had taken over the president's office, there was little hope that the work would get more intense,

²⁰⁸ The broader analysis of the issue is presented in the text: G. Górski, *Kryzysy wyborcze w Polsce i w Stanach Zjednoczonych a rola Sądu Najwyższego*, (in:) *Hominum causa omne ius constitutum est. Księga Jubileuszowa ku czci Profesor Alicji Grześkowiak*, A. Dębiński, M. Gałązka, R.G. Hałas, K. Wiak (ed.), Lublin 2006.

and Sejm of II term would be capable of preparing and passing the new constitution²⁰⁹.

However, in the mid 1996 the situation had significantly changed. To comprehend it, the results of 1993 elections and how they were reflected in Sejm should be reminded.

As I have already mentioned, the centre-right parties got altogether 45% of votes in the elections²¹⁰. The left wing, i.e. SLD, Unia Pracy and PSL, got together around 43% of votes²¹¹, whereas Unia Demokratyczna got the support of around 11% of the voters. Taking into consideration that only two of centre-right parties had passed the PROG, BBWR and KPN, distribution of seats in Sejm in no way reflected the actual distribution of votes. Thus, centre-right parties had no more than 10% of seats, the left wing 75%, and UD about 15% of seats.

In the meantime, in the half of 1996, the centre-right groups consolidated around Akcja Wyborcza Solidarność (AWS) and Ruch Odbudowy Polski (ROP), managed to get a significant social support. It started to be obvious in the elections which were to take place in the autumn of 1997, not only would they acquire a big representation in the parliament, but also would probably win the elections.

What is more, the consolidation of the right wing was based on the ground of so called Obywatelski Projekt Konstytucji (the Citizen's Project of the Constitution) which was being prepared under the patronage of the trade unions "Solidarność". Such a project, based on citizens's initiative, was possible according to the constitutional bill on the procedure of preparation and enactment of the Constitution of Poland from April 1992²¹². The project had to be supported by at least half a million of citizens, however this one acquired the support of a million and a half.

²⁰⁹ Appointing a non-important member of SLD on the position of the head of the Constitutional Commission proves that neither SLD nor A. Kwaśniewski was interested in the positive outcome of constitutional work.

²¹⁰ Apart from BBWR and KPN, only "Ojczyzna" associated closely with the government ZChN acquired 5%. However, since the election threshold for coalitions was at the level of 8% it didn't enter Sejm.

²¹¹ SLD acquired 20.4%, PSL 15.4%, and UP 7.3%.

²¹² Constitutional act of 23 April 1992 on the procedure of preparing and enacting of the Constitution of the Republic of Poland, J.L. of 1992 No. 67, item 336 (Ustawa Konstytucyjna z dnia 23 kwietnia 1992 r. o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej, Dz. U. z 1992 r. Nr 67, poz. 336).

It was a significant signal for A. Kwaśniewski and the left wing. It meant, that if the current parliament didn't manage to enact constitution, it would be necessary to negotiate compromise with the centre-right parties in the following Sejm. Since there weren't any significant ideological differences between SLD, PSL and UP, it was possible to force through their own constitutional ideas basing on the votes of these parties in both Sejm and Senat.

The management of SLD and president Kwaśniewski, however, wanted to avoid the opinion that such a constitution was created only by the consolidated post-communist left wing²¹³.

Therefore, many concessions were made in order to involve Unia Wolności²¹⁴, and to make its leader T. Mazowiecki, the first non-communist prime minister in PRL, one of the symbolic creators of this document. On the one hand, it was to be the proof that the new constitution was supported by part of "Solidarność" block, on the other to make impression that the whole of Sejm, i.e. the representation of the nation, with just the exception of insignificant margin (no more than 10% votes), would enact the Basic Law.

Getting UW was significant since the new Constitution had to acquire support in the constitutional referendum. The possibility to include this party in the pro-constitution block in the referendum campaign was to neutralize the increase of support for the centre-right wing, opposing the new regulations.

In the spring of 1997 the works of Constitutional Commission got the record pace. The constitutional coalition was overcoming yet another discrepancy, aiming at any price at organizing the referendum in May 1997. It was not only about, voting before the visit of John Paul II. The left wing wanted to have a guarantee that the new constitution would start to be valid before the new parliament constituted itself. They feared that the centre-right wing would do everything to make the validity of such a solution impossible.

Thus, in the atmosphere of a kind of "constitutional coup" the left wing parties, which in the elections of 1993 acquired only 58% of the social support, with the attendance below 50%, forced through in the parliament

²¹³ SLD along with its coalition partner PSL were identified with the pre-June PZPR and ZSL. On the other hand, UP although consisting of the left-wing activists of "Solidarność", was actually dominated by former members of PZPR.

²¹⁴ Unia Wolności emerged as a result of merging Unia Demokratyczna and Kongres Liberalno-Demokratyczny of the former prime minister Bielecki, after this party had been defeated in the elections of 1993.

a plan imposing the new constitution. On this basis on 27th May 1997 the constitutional referendum took place. Only 42.86 % of voters took place in it. Despite, an enormous propaganda pressure from the constitutional coalition, the result came as a shock for them. There were only 52.7% votes "for" the constitution (which meant merely half a million more than against it), although they expected a much higher result²¹⁵.

There also appeared a legal controversy around the referendum. The existing constitution didn't mention the participation of at least 50% of voters as the condition of validity of the referendum. Such a demand was the result of the bill on referendum passed in 1995²¹⁶. However, the interpreters of law at that time decided that the regulation of the bill was so called *lex specialis* in reference to the ordinary bill²¹⁷. Thus the validity of the referendum wasn't discredited.

As a result of the referendum the final version of the new regulation was accepted by Zgromadzenie Narodowe, dominated by the left wing constitutional coalition. On 17th September 1997 it was signed by the President, A. Kwaśniewski, and a month later it entered into force. It took place on 17th October 1997, two days before the session of the newly elected parliament.

The winning AWS, just after the constitutional referendum and during its campaign, was determined to introduce significant alterations in this document that had been passed in controversial way. However, after the elections no real actions were taken.

On the one hand it resulted from the fact that Unia Wolności, one of the main creators of the constitution, had become the coalition partner of AWS in the new government. What is more important, however, beneficial for AWS system regulations, providing prime minister and a government with a large independence, and a wide range of activities, even without the support of majority in the parliament, made the attitude of this party towards the constitution very relative. Hence, no changes of the Constitution were even discussed, and this situation lasted in that and the next parliamentary term between 2001 and 2005.

²¹⁵ The pro-constitution block was convinced that the proportion of the referendum would be at least 3:1.

²¹⁶ The act of 29 June 1995 on referendum, J.L. 1995 No. 99 item 487 (Ustawa z dnia 29 czerwca 1995 r. o referendum, Dz. U. z 1995 r. Nr 99, poz. 487).

²¹⁷ It was so, although in the article 1 of the act of 1995 it was clearly stated that this document regulates the rules and procedure also concerning the referendum mentioned in the constitutional act of 1992. Assuming that this regulation was *lex specialis* required a lot of courage.

IX.

Electoral crises in Poland and in the United States and the role of Supreme Courts

Introduction

In a democratic state where two powers supported by a relatively equal parts of the society struggle on political grounds, it is a frequent case that a conflict appears concerning the determination of the election result. Such a situation is not rare, thus there is the necessity of creating mechanisms solving arguments, since there must be a methodology of the definite determination of the elections outcome. Otherwise, the lack of this methodology might lead to deep, long-lasting political crises. In the recent years we could observe complications associated with this issue in numerous countries worldwide, and the example of the events Ukrainian so called "Orange Revolution" that happened at the end of 2004 and the beginning of 2005, is one of the symptoms of potential conflicts.

In Poland the model of the validation of parliamentary and presidential elections results by the Supreme Court has been applied²¹⁸. Regardless numerous opinions questioning this rule, it was acknowledged as the most optimal one. A similar model exists in the United States, although it does not, like in Poland, result from the solutions accepted in the electoral law²¹⁹, but from the applied practice.

In my text I would like to analyze three crises that appeared around the presidential elections, two in the USA and one in Poland. At their background I would like to assess the decisions made by the highest judicial organs in both countries, especially their consequences for shaping a particular model of constitutional system, as well as the role of supreme courts in it. I will begin the analysis with the presentation of the election crises in the USA in 1876 and 2000.

²¹⁸ Art. 101 of the *Constitution of the Republic of Poland of April 2nd, 1997*, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

²¹⁹ In the United States there is no state electoral law either for the elections to the Congress or the presidential elections. The elections are conducted according to election regulations set by each state autonomously.

The Election Crisis of 1876 in the US

The crisis resulted from a very even contest between the Republican Party candidate, Rutheford B. Hayes, and the one of the Democratic Party, Samuel J. Tilden. The weakness of the Republican candidate had created, for the first time in a quarter of the century, a real opportunity for Democrats to regain the highest posts in the federal government²²⁰. It ought to be remembered that since the election of A. Lincoln and the times of the Civil War, the Democrats, identified with so called rebellious southern states²²¹, had played second fiddle and lost subsequent elections to both houses of the Congress, as well as the presidential ones.

During the elections held in 1876, however, there was a visible difference. Initially it seemed, in view of clear superiority of the Democrats and obvious weakness of the Republican candidate, that Tilden would acquire the majority of votes in the Electoral College. Yet, when this perspective began to materialize, the Republicans undertook particular actions in four states, which resulted in their advantage over the electors.

