

The Constitution  
of Poland  
*A Contextual Analysis*

Mirosław Granat  
and  
Katarzyna Granat

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# 1

## *Polish Constitutional History and Tradition*

Monarchy–Republic–Nobles’ Democracy–First European Constitution–  
‘Solidarity Movement’ – Independence – Freedom

### I. INTRODUCTION

THE REPUBLIC OF Poland (*Rzeczpospolita Polska*) is a Central European country encompassing a territory of 322,575 sq km, with a population of around 38 million.<sup>1</sup> It has a more than 1,000-year tradition as an independent state, formed from a collection of Slavic tribes around the ninth century. For centuries, Poland was an independent monarchy, first hereditary, then elective. It then lost its independence between 1795 and 1918 and was reborn as a republic following the First World War. Due to its geographical position in the centre of Europe, between Germany and Russia, its territories experienced both world wars, suffering six million casualties in the Second World War alone. The country also endured enormous material damage and losses to its territory when its borders were moved westward after the war. This in turn caused a wave of resettlement of citizens and migration. After the Second World War, Poland came under the influence of the Soviet Union, becoming a Communist state. It took until 1980 for real resistance against the Communist government to emerge, most visibly in the form of the social movement ‘Solidarity’, led by Lech Wałęsa. Because of its repeated suffering over the centuries, Poland has been, not without reason, labelled ‘God’s playground’.<sup>2</sup> Nowadays, having regained its

<sup>1</sup> Główny Urząd Statystyczny, *Rocznik Statystyczny Rzeczypospolitej Polskiej* (Warsaw, 2017) 82 and 205.

<sup>2</sup> See N Davies, *Boże igrzysko. Historia Polski* (Kraków, Wydawnictwo Znak, 2010).

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independence for the most recent time in 1989, Poland benefits from its central position in Europe in the areas of trade, economic cooperation, services and new technologies. Poland today is a member of the North Atlantic Treaty Organization (NATO) (since 1999) and the European Union (EU) (since 2004).

This chapter highlights a number of key aspects characteristic of Polish constitutionalism: the thirst for independence; attachment to freedom, both as a nation and in its citizens; and peaceful conflict resolution. It also traces the development of freedoms and rights, and the formation of independent constitutional review.

Poland and its citizens are characterised by a strong desire for freedom and the perception of the state as *Rzeczpospolita*, referring not only to the Republic of Poland and thereby denoting the name of the state, but also its republican system and, at a more abstract level, its community of citizens. Poland's tradition of freedom and independence goes back to the late Middle Ages and these traditions remain meaningful for today's constitutionalism. In particular, Poland adopted a system called a 'nobles' democracy' (from the fifteenth to the eighteenth centuries) with a number of concepts that were original at the time, such as sovereignty of law and religious tolerance, but also some that led to the eventual failure of the state, for instance, *liberum veto*, a form of unanimity voting that disabled the functioning of the parliament.

Contemporary Polish constitutionalism is represented by the Constitution of 1997, which was adopted by the National Assembly on 2 April 1997. The Constitution was then approved by the nation in the referendum of 25 May 1997. It was supported by 53.45 per cent of the eligible voters, with a turnout of 42.86 per cent.<sup>3</sup> It entered into force on 17 October 1997.<sup>4</sup> It is a comprehensive tract, consisting of 243 articles. It contains, inter alia, a catalogue of fundamental rights and freedoms, provisions on the bicameral parliament (the Chamber of Deputies and the Senate), the executive (the President and the government), the judiciary, local self-government, public finances and the procedure for constitutional amendment. The Constitution of 1997 has been a symbol

<sup>3</sup> Announcement of the National Electoral Committee of 26 May 1997 on the outcome of vote and outcome of the constitutional referendum of 25 May 1997, JL 1997 No 54 Pos 353.

<sup>4</sup> *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r* (Constitution of the Republic of Poland of 2 April 1997), JL 1997 No 78 Pos 483, JL 2001 No 28 Pos 319, JL 2006 No 200 Pos 1471, JL 2009 No 114 Pos 946. This book relies on the English translation of the Constitution available on the website of the Polish parliament: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

of a free Poland, based on the values of human dignity and the rule of law, and guaranteeing both the state's independence and the freedom of its citizens.

For over 20 years, under the 1997 Constitution, various government majorities held power. In 2015, the Law and Justice party (*Prawo i Sprawiedliwość*) won the parliamentary elections and began to make radical changes to the state system. These changes were effected in the form of statutes rather than formal constitutional amendments.<sup>5</sup> The Law and Justice government, despite retaining relatively broad support from the electorate, does not have a sufficient majority in the parliament to amend the Constitution. The negative changes that have taken place in Poland since 2015 concern the judiciary to the largest extent and as a consequence pose a threat to constitutional freedoms and rights.<sup>6</sup>

## II. INDEPENDENCE AND REPUBLICANISM

### A. Independence

Poland's statehood, in the form of an independent kingdom, took shape over the tenth and eleventh centuries. In 966, Mieszko I, the leader of the Polans (*Polanie*) tribe that inhabited the territories of what would eventually become Poland, converted to Christianity and was baptised, an event that has been called the 'Baptism of Poland'. The baptism greatly strengthened the country and Christianity quickly became the state religion. In 1025, the first king, Boleslaw Chrobry, was crowned, which further stabilised the state and its authority. In the fifteenth and sixteenth centuries, the Polish court was one of the strongest in Europe, reflecting the political and economic status of the country at the time. In 1569, Poland joined into a union with the Grand Duchy of Lithuania, creating the Polish-Lithuanian Commonwealth (*Rzeczpospolita Obojga Narodów*). The Commonwealth spread over a vast territory of 1,000,000 sq km, governed by a monarch who was both the King of Poland and the Grand Duke of Lithuania. Until its fall in 1795, the Commonwealth remained a dualist state consisting of the Kingdom of Poland and the Grand Duchy of Lithuania. This was the only period during which Poland was a federation.

<sup>5</sup> Article 235 of the Constitution.

<sup>6</sup> See chs 5, 6 and 8.

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In the eighteenth century, due to frequent wars, the reign