In Florida, Louisiana and North Carolina, the state authorities dominated by the Republicans and military men²²², invalidated thousands of votes for Democratic candidates and electors, by which they gained their electors. However, one of the elected electors was a federal official, which made his mandate invalid. In his place the Republican governor appointed an elector from members of his party, which tipped the balance of presidential voting in this state in Hayes's favor. As a result of the Republicans' actions, the distribution of votes in the Electoral College was 185 to 184 in favor of Hayes. Invalidating their actions, even concerning one elector in Oregon, was tipping the balance in Tilden's favor.

These, not entirely honest actions of the Republicans, had led to the political confrontation in Washington. Determining how to qualify the ac-

²²⁰ P. Zaremba, *The History of the United States*, London 1968, pp. 292–293.

²²¹ The Democrats had political domination in the southern states and indeed were greatly responsible for so called secession of these states and the creation of the Confederation of the Southern States by them. It must be remembered, however, that the Democrats were active also in other states, yet there they were identified with, e.g. the head of the Supreme Court R. Taney, responsible for the controversial decision in case of D. Scott.

²²² One must remember that military authorities still played significant role in the southern states. As a result of Reconstruction, introduced after the Civil War, there were still special regulations limiting the independence of local authorities and civil rights.

tions in the light of legal regulations in power had become one of the most crucial elements of the battle.

In its second chapter the Federal Constitution allows the states to determine the procedure concerning the election of their electors to the Electoral College. The role of the federal authorities had been determined as follows: the Presiding Officer of Senate in presence of the Senate and the House of Representatives performs the opening of the state confirmations of the electors election, and "*the Votes shall be then counted*".

In this situation the dispute was concerned over the issue whether the counting was to be made by this Presiding Officer of the Senate (the incumbent vice president Ferry, one of the Republican leaders), both houses separately (in the Senate the Republicans prevailed whereas in the House the Democrats held the majority) or both houses jointly (altogether the Democrats prevailed)?

The outcome of the elections depended on resolving this question, and actually confirming the manipulated elections of the electors in the states (the Democrats used similar practices²²³ in this field too).

Special commission for deciding the result of the election

It was acknowledged that the best option to make the way out of the crisis was to appoint the special commission. The commission was then responsible for the fate of the presidential elections. The commission consisted of five Senators and five Congressmen. In accordance with the expectations, the Republican majority in the Senate appointed three Republicans and two Democrats, while the Democrats prevailing in the House of Representatives appointed three Democrats and two Republicans. In this way both parties reached the balance in the commission. Additionally, the commission was to consist of five judges of the Supreme Court, four of whom were to be appointed by federal district judges. As a result of their appointment there were to be two Democrat judges and two Republican ones. The fifth judge was to be appointed by the four previously appointed

²²³ It has to be noted that in the states where Democrats dominated, they used similar practices in "counting" votes.

judges. It was expected that they would appoint the only independent judge of this court, judge Davis. It was he actually, who could resolve this complicated situation. However, Davis, probably fearing of such an immense responsibility, took advantage of his election to the Senate from Illinois and resigned from his post.

Among the remaining judges of the Supreme Court there were neither Democrats, nor independent judges. Therefore, it was a Republican that had to be the fifth appointed judge and the fifteenth member of the commission.

The Democrats agreed for this post to be taken by judge Joseph P. Bradley, appointed by the Republicans. They calculated that he would be the one to reject the party attitude, but would be impartial in his assessment. As it soon appeared, these hopes were groundless. Bradley occurred to be a loyal Republican, and not only tipped the balance of the commission's decision in favor of the Republican candidate, but also was the one who had written the justification of the decision taken with the majority of one vote, two days before the inauguration of the President on March 2nd 1877. It is worth noting, however, that the Democrats did not particularly protest against the decision of the commission. Such a situation could happen since the Republicans in turn agreed to withdraw entirely from the policy of so called Reconstruction, and resigned completely from any repressions against the Southern states. The Democrats recognized that "loosening" restrictions towards the states already dominated by them was much more significant for the interests of the South than taking the Presidential office by Tilden, hence this could still motivate the Republican radicals to foster the anti-Southern phobias in the Northern states. This, as it seemed, step back, let the Southerners leave the state of isolation, and the Democrats to win the following presidential campaign.

The most significant legal issue to be settled by the commission was answering the question whether the confirmations of the electors' election if transferred in an appropriate way by a state official could be questioned. The question was of crucial importance for acknowledging or not the decisions of Republican and military state officials from Florida, Louisiana and South Carolina. It was there, where apart from such certificates made on the basis of the election results taking into account the invalidation of the Democrats' votes, there were also protocols prepared

by the election commissions dominated by Democrats and acknowledged these votes.

A decade afterwards, drawing conclusions from the aforementioned problems, the Congress passed the bill determining the rules of conduct in similar situations in a more precise way. Till the time of the elections in 2000, such issues had not occurred on a similar scale.

Although the whole situation did not do the Supreme Court credit, it had paradoxically influenced upon the strengthening of its position. It might not have been directly involved in solving the issue as an institution, yet the presence of five of its members in the commission made it a true arbiter of the argument. Both parties of the confrontation and the state opinion were aware of the fact that without the involvement of the authority of the Supreme Court judges any other solution would be defective. Therefore, the largest animosity focused on judge Bradley. He became the object of an extremely severe political campaign and accusations of various connections, especially of preferring the party interests to the authority of the law. The political crisis had, however, been prevented, and the Court had been strengthened as a result²²⁴.

The Election Crisis of 2000 in the US

The presidential election held in 2000 involved fierceness that had not been known for a long time, which resulted from the fact that both vice president Al Gore and governor George Bush, who were running for the office, acquired almost equal support in surveys, which showed analogically in the equal distribution of votes in the Electoral College.

After votes from all the states, apart from Florida, had been counted, it occurred that vice president Gore received 267 votes of electors, whereas governor Bush 246 votes. The necessary majority for the election in the Electoral College was 269 votes; hence the results of voting in Florida, having 25 votes in the College, were to be decisive. The first results of the voting in that state were favorable for Bush, who overtook his rival by 537

²²⁴ For more on the circumstances of this election crisis see: P. L. Haworth, *The Hayes–Tilden Disputed Presidential Election of 1876*, Cleveland 1906; W. Severn, *Samuel J. Tilden and the Stolen Election*, New York 1968; W. Rehnquist, *Centennial Crisis: the Disputed Election of 1876*, New York 2003.

votes. It was an extremely little difference, making less than 0.001% of given votes. This preliminary results meant the victory of Bush in the elections. Bush even received congratulations from the rival. Moreover, in four other states where Gore had won, the difference was also minimal²²⁵.

However, it was already in the morning of the November 8th, 2000 that the staff of the vice president Gore questioned the results of voting in Florida stating that in three constituencies, due to the faulty work of voting devices²²⁶, the electoral intention of the voters had been distorted, and their votes were counted for the wrong candidate. Therefore, it was demanded that the procedure of counting votes in these constituencies was to be resumed (especially in Palm Beach constituency, where actually candidate Buchanan, neighboring Gore on the voting list, had acquired a far larger number of votes than in other constituencies).

What is more, Gore's staff remarked, a couple of thousand votes would arrive by mail (mainly from soldiers who were on missions beyond the USA territory), which were to be, according to them, for the Democrat. However, when it soon appeared that the overseas votes made the superiority of Bush larger, the whole impact of the Gore's staff (and actually an army of lawyers who arrived to Florida), was directed at questioning the results in Palm Beach and forcing yet another counting of votes. This initiated probably the most spectacular legal struggle in history, which was additionally conducted in the awareness of the whole world.

The situation was also complicated by the political distribution of power in Florida authorities. The state administration was held by the Republicans, with the governor Jeb Bush, the brother of the candidate for the Presidential office, whereas in the state legislative and supreme court the Democrats prevailed. Gore's lawyers were intending to acquire solutions in court, yet they remembered that eventually it would be the federal Supreme Court that would settle the case. In this bench the Republicans prevailed 5:4.

On the other hand, the time worked in favor of the Republicans, since the ultimate results of the elections in Florida were to be transferred to Washington by the Republican state secretary of the state.

²²⁵ In New Mexico the difference was 0.006%, in Wisconsin 0.22, in Iowa 0.31, whereas in Oregon 0.44%. Altogether these states gave College 33 votes.

²²⁶ Voting in Florida (like in many other states) was performed with the use of devices perforating holes on voting cards beside the name of a preferable candidate.

Bush's lawyers forced the initiation of the recount procedures at the level of state courts, in which situation the Supreme Court of Florida, dominated by the Democrats, complied with the suggestion of Gore's lawyers, that in this counting the intentions of electorate ought to be examined. Thus, thousands of votes were thoroughly analyzed both from the perspective of the placing of a perforated hole on a voting card, and the way a hole was perforated²²⁷. Such a procedure lasted for a very long time, and soon it had become obvious that the election commissions would not manage to count votes before the date of transferring the complete protocols from the elections of electors by the state of Florida to Washington.

Nevertheless, the staff of Bush, unwilling to take the risk of the results of this counting, forced the introduction of the decisions taken by the Supreme Court of Florida to the federal Supreme Court. In this way the case *Bush v. Gore*²²⁸ had been resolved.

Decision of the US Supreme Court

On December 12th, 2000 the attention of the whole country, and without much exaggeration it can be stated that the attention of the whole world, was drawn to the edifice of the Supreme Court placed just beside the Washington Capitol housing the Congress. The Court answered two questions: the demand to cease the recount, as well as invalidating the decision of the Supreme Court of Florida, which by consenting on this "examination of the intentions" of voters had actually changed the content of the state election law during the elections.

When it comes to the first question, the judges occurred to be above the party divisions, and ordered to cease the further recount with the majority of 7:2. Referring to the second question, however, the result of the voting reflected the party preferences (5:4) in favour of the Republicans, which meant that the state court was denied the right to make changes in the election law regulations during elections.

²²⁷ A voting device was perforating a triangular hole. For a vote to be considered valid it was necessary that paper be torn from a voting card in at least two out of three apexes.

²²⁸ *Bush v. Gore*, 531 US 98 (2000).

The decision of the Supreme Court had automatically aborted the argument. Against the expectations of his supporters, Gore did not risk to contest openly the decision that had been taken. In this way the state authorities confirmed the victory of Bush, who was able to assume the office due to the electors' votes.

The situation described had increased, in an unprecedented way, the authority of the Supreme Court of the USA in the constitutional system of this state. As the highest arbiter of political cases, the Court had actually taken the superior position within the American federal government. The Court confirmed that as the guardian of the obedience of the law it plays the crucial role in American democracy.

The Election Crisis of 1995 in Poland

Like the above described American elections, the presidential elections in Poland in 1995 were held in the situation of balanced confrontation between the president in office Lech Wałęsa and the candidate of Sojusz Lewicy Demokratycznej (SLD) (the Alliance of Democratic Left Wing) Aleksander Kwaśniewski. It was already in the first round that the difference of votes between two victorious candidates was minimal – Kwaśniewski received 35.11 % of votes, whereas Wałęsa 33.11%.

The second round brought an extremely severe confrontation of both candidates, in consequence of which the ultimate result was slightly more favourable for Kwaśniewski, who received 51.72% of votes (Wałęsa 48.28%). The dramatic situation stemmed from the first surveys, according to which it was Wałęsa's victory, yet according to the following ones – hour by hour – the situation was changing until eventually in the morning of the November 20th, 1995 it became clear that Kwaśniewski had won. The difference of votes in favour of Kwaśniewski about 650,000, with around 19 million of votes in total.

However, the problem of the elections validity appeared almost immediately. Two issues, extremely intensely exploited during the campaign, were raised as significant factors that, according to the opponents of Kwaśniewski, had influence on the validity of the elections.

Firstly, these were financial matters. Kwaśniewski's staff had taken advantage of all the possible opportunities to present Wałęsa as a person who got enriched using the "Solidarność" symbol. It was to show the contrast with Kwaśniewski, who took pride in declaring modest property. It occurred, however, that he concealed the property owned by his wife (including the famous shares in the insurance company "Polisa"). Despite this, the left-wing propaganda was more effective, and voters were convinced that Kwaśniewski was the candidate who was more transparent financially.

Secondly, it was the issue of education. Although Wałęsa was still presenting himself as a working class representative, he had a secondary school education. Kwaśniewski had registered as a candidate with an academic degree. The issue of the superiority of Kwaśniewski's education had been intensely exposed in his campaign. This specific "superiority" of his education was one of the most significant factors determining the decisions of voters during the elections, which was vivid in almost all the analyses of election decisions made particularly by hesitant voters.

While the first issue did not present any legal possibility of questioning the actions of Kwaśniewski's staff, the other one involved making an untrue declaration during the candidate's registration, since Kwaśniewski, as it occurred, could not confirm his university education.

Therefore, almost 600.000 protesting notes were forwarded to the Supreme Court, in which it was pointed that as a result of an untrue declaration voters were mistakenly expressing their support for Kwaśniewski²²⁹.

Decision of the Polish Supreme Court

These cases were resolved on the December 9th, 1995²³⁰ by the Supreme Court as a whole, namely the Chambers of Administration, Labour,

²²⁹ In these protests also other cases of breaking the election law had been mentioned, however they were not of such a significance as the ones concerning the effects of the lie referring to Kwaśniewski's education.

²³⁰ *Wyrok Sądu Najwyższego z 9 grudnia 1995 roku (Resolution of the Supreme Court of December 9th, 1995)*, III SW 1102/95, <http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III%20SW%201102-95.pdf>.

and Social Insurance. The content of the resolution was indeed amazing, since firstly the Court decided that:

"Referring to the accusations concerning the information on the education, the Supreme Court with all the members of the Chamber of Administration, Labour and Social Insurance fully agrees with the opinion expressed in the grounds for the decision of the Supreme Court from the 5th December 1995, III SW 1094/95 (also confirmed in the grounds of all other decisions on the legitimacy of large groups of protests) that Aleksander Kwaśniewski does not have university education, hence the information concerning this matter presented in the registration of this candidate was untrue. The Supreme Court emphasises the discrepancy between this information and the real state, since it is not necessary to analyze subjective elements behind the deliverance of such information. Since the question whether delivering it was willful or not, purposeful or not, does not make any difference to the fact that the information was untrue. In this situation, it must be stated that delivering such information by the Election Comity registering the candidate for the president's office and publishing it in the announcement of the State Election Commission was the breach of the bill on the election of the President".

However, instead of drawing legal conclusions on these grounds, in the further part the Court began incomprehensible pondering concerning the situation whether or not this breaking of the law had affected the result of the elections²³¹. Hence, the Court remarked that, *"no measurable or verifiable influence of the stated breach of the election law on the election results had been recognized"*, as well as, *"the Court did not decide that the proved breach the election law had altered or even could alter in a significant way the proportion of votes for the two candidates"*.

The final conclusion of the Court was worth of Pilate:

"The Supreme Court emphasizes that this resolution is but a statement of the lack of the legal grounds for questioning the validity of the elections. It is thus beyond the competence of the Supreme Court, what is raised in the protests, to assess the personal virtues and moral features

²³¹ The Supreme Court made an attempt aiming at the presentation of particular general conditions concerning the relation between the act of misinformation included in the public documents referring to Aleksander Kwaśniewski and the process of individual assessment and voting decisions taken on this basis.

of the person elected for the office of the President of the Republic of Poland".

Court showed, that law might actually be used as a means to achieve various purposes, without the need of obeying any rules, and the individuals perceiving law in such way acquire *de facto* protection from the highest judicial organ of the state. The grounds of the resolution of the Supreme Court were actually preserving the deep erosion of the Polish legal system, and turned the rules of a democratic state of law into the meaningless clichés. The negative effects of this situation are still present.

There are no reasons to argue with the premises of the Supreme Court's decision, taking into account the fact, that it was its own members who, in an unprecedented number of five separate votes, criticized the opinion of the majority. However, the assessment of the Supreme Court's decision in the context of how the democratic state of law is comprehended as the supreme constitutional rule still remains a fundamental issue.

By its resolution the Supreme Court approved of the situation when the highest office of the state, the office appointed to "*guard the obedience towards the Republic's Constitution*"²³² was taken by an individual, who broke this law intentionally fighting for the office. The Court had also released itself from the moral judgment of this fact by conducting incomprehensible pondering over the question of how the stated blatant breaking of law had affected the decisions of voters.

Conclusion

Deep political crises resulting from the balance of power between the most important groups participating in elections force political elites to search for the ways of easing these potential tensions. In the situations discussed above, the highest judicial organ of a state accepted the role of the arbiter. However, the results of this arbitrage, as it has been described, were entirely different.

The decisions taken by the American judges in 1876 and the Supreme Court in 2000 served the strengthening of their position in the American constitutional system. They also enhanced the role of law as the most im-

²³² Art. 28 §1 Ustawy konstytucyjnej z 17 października 1992 roku...

portant arbiter of political arguments preventing violent solutions. In conclusion, they contributed to the construction of legal order, referred to in American system as rule of law.

The decision of the Polish Supreme Court in 1995, on the contrary, proved that the law of the IIIrd Republic was a completely relative phenomenon. Although the Supreme Court confirmed the obvious violation of the electoral law by one of the candidates and had no doubt that it had to affect the result of the election, he did not dare to annul the election.

In this way the court also lost the chance to build its authority, choosing instead a little worth theoretical consideration.

X.

**Constitutional Tribunal
On War with the President,
Government and Parliament
of Poland in 2015**

Introduction

In November 2015 victorious party PiS (Law and Justice) acquired over 50% of seats in both houses of the Parliament as a result of general election, which allowed it to form a majority government independently. It ought to be emphasized that In the history of free Poland after 1989 such a situation happened for the first time and obviously must have been surprising for the major part of commentators. Most of all, however, the above situation was astonishing for the so far ruling party Platforma Obywatelska (Citizens Platform) and its coalition partner Polskie Stronnictwo Ludowe (Polish People's Party), as well as the party that had emerged from the circles previously associated with Platforma, known as Nowoczesna (Modren).

We have no intention of analyzing tense political relations during this particular period, but we do intend to examine if the Constitutional Tribunal led by professor Andrzej Rzepliński had abandoned its apolitical position. Therefore, we need to outline the positions and standpoints taken throughout the period of several – month lasting fierce argument between the most significant parties.

Political conditioning of the argument of the Constitutional Tribunal with the President and the Parliament

According to PiS powers ruling Poland before the 2015 elections had made an attempt to introduce such regulations that would secure its elementary interests in case PiS won the autumn general election. The leadership of PO supported by PSL assumed that President Komorowski would hold his post after the election which was to be held in the summer of

2015. Yet, they took into account the possibility of losing majority in the parliament and their government. Assuming that PiS would aim at "spoiling the state" this group intended to strengthen the Constitutional Tribunal in order to make it the unmovable obstacle against changes in legislation that had been announced by the opposition.

This scenario occurred to be impossible to fulfill due to unexpected election failure of B. Komorowski, as well as more and more inevitable victory of PiS in the general election. When it was clear that PiS would have a significant supremacy (although the thought of such a massive victory had not been accepted yet) legislative changes had been conducted that aimed at guaranteeing the Tribunal the membership for the following four years that would enable it to block effectively all the reforming activities of the new parliament and government.

Both PO and PSL denied having such intentions during their work concerning the new foundations of the Tribunal functioning. The sole objective declared by them was to put in order the aspects regulating the work of the Tribunal, which were not particularly clear. In case of the issue of changing the date of electing judges, the point was to provide the Tribunal with the opportunity to act in full panel incessantly. It was claimed particularly, that due to the end of the term of five judges of the Tribunal that coincided with the end of parliamentary term there was the necessity of setting the rules concerning the election of the new judges to guarantee the Tribunal's undisturbed acting.

The initial point of our further pondering ought to be based on the analysis of the membership of the Tribunal at the end of term of the parliament elected in 2011.

Five of the judges were appointed during the term of 2005–2007 parliament, i.e. in the period when the majority was held by PiS (although not the majority that allowed the independence in appointing judges). The following judges were associated with this party: Maria Gintowt-Jankowicz, Wojciech Hermeliński, Zbigniew Cieślak and Teresa Liszcz. Marek Kotlinowski was connected with Liga Polskich Rodzin (the League of Polish Families). Whereas Mirosław Granat, appointed with the recommendation of PiS, after some time took the position closer to PO. The terms of the following six were coming to an end the soonest: M. Gintowt-Jankowicz, W. Hermeliński and M. Kotlinowski – on 6th November 2015, Zbig-

niew Cieślak on 2nd December 2015, Teresa Liszcz on 8th December 2016, and M. Granat on 27th April 2016.

As many as nine out of ten judges appointed between 2007 and 2012, which was when the parliament was dominated by PO, were associated with this party. These were subsequently appointed: Andrzej Rzepliński, Stanisław Biernat, Stawomira Wronkowska-Jaśkiewicz, Stanisław Rymar, Piotr Tuleja, Marek Zubik, Małgorzata Pyziak-Szafnicka and Leon Kieres. One Judge, Andrzej Wróbel, was appointed with the recommendation of Sojusz Lewicy Demokratycznej (the Alliance of Democratic Left Wing) Summarizing, the judges associated with PO prevailed in the Tribunal having 9 members, including the ones holding the functions of the president and vice president as well as being in good relations with the judge recommended by SLD, A. Wróbel, and judge M. Granat, who shifted into their political positions.

In the event of inevitable change of the parliamentary majority, between 2015 and 2019, the situation in the Tribunal would have changed significantly if all the vacant positions had been taken by judges recommended by PiS. In June 2018 at the latest as many as eight judges would have been appointed to the Tribunal by the new elected parliament, which would have most probably meant the ones associated with PiS. This in turn would have resulted in the inability to block effectively legislative activities of the parliamentary majority taking advantage of the judicature of this organ. Additionally, due to the leaving the bench by the President and the vice President it was clear that President A. Duda, would appoint for these key positions judges from amongst the newly appointed ones. What is of importance, is the fact that there was only one vacant position to be filled in May 2019 by the end of this parliamentary term.

In the light of the above presented conditionings one may not accept as credible the assurances expressed by the circles focused around PO, claiming that the actions taken in order to accelerate the appointment of five judges of the Tribunal before the beginning of the new parliament term were not related to the aim of maintaining the political control over the Tribunal until the end of this parliament's term.

Thus, the changes in the act on the Constitutional Tribunal²³³ introduced by the previous parliament became the area of confrontation. On

²³³ Ustawa z 25 czerwca 2015 roku o Trybunale Konstytucyjnym [The Act on the Constitutional Tribunal from 25th June 2015], (Dz. U. poz. 1064).

the basis of the act on 8th October 2015 five judges were appointed: Ryszard Hauser, Krzysztof Ślebzak, Andrzej Jakubecki, Bronisław Sitek and Andrzej Sokala. The two last ones were recommended accordingly by PSL and SLD, whereas the first three ones by PO. This solution meant that by the end of the term of 2015 parliament, the judges related to PO were to be prevailing significantly in the Constitutional Tribunal.

Due to essential doubts regarding the constitutional character of the imposed change in the act on Constitutional Tribunal, President Andrzej Duda did not accept the oath of five judges appointed on 8th October 2015. In consequence they did not assumed the positions in the Tribunal. Simultaneously, on 25th November 2015 Sejm adopted the resolution on the legal invalidity of October resolutions, on the basis of which the judges had been appointed.²³⁴ Then, on 2nd December 2015 Sejm appointed five following judges: Henryk Cioch, Mariusz Muszyński, Lecha Morawski, Piotr Pszczółkowski and Julia Przyłębska²³⁵, whose oath was accepted by President A. Duda and who assumed the posts of the Constitutional Tribunal judges.

The breaching of constitutional competences of VIII term Sejm

The filling of these positions had caused the first major argument between the Constitutional Tribunal on the one side and the parliament and the government on the other²³⁶. Its focal point was the judicature of the

²³⁴ Uchwały Sejmu z 25 listopada 2015 roku w sprawie nieważności uchwał Sejmu RP z dnia 8 października 2015 roku o mianowaniu sędziów [The Resolutions of Sejm from 25th November 2015 on declaring the legal invalidity of the resolution of the Polish Republic Sejm from 8th October 2015 on the appointment of judges] (Monitor Polski 2015 poz. 1131, 1132, 1133, 1134 i 1135).

²³⁵ Monitor Polski 2015, poz. 1182, 1183, 1184, 1185 i 1186.

²³⁶ It is worth mentioning here a number of opinions and standpoints in which this issue has been assessed. The ones to be mentioned are: B. Banaszak, *Opinion from 24th November 2015 roku*, BAS-69/15A as well as his *Gloss to the Judgement of Constitutional Tribunal from 3rd December 2015*, Przegląd Sejmowy Nr 2(133)/2016; J. Szymanek, *Opinion from 23rd November 2015*, BAS-69/15A; M. Muszyński, *Anatomy of "a plot". Legal Analysis of the Process of Appointing the Constitutional Tribunal Judges in the Autumn 2015*, Przegląd Sejmowy Nr 2 (139)/2017; or M. Wiącek, *Gloss to the Judgement of Constitutional Tribunal from 3rd December 2015*, Przegląd Sejmowy Nr 2(133)/2016.

Tribunal from 3rd December 2015 (K34/15). This case resulted from the motion of a group of PiS MPs questioning a number of regulations of the act on the Constitutional Tribunal from 25th June 2015 (further on: the act on CT), amongst which there were the ones that led to the appointment of the five judges by the old parliament on 8th October 2015.

We are intending to focus on this part of the judiciary since its effects are still of significance.

The subject of the proceedings regarded the accordance with the regulations of:

Art. 112 and 197 of the Constitution with the regulations of art. 19 point 2 of the act on the CT saying that, "*The motion regarding the notification of a candidate for the post of a judge of the Tribunal is to be forwarded to the Speaker of Sejm within three months before the day the term of a Tribunal judge ends*", as well as

Art. 62 point 1, art. 112, art. 194 point 1 and art.197 of the Constitution with the regulation of art. 137 of the act on CT saying that, "*In case of the Tribunal judges whose term ends in 2015 the time limit to deliver motion referred to in art. 19 point 2 is 30 days since the day the act came into force*".

It was this construction of the regulations in question that became the basis for appointing the judges by Sejm on 8th October 2015.

Let us settle first what such a construction of regulations meant in practice. When this amendment to the act on CT was adopted the date of general election had not been established yet. Furthermore, neither was known the exact date of the end of term of the parliament elected in 2011, which began its term on 8th November 2011. In accordance with the regulations of the Constitution, the election to the Sejm of the 7th term were to be announced by 1st August 2015, and their date was to be selected out of three dates: 11th, 18th, and 25th October, since actually it was impossible to hold the election on 1st November 2015²³⁷.

The final decision concerning the selection of the date was to be taken by the new President of Poland Andrzej Duda, who was the President-elect²³⁸ on the day the act was adopted. Therefore, it ought to be

²³⁷ 1st November is the All Saints Day it is obvious and due to its character and the mass journeys of the Poles to the places of burial it is obvious that planning general election on this day was out of question.

²³⁸ The second round of the presidential election was held on 24th May 2015, while the office was taken by Andrzej Duda 6th August 2015. It ought to be pointed out here that there are discrepancies when it comes to the interpretation whether the president is entitled to de facto

emphasized at this point, that by adopting the act on the CT on 25th June 2015, the parliamentary majority had no knowledge which Sejm would have the right to decide on the appointment of at least three CT judges whose term was due to end on 6th November 2015. It was entirely obvious, however, that the term of judges that was to end at the beginning of December 2015 would take place during the term of new Sejm. This issue is of fundamental significance while assessing the content of the analyzed judicature of CT.

While adopting the act on CT on 25th June 2015 the majority at that time, as we have pointed out before, claimed that they aimed at specifying the issue of appointing the judges of CT, which in the act so far had not been determined with any determined date. Such a solution was applied by the previous legislator by referring to detailed regulations in the Organizational Rules (Regulamin Sejmu) of Sejm assuming that the question of time limits in which Sejm performs its constitutional prerogative to appoint the judges of CT is included in the range of its own disposal²³⁹.

It ought to be also emphasized that according to the regulation valid before the adaptation of the new act, judicature of CT in most significant cases, e.g. in so called "full panel" required the participation of 9 judges present in adjudicating panel²⁴⁰. The significance of this stemmed from the fact that even temporary vacancies on the five positions of judges in the Tribunal would in no way hinder its work, including the cases of larger gravity. What is important as well, also the new regulation from 2015 included in art. 44 point 3 the full panel was determined as consisting of nine judges.

Only after setting the context one may comprehend the essence of changes introduced in June 2015 regarding the manner of appointing

shorten the term of the previous Sejm while setting the date of the first assembly of the new one. On the other hand, there are no controversies regarding the situation that the term of the previous Sejm might be prolonged with the time necessary to set the first assembly of the newly elected Sejm.

²³⁹ Regulamin Sejmu RP z 30 lipca 1992 roku [*The Organizational Rules of the Polish Republic Sejm from 30th July 1992*] (M.P. Nr 26, poz. 185). Accordingly to the regulations of art. 30 of the Rules for many years there had been no problems in efficient filling of positions in the CT without any consequences for the effective way functioning of this organ.

²⁴⁰ Art. 25 par. 2 of the act on the Constitutional Tribunal from 1st August 1997 [ustawa z dnia 1 sierpnia 1997 roku o Trybunale Konstytucyjnym] (Dz. U. Nr 102, poz. 643) stated: "Hearing a case in full panel requires the participation of at least nine judges of the Tribunal. A trial is presided by the president or vice president of the Tribunal, and in case of they are not able to preside, by the oldest judge of the Tribunal".

new judges of the Tribunal. Even more so if we analyze the route of forwarded motions in the dynamic environment of political proposals.

The primary version of the act's project (Sejm paper No 1590/VII) it was suggested that the procedure of appointing the judges should be initiated 6 months before the end of term of the judge who is finishing his service (therefore in this particular case it meant the date at the beginning of May 2015). Eventually, the candidate was to be presented to the Speaker two months before the end of term, i.e. at the beginning of September 2015.

It is already clearly seen in this suggestion that the main aim was to deprive the new parliament of any influence on the appointment of the judges whose terms were beginning during the term of this Sejm. Then, however, this idea was abandoned and for some time the general regulation described in the act on CT from 1997 was applied. Finally, though, in April 2015 the solution that regarded presenting candidates four months before the end of term at the latest was accepted, which during the further work on the act eventually determined the limit date of three months. As a result the parliament decided that the ultimate date limit for the presentation of the first three candidates for the posts of new judges would be on 6th August 2015. It seems that this solution had emerged in relation to the fact that on this very day the newly elected President, A. Duda was to take his office.

Thus, the accepted construction had objectively excluded the authorization of the new parliament to appoint the judges of CT whose term was finishing with the beginning of the new parliamentary term. As it had been known since 17th July 2015 that the general election would be held on 25th October 2015²⁴¹. Such a date of the election implied, however, that the first assembly of Sejm could take place on the day before the term of CT judges ended, hence hypothetically, the new Sejm could provide the incessant functioning of the CT in its full panel consisting of fifteen judges²⁴².

²⁴¹ Zarządzenie Prezydenta RP z 17 lipca 2015 roku [The Decision of the President of the Polish Republic from 17th July 2015].

²⁴² In the justification of the Tribunal's judgement (p. 2020) there is an uncritical summary of these "intentions of the legislator" – these solutions were "motivated by pragmatism by the expected necessity to guarantee for the Tribunal ability to adjudicate in full panel in the transitory period". Let us emphasize once again – this statement was untrue since "full panel" meant 9 judges on the grounds of regulations from 1997, which was in no way endangered with the end of the term of three judges on 6th November 2015.

Taking the above into consideration, in no way can one acknowledge arguments accompanying the approval of the particular legal construction, even more so since while it was being adopted one could not have excluded the fact that the election would have been held, e.g. on the first possible day, i.e. 11th October. Then it would have guaranteed Sejm with almost a month to deal with the issue of appointing the first three of judges finishing their terms. There would have been no formal problems to fit in the time limits, provided the procedures of the act from 1997 had been in power.

Only in this context it is explicit that the real intentions of the ones who had introduced the changes were entirely different from the ones that were declaring.

The sentence of the Constitutional Tribunal from 3rd December 2015

The above presented arguments were not taken into account by the Constitutional Tribunal which was resolving the issue of the constitutional character of the presented regulations. Basing on false premises, sharing the untrue motivation of the legislator, the Tribunal had constructed the reasoning which in no way could be accepted on the grounds of the rational rules of law.

In the first part of the reasoning included in point 16 of the justification to the judgement, the CT focused on the question of breaching so called the regulation autonomy of Sejm with the subject regulation. This accusation of breaching was forwarded by the claimant claiming that the issue of determining the time limits of performing by the chamber particular activities regarding the appointment of individuals to the state organs is the internal matter of Sejm. The CT had conducted a fairly broad reasoning regarding this issue, yet in its key fragment it appeared to be highly concise, so to say. It stated namely (P.6.12) as follows, *"the question of the time limit of forwarding a motion regarding the submitting of a candidate for the position of the CT judge, apart from undoubtedly technical aspects and internal ones from the perspective of the work organization, also possesses the dimension that exceeds beyond the sphere of exclusively the regula-*

tory matter of Sejm. As mentioned above, efficient and timely filling of the vacant position of a CT judge is the responsibility of the suitable state organs which cannot neglect it. (...) The legislator is obliged to regulate the matter of the time limit for the submitting of a candidate for the position of a CT judge in the manner that will guarantee the protection of the constitutional term of a Tribunal judge, the incessant course of assignments fulfilled by the constitutional courts, as well as the efficiency, transparency and diligence of the appointment process as a whole".

There is no point in returning for the third time to prove the obvious fact that in the situation present on the turn of VII and VIII terms of Sejm there were no objective premises which would make the legislator assume in June 2015 that *the incessant course of assignments fulfilled by the constitutional courts, as well as the efficiency, transparency and diligence of the appointment process as a whole* could be jeopardized in any possible way. On the contrary, the regulations from 1997 in power so far had never led to any threat toward the functioning of the CT. Contrarily, the practice up to then had proved that even much more fragmentized chambers were capable of achieving compromise regarding the appointment of the judges without much trouble. Additionally, as it has been implied, even hypothetical hazard towards the smoothness in appointment of the new judges due to the uncertain starting moment of the new parliamentary term could in no way influence the infinite capability of the CT to adjudicate, as since the beginning of December 2015 its 12-judge panel had been guaranteed. This panel was entirely sufficient to assure *the incessant course of fulfilling assignments* of the CT, including the adjudication of the most significant cases in, so called, *full panel*.

Moreover, the attention should be drawn to the absurd manner of reasoning of the CT in which it was claimed that the constitutional power of Sejm means its obligation. The above is of particular significance since this manner of reasoning will also be present in different circumstances regarding other judicature. It is worth remarking, however, that the absurdity of this reasoning stems from unjustified assumption that *the efficiency, transparency and diligence of appointment process as a whole* were conditioned by the introduction of such a mandatory time limit for submission of candidates for the position of the CT judges which would exclude the possibility of conducting this procedure by Sejm of the following term, during which the terms of the five judges were due to end.

What is more, in order to be absolutely positive that the new President would astonish the majority with too prompt date of election, which could actually paralyze the appointment of the judges, the stipulation of art. 19 point 2 was introduced that was directed explicitly at the appointment of the judges in 2015. In this case, the fact of conditioning the date of submitting candidates regardless of the time limits concerning the terms of the judges as well as the parliamentary term, proves unambiguously the falseness of this laconic reasoning of the Tribunal. It is fairly possible that this obvious falseness of the presented arguments made the CT judges incapable of doing better than the above presented concise remarks.

However, there is another element that was entirely neglected in the justification, and yet of a fundamental significance. Both this laconic justification and the statements made by professor A. Rzepliński or other judges and the leaders of PO, PSL or Nowoczesna, were persistently focusing on the justification claiming that the regulations adopted in June 2015 did not aim at playing against the future governing majority. They were to serve the permanent regulation of these procedures and guaranteeing the efficiency of CT activities. Also in this case the arguments are false and it is not difficult to prove that they could have led to the opposite results. It is so since Sejm conducts the appointment of the judges with the absolute majority at the presence of at least the half of the overall number of the MPs (art. 17 point 2 of the act on CT). Therefore, as this procedure is of democratic character, it is indisputable that the full filling of all the positions in the Tribunal could be guaranteed in the ultimate way by taking advantage of the regulations included in the act on CT. It is not impossible to imagine the situation when Sejm is not capable of selecting the majority sufficient for the appointment of a judge.

Nota bene, assuming the above mentioned situation the legislator had determined in art. 20 the procedure of the repetition of the voting 14 days later. Hence, it means that while in 2015 the legislator had allowed the possibility of failure in case of a candidate submitted three months before the end of the term of a CT judge and had provided the suitable regulation shortening the time limit to submit the subsequent one, in case of 2015 election no such problems were assumed since the time limit of submitting a candidate was set entirely regardless of objective factors (the term of a judge or parliamentary term). Additionally, it confirms that both in case of the statutory regulation from June 2015 as well as in case of the CT ad-

judication from December 2015 we have the situation of a specific forms of: the effect oriented legislation and the effect oriented jurisprudence.

The Tribunal was even more laconic in its reasoning regarding the constitutional issue of breaching the competences of the Sejm of VIII term by the Sejm of VII term, which were crucial from the constitutional perspective.

Therefore, first the CT (p. 6.16) stated that, "*at the moment of its [act's] announcement, it had not been clear yet when the President would set the election, and moreover when he would set the date of the first assembly of the VIII term Sejm.*" While consenting with this view, which we have done above, it ought to be emphasized the further suggested manner of reasoning by the CT includes but one possibility. The Tribunal stated that since the last date in which the election could be held was on 1st November 2015 (which for obvious reasons was excluded) the term of VII term Sejm could last till 30th November 2015 due to the fact that in these circumstance 1st December 2015 was the last day for the new Sejm to assemble.

Deciding on the constitutional character of the regulation based on such hypothesis is in itself discreditable for the CT. Firstly, since several other hypotheses regarding the possible course of events that could have happened are equally justified. Like the argument that the election might have been held on 11th October 2015, and the first assembly of VIII term Sejm already on 14th October 2015.²⁴³ It would have meant the end of the VII term Sejm on 13th October 2015. The sole fact that the CT had neglected this circumstance entirely, but also the fact that between the extreme ones there had been several other possibilities and in no way had it made any attempt to construct the argument for selecting exclusively one option, proves that the accepted solution was of a completely instrumental character.

Secondly, as it has been pointed at already, due to the fact that there were no premises to claim that the efficiency of the Tribunal in the mid-term may experience the slightest threat. Hence, in each situation the CT preserved the capability of adjudicating cases, including the ones requiring the full panel. Therefore, there were no objective circumstances that

²⁴³ Traditionally National Electoral Commission announces the outcome of general election on a Tuesday after the election Sunday. Therefore, hypothetically the assembly of the new-term Sejm can be held even on Wednesday.

would justify the intrusion of the VII term Sejm into the unquestionable competences of the VIII term Sejm.

By creating certain grounds on the basis of false premises the Tribunal had in consequence made the interpretation (p.6.17) in which it reasoned that the regulation of the Constitution that mandated the right to appoint a judge belongs to Sejm, *"whose time range of action overlaps the day of the expiry or the end of the term of a Tribunal judge."* Only when the *"significant factual circumstances come into existence"*, *"the obligation to appoint a judge of the Tribunal is transferred in the natural way to the subsequent Sejm"*.

We must admit that taking into account the depth of political argument as well as the constitutional matters that emerged in the autumn of 2015, and particularly the temperature of the political debate, the basis of resolving the constitutional complaint in the presented range must seem highly disappointing. In this case the CT had not acted like a constitutional court whose obligation lay in balancing all the potential variants of the situation that might have appeared hypothetically. Only and exclusively basing on such an analysis could the CT make an attempt to establish its standpoint introducing the potential argumentation by the elimination of other possibilities. Such a solution, even though not lacking polemical and controversial elements, would anyway possess the value of thoroughness and perspicacity. The line of reasoning applied by the CT cannot be perceived as thorough and perspicacious, and at the same time logical, hence it is of little value.

It was, however, basing on these premises that the CT, on the foundation of these two sentences decided that the Sejm of VII term was authorized to appoint three judges (so called November ones), whereas the appointment of two judges (so called December ones) meant breaching the Constitution. Still this reasoning is the basis for a hazardous situation not only in the area of a public debate that is present in Poland. Influential groups of lawyers formulate their opinions on its basis, questioning the rightfulness of adjudicating by the present panel of the CT. Furthermore, international centers have been involved in the protection of these two sentences from the CT judicature, which formulate far-fetching accusations claiming that these "arguments" decide on the condition of both Polish democracy and Polish state of law.

On no account can we refer this constitutional crisis to the situation which had become the initial point for the establishing of the modern institution of the judicial control of constitutional character. Comparing these two situations, even though seemingly conditioned in an entirely different manner, proves however how serious constitutional crises might account for either building up the grand role of constitutional court (as it was in the case of American Supreme Court) or to ruining its position and dignity (as it has happened in the case of the Polish Constitutional Tribunal)²⁴⁴.

The case *Marbury v. Madison*²⁴⁵ from 1803

The Supreme Court of the United States, which initiated its activity in 1790, had not managed to ensure itself the position in the emerging system of American Union that could be serious enough to place it, as the Constitution claimed, as equal with the other two branches of the federal power, namely Congress and President, until John Marshall became its Chief Justice.

This situation had not even been changed by the fact that one of the heroes of the Independence War, a close co-worker of George Washington, John Jay, was appointed its first Chief Justice. Since Jay was reluctant to take this position and kept distance towards this function while performing it. Neither was he interested in strengthening the position of the Court. He resigned without any regrets to overtake much less prestigious function²⁴⁶.

Another evidence of the little significance the Supreme Court was perceived with is the fact that after federal offices had been removed to the new capital, the Federal District of Columbia with Washington, it appeared that amongst the erected buildings there was not the one that could be its seat. Thus, the Supreme Court had to be placed for some time, actually il-

²⁴⁴ These issues are the subject of broader studies in the work: G. Górski, *Sąd Najwyższy Stanów Zjednoczonych do 1930 roku*, Lublin 2006.

²⁴⁵ 1 Cranch (5 U.S.) 137 (1803).

²⁴⁶ Let us remind here that after being elected to the office of the New York state governor Jay resigned from the post of the Supreme Court Chief Justice.

legally, in the rooms of parliamentary commissions provided to it by the Congress.

John Marshall took his office in 1801 in peculiar circumstances and as a man of significance. The United States had been the arena of a huge political conflict for several years, which was to be of fundamental meaning for the future of the state.

The conflict was escalating after President G. Washington, the historic leader of the nation, had left his office in 1797. It was the struggle of two grandest individuals on the American political stage, beside Washington. Yet, most of all two opposing visions of the further evolution of the system that USA was to apply. The visions were represented by two, paradoxically closest co-workers of Washington's: Alexander Hamilton and Thomas Jefferson.

Hamilton was in favor of deepening the federation of the American states along with strengthening the competences of federal authorities. His political supporters created the party of federalists.

On the other hand, Jefferson opposed the deepening of the union, and expanding the competences of federal authorities. At the same time, he was the guardian of the sovereignty of the states creating the union. Politicians around him created the anti-federal party of republicans²⁴⁷.

As a result of disagreement in the federalist camp, it was not the unquestioned leader of the party, Hamilton, who succeeded Washington as the president, but his party colleague John Adams²⁴⁸. The further conflicts amongst the federalists that emerged during his term eventually led to the victory of republicans in the elections to both houses of the Congress in 1800, which was a shock for the federalists. Yet, it ought to be pointed out that Jefferson had become the president thanks to... Hamilton. It was the votes of federalists that tipped the balance to his favor. Having the alternative of supporting either his rival Jefferson or another republican, a swindler Burr, Hamilton chose the first option²⁴⁹.

²⁴⁷ Jefferson's republicans had nothing in common with the Republican Party that was established several decades later and still exists. Jefferson's party was closer to the Democratic Party.

²⁴⁸ Paweł Zaremba, *op. cit.*, p. 107–108. Paradoxically, due to the contemporary form of the electoral law the greatest rival of Hamilton's, Jefferson was appointed the vice President, partially thanks to the votes of federalists.

²⁴⁹ In the Electoral College that elected the president, Jefferson had 73 supporters, Burr, also a republican, the same number of electors. Burr did not quit the fight for the office, and here the decision was in hands of federalist electors: Adams – 65 and Pinckney – 64 and Jay – 1. The latter ones were the candidates of the Hamilton part of the party, however his at-

T. Jefferson was to take the office of the President of the United States, and the predominance of republicans in Congress made his situation convenient. There had emerged the perspective of untroubled fulfillment of the election programme, which was actually aiming at the dismantling of the federal institutions that had been constructed with much effort. Hence, there was about to take place the essential return towards the concept that had lain at the foundation of the United States as the loose confederation of independent states.

At the same time, the federalists shaken with the failure were searching for opportunities to survive in politics. It was this search that initiated the concept of taking advantage of the institution of federal judicial branch in order to retain the influence on the public life. The system functioning so far on the basis of *Judiciary Act* from 1789²⁵⁰, was clearly faulty and inefficient. There was, then, the objective need of introducing changes which would improve the efficiency of both Supreme Court as well as the district courts of appeal. Henceforth, on 13th February 1801, i.e. the last days of the term-finishing Congress a new *Judiciary Act* was adopted. However, apart from the necessary amendments that diminished the workload of the Supreme Court judges in courts of appeal, there were also included regulations multiplying the posts of judges in the federal judiciary (e.g. 6 new district courts were established).

However, there was little time, since there were only three weeks left, to fill new positions, or as the newspapers connected with Jefferson would have probably referred to as "sinecures". Adams was to pass his office on 4th March 1801. Yet, the president had managed to deal with this serious matter. The nominations that he had accomplished on 2nd March, were confirmed by Senate according to the requirements of the act. Throughout the following several dozen hours it was necessary to prepare the nomination acts and hand them in to numerous nominees²⁵¹. The work was on progress still on the night of 3rd to 4th March. However, despite the involvement of many people, the nomination acts had not been delivered to all the nominees.

titude also had influence on the behavior of a large part of Adam's supporters. Anyhow, it was Adams and Hamilton who decided whether Jefferson or Barr would become the president.

²⁵⁰ U.S. Statutes at Large 1 (1789): 73.

²⁵¹ Apart from positions of judges, the federalists filled In this manner also dozens of posits In the state administration.

Among the ones who did not receive their nominations was one of the most prominent federalists in Maryland, William Marbury, who was nominated for the post of the judge in the Federal District of Columbia.

Jefferson's republicans were observing this situation with helpless rage. Yet, the moment he took the office, Jefferson ordered his newly nominated Secretary of State, James Madison, not to deliver the remaining nomination acts. This is the decision that resulted in the trial we are interested in.

It is justified at this place to draw attention to the particular role played in this situation by John Marshall, the Secretary of State in the cabinet of the outgoing president. It was him, who conducted the whole undertaking from the technical side, and due to the excess of work was not able to deliver all documents. To highlight the entire situation we need to emphasize that he was appointed for the position of the Supreme Court Chief Justice, which means he was acting in double role. Soon, he was about to become the arbiter in the case in which existence and shape he was deeply involved²⁵².

Taking into account the context outlined above it is one can hardly be surprised that one of the first initiatives taken by the republicans after they had overtaken the power was to change Judiciary Act.

The act was called by them disdainfully "*Midnight Judges Bill*", which expresses their attitude to the work co-worked on by J. Marshall.

On 29th April 1802 Congress adopted the abortion of the law from 1801 and re-establishing the state from 1789²⁵³. As a result of this regulation all the "*midnight judges*" were dismissed.

It is worth remarking at this place that *Judiciary Act* from 1801 had also become the subject of the court trial adjudicated by the Supreme Court under the leadership of J. Marshall. In his short opinion on *Stuart v. Laird* case he merely stated that Congress was authorized by the Constitution to determine the form of lower tribunals and to transform them from one form into another. The court pointed out that there were no words in the

²⁵² It comes as no surprise, then, that Jefferson made efforts to invalidate Marshall's nomination.

²⁵³ The introduction of this amendment had caused a temporary paralysis of the federal judiciary since there were doubts regarding how the panels were to be formed (i.e. how many judges of the Supreme Court were to sit in them) Marshall's view was determined and along with the majority of the Court panel he did not recognize the necessity to accept amendments introduced by republicans to enable the work of the courts. However, the referred to issues had influence also the work of the Court, which resulted in some delays in hearing cases, e.g. the complaint of Marbury.

Constitution that would limit or restrain the rights of the legislative branch in this respect.

This judgement was of great significance since it made yet another element in the power test of both sides in the massive political conflict. Marshall, one of the Federalist leaders, had probably considered that at this very moment it would be hard to succeed in the confrontation with the Republicans, treating this case as the source of insult, on the basis of fairly frail arguments of his party colleagues. Therefore, he had actually passed a sentence on his party colleagues in this brief opinion. The Republican achieved what they were aiming at.

Groundbreaking opinion of Judge Marshall

The verdict announced a few days after the adjudication in the *Marbury v. Madison* case, was their factual success and a compensation of a kind for the outcome of that case which was anyway controversial for them. Moreover, they cleared of the humiliation, got rid of rivals for convenient and influential sinecures. They also must have greeted with joy the content of the opinion in this case. Having the majority in Congress they could practically have nearly unlimited perspectives of fulfilling their legislative programme.

Nearly, since by referring in his opinion to the Constitution, Marshall had in practice determined clear limits of this freedom. He understood well at this point that in the future the interpretation of the Constitution which would put to a halt any attempts to dismantle the union by the Republicans would depend on his decision. This reasoning was distinctly strengthened by the content of the adjudication in Marbury case. The future proved that the briefness of this opinion was far from coincidental.

William Marbury, the great estate owner and banker from Maryland, was a representative of one of the most influential families in the state and one of the leading activists of federalists in this area. He acquired the nomination for the newly-established position of a judge in the capital Federal District of Columbia from the outgoing Adams.

However, he was one of those who had not received nomination from Marshall during the last hours of Federalists in office. When despite his insistence the act of nomination was not handed to him by the new secretary of state J. Madison, feeling wronged Marbury applied for the writ to hand over the act of nomination. Acting on the grounds of section 13 of *Judiciary Act* from 1789 he forwarded his motion directly to the Supreme Court. The regulation he referred to stated that in cases regarding the writ against federal officials, like for instance the secretary of state, the Supreme Court was the appropriate one.

This motion created for J. Marshall a huge problem of political character at the very beginning of his term of office, since he had to adjudicate in the case in which he had great interest for various reasons. It was Marshall who had actually caused his part colleague's problems, but also he was the main co-author of the whole "*midnight judges*" affair. The attention and expectations of party colleagues, who had sceptically accepted his nomination to the Chief Justice of the Supreme Court, were directed at him. On the other hand, there was the huge pressure of the political opponents, with president Jefferson at its head. They were explicitly expressing their intention to make "the order" in the federalists dominated Supreme Court the moment it made an attempt to disturb the realization of their programme.

Seemingly, Marshall had but two options. If he had wanted to pacify republicans and wait out the most difficult time, he could have acknowledged that the Supreme Court had no such authority over the Executive branch to order it. In this case he would have had to dismiss Marbury's motion. Such a decision would have caused not only the problems in his party, but would also have been the confirmation of the marginal position of the Court in the system of constitutional authorities. Additionally, it would have opened for Jefferson all the opportunities to realize the anti-federalists programme undisturbed.

On the other hand, by complying with the demand, he would have risked the fierce confrontation with the Republicans, in return for the loyalty towards the party. Yet, in this case as well the benefits might have been illusory since the Supreme Court did not possess any means to enforce the writ. Henceforth, in this case alike there was no guarantee that the case would conclude as he wished, and there was the risk of a similar outcome, namely the loss of the remaining prestige by the Supreme Court.

Marshall had circumvented this unfortunate dilemma in an extraordinary manner. He considered that the regulation that Marbury's motion was based on was unconstitutional. In his opinion, he pointed out that the Constitution clearly determined the range of competences that the Supreme Court possessed. According to him, *Judiciary Act* had stepped beyond the constitutional regulation in the subjective regulation. The Constitution did not allow the extension of competence of the main authorities by the means of an act. Thus, this act in no way could provide the Court with the right to express the order to the executive branch. By recognizing that there was no legal basis, he could in consequence dismiss the Marbury's motion, in this way omitting the unsolvable dilemma.

This opinion, however, did not mean the capitulation of the Court, as it might have seemed. On the contrary, it strongly emphasized that the Executive could not be above law, and in fact had clearly outlined the range of the law making activity of the Congress. The Republican dominated Congress had received a mighty signal that the Supreme Court was entitled to protect the conformity of acts, or more precisely as Marshall stated "ordinary acts", with the constitution, in the same procedure as in the situation of the subjective case.

Republicans only seemingly could be satisfied with the outcome of the confrontation. The Marbury's motion fell through and the federalists had to swallow an insult. Since it was the man from their (i.e. federalists) political camp that dealt them this painful stroke. However, in fact Marshall was presenting his power sending the signal that he would simply verify the legislative activity of federalists who had dominated both chambers.

They could in no way counteract the fact that it was the Supreme Court and most of all Marshall personally would from then on act as the guardians of the constitution, and actually of the union itself. They would have had to attack him for the decision that was considered by less perspicacious observers to be a success. Henceforth, it was a truly Pyrrhic victory proving the real genius of Marshall's.

Indeed, Marshall had ended the situation as a victor and new arbiter in issues regarding the application of the Constitution. His judgement was the political act of grandmaster in the breakthrough moment, and at the same time a truly Judgment of Solomon in an extremely complex situation. Therefore, it was commonly considered that Marbury v. Madison case had become a milestone in the history of American constitutionalism, as well as

establishment of the balance between three branches of the United States Government – Congress, President and the Supreme Court²⁵⁴.

So what conclusions stem from this case for the political confrontation of the Polish Constitutional Tribunal with the Legislative and Executive of AD 2015? President Rzepliński and the majority in the CT could take advantage of the argument in order to set the system position of this organ ultimately. From the rational perspective, the case of breaching not only the Constitution but also the rules of the democratic state of law by usurpation of the VII term Sejm was so obvious that the confirmation of this was actually a necessary act. President Rzepliński and his supporters in the Tribunal would have acknowledged that their political camp would soon lose the full control over the organ had they invalidated the explicitly contrary to the Constitution appointment of the all October five judges. Yet, at the same time they would have established the unquestioned authority of the Tribunal for decades proving that it was able to achieve the level in reliable assessment of the Constitution violation despite its political liking. Selecting the other way, however, it provoked the conflict which in consequence resulted in ruining the dignity of this body.

Amending of the Constitution by the judicial decisions of the Constitutional Tribunal

One of the elements of this particularly controversial judicial decision of the Tribunal ought to be paid attention to. In p. 4. 3 and p. 8. 5 of the justification the Tribunal had made the first step in a kind of revision of the manner that the Polish President's prerogatives are to be interpreted. It corresponds with the straightforward usurpation of the right by the Tribunal, which is neither expressed in the Constitution nor consistent with the most elementary principles of the system.

²⁵⁴ More on the case *Marbury v. Madison* in: G. Górski, *Sprawa Marbury v. Madison z 1803 r. a kształtowanie zasady sądownictwa konstytucyjnego*, Czasopismo Prawno-Historyczne, Poznań 2000, Vol. LI.

In p. 1. 1 of the justification the Tribunal introduced the following statement while pondering over its independence, "*The Constitutional Tribunal does not only guarantee the supremacy of the Constitution but also guards the three division of authorities*". This statement was necessary for the Tribunal to accomplish extreme relativity of the nature of the Polish President's prerogative in the above mentioned points. Additionally, the Tribunal in its further pondering and on the grounds of the following decisions, took advantage of this basis to accomplish far-fetching relativization of the rights of emanation of the constitutional sovereign, i.e. the parliament, to constitute law.

The Tribunal usurps for itself the right to be "the guarantor of the Constitution supremacy" basing on the competence that is expressed in the regulation of art. 188 p. 1 of this Constitution to adjudicate in cases, "*of compliance of acts (...) with the Constitution*". There is no doubt that such an usurpation was made in the context of the entire revealing the weaknesses of the contents of art. 126 point 1 and 2 of the Constitution. The first of them states that the President of the Polish Republic is, "*the supreme (...) guarantor of the continuity of state authority*". Whereas, the latter one states explicitly that it is the President of the Polish Republic, "*who watches the obedience towards the Constitution*".

In previous years, on the basis of the significant content of stipulation from point 2 of the regulation, the Tribunal had applied the standpoint that the regulation does not determine President's competences but rather his obligations. A particular attention ought to be paid the views expressed by R. Mojak, who has made several attempts to specify the essence of these obligations of the President. He pointed at the President as a specific political arbiter, whose role should be accomplished in the situation of endangered fundamental constitutional values, disruption of the state functioning as well as the mechanisms of public authorities²⁵⁵. In another place the author acknowledged that in the situation of particular jeopardy towards the state the regulations of art. 126 could become the source of competence for the "organ of reserve authority"²⁵⁶ of a sort.

²⁵⁵ R. Mojak, *Model of Presidency in the Constitution of Polish Republic from 2nd April 1997*, [in:] *System of Government in the Republic of Poland. The Constitutional Premises and the System Practice*, M. Grzybowski (ed.), Warszawa 2006, p. 37.

²⁵⁶ R. Mojak, *Parliament and Government in the System of the Third Republic of Poland*, Lublin 2007, p. 119.

On the other hand, P. Winczorek remarked that the activity of the Polish Republic President may involve actions that are difficult to be determined in legal categories, yet of significance in a particular situation²⁵⁷. Whereas, P. Sarnecki emphasized that, "*watching the obedience towards of the Constitution*" means the care for the state, "*in which* [regulations of the Constitution] *were not violated by anybody* [which means any other organ of the state]." In his opinion it proves that the functioning of the President is about representing not any Polish statehood, but the particular one, constructed by the Constitution of 2nd April 1997²⁵⁸.

There is no doubt, that by comparing the content of art. 126 and 188 p. 1 of the Constitution the constitutional legislator granted the supreme role in guarding the obedience towards the Constitution to the President of Poland. It is not surprising, since such a system decision stemmed from the fact that it is the President who receives the strongest mandate from the national sovereign. The institution of President is created in the direct elections and he is appointed to perform the most significant obligations in the state by the disposer of the "supreme authority", i.e. the sovereign Nation (art. 4 point 1).

Taking his into account, the Constitutional Tribunal as created by only one of the parliamentary chambers, in which the appointment of a judge is the emanation of a parliamentary majority that varies in time²⁵⁹, can in no way equal the power of the President's democratic mandate. It is exactly for these reasons that the constitutional legislator adopted such an authorization and mandated the President with such a responsible obligation. At the same time this construction entirely ignores the dependence the President on any relation with the Constitutional Tribunal while performing this "obligation". It results from the fact that within this system construction the competence of the Tribunal has been determined very precisely, and at the same time, narrowly. It is limited exclusively to the examination of compliance of acts with the Constitution.

²⁵⁷ P. Winczorek, *Comments to the Constitution of Polish Republic from 2nd April 1997*, Warszawa 2000, p. 169.

²⁵⁸ P. Sarnecki, *Comments to selected regulations of the Constitution of Polish Republic*, [in:] *The President of Polish Republic. The Comment*, Kraków 2000, Art. 126.

²⁵⁹ One ought to keep in mind that regardless from the fact in which tour the President is elected he must acquire the absolute majority of votes of the Nation, whereas the parliamentary majority for the appointment of judges may be constructed *ad hoc*, basing on political parties that have much less support.

From this description of the Tribunal's competence one may not conclude its right to be "*the guarantor of the Constitution supremacy*". Therefore, it must be acknowledged that this *passus* is clearly in opposition to the literal content of the Constitution. Henceforth, since all the commentators agree that the much more precisely expressed competence from art. 126 par. 2 constructs the "obligation" of the President, the Tribunal has no right to conclude its role as "the guarantor of the Constitution supremacy" from art. 188 p. 1.

While this usurpation provides the grounds for some reasoning, the statement that the Tribunal "also guards the three division of authorities" extends beyond any constitutional foundations. Even the most "creative" attempts of interpreting the content of art. 10 of the Constitution do not provide any opportunity for the rational justification of this usurpation.

However, the usurpation was necessary on the grounds of subjective decision in order to reinterpret entirely the nature of personal competences of the President, i.e. so called prerogatives. In opposition to the strong perception regarding the essence of this institution, present not only in Polish doctrine, the CT formulates the opinion according to which, "*granting the president's prerogatives the character of acts that entitle the head of the state to undertake certain decisions in an entirely autonomous manner, depending solely on the President's discretion, stays-seemingly-in opposition with the fundamental premises of the state system which bases on the division and balance of authorities*" (p. 4. 3. 166).

The above led to the statement according to which, "*accepting the oath of the Tribunal judges²⁶⁰ cannot be perceived as depending on the head's of the state discretion. The President is obliged to accept the oath from the judges appointed by Sejm*" (p. 8. 5. 283). And further on, insisting on these arguments the Tribunal untruly stated that, "*refraining from the acceptance of the oath from a Tribunal judge might in some cases result in making it impossible for the Tribunal to adjudicate in the full panel*" (p. 8.5.1.285).

The argument on the alleged threat towards the Tribunal's capability of recognizing cases in full panel due to the refusal to accept the oath from an individual appointed by Sejm, referred to yet once again, does not stand to the criticism. As proved above, such a situation did not take place even

²⁶⁰ This statement was untrue since the President accepts the oath of "an individual appointed for the position of a judge", and not from the Constitutional Tribunal judges.

in the difficult time of the turn of VII and VIII terms of Sejm. One may assume that there is no need to fear a similar situation in the future.

Eventually, one more argument of significance ought to be referred to²⁶¹. According to the new Constitution adopted in 1997 the number of the Constitutional Tribunal members increased from 12 to 15. Due to this there appeared the necessity to fill three new positions in the Tribunal. The political calendar of that time set the general election for 21st September 1997, whereas the Constitution was to come into force on 20th October 1997. It was likely, then, that the new Sejm would not manage to appoint three judges before the new Constitution came into force. Therefore, it was justified for the old Sejm to appoint the judges. However, the Sejm ending its term, even though its composition differed in a radical way from the one to the new one, refrained from making appointments granting this right to the new chamber. The appointment was held on 6th November 1997, and in this way the Tribunal acquired the panel consisting of fifteen judges as determined in the Constitution.

Undoubtedly, this situation had created extremely mighty constitutional precedent, which play a key part in the constitutional practice. Unfortunately, in the reality of autumn 2015 the parliamentary majority had entirely neglected this precedent. Even worse, in the discussed judgement the Tribunal did not refer at all to this fundamental issue.

Conclusion

Concluding, it ought to be acknowledged that the December 2015 judicial decision of the Tribunal aimed at establishing, on the one hand, legal premises to continue the conflict around filling the vacant positions in November and December 2015. On the other hand, being aware that the constitutional conflict would not end after accepting the content of this decision, the Tribunal established for itself the basis for unjustified exceed beyond its competences, assigned to it by the Constitution. Soon the Tribunal was to take advantage of it ruthlessly in order to escalate the tension and constitutional crisis.

²⁶¹ B. Banaszak drew our attention to it in the above mentioned *Gloss* to the judgement of the Constitutional Tribunal.

Unfortunately, such an attitude resulted in ruining the authority and dignity of this organ, which was proved by the radical decrease of the social trust towards it. Political involvement of the majority of Tribunal judges during the subsequent confrontations lasting since 2016 lowered this social trust to the limits that could threaten the authority of the Polish state. Sadly it must be admitted that neither professor A. Rzepliński, nor the majority of Tribunal judges supporting him at that time had done anything to simulate the minimum of political distance towards all the confronting political powers. Led by professor A. Rzepliński, the Tribunal had not only become a distinct side of the confrontation but also even overtook the role of the most important centre of political opposition towards the parliament and president elected in 2015 by the national sovereign. Thus, the deterioration of the authority of this body could have been the only, obvious and inevitable consequence of such an attitude.

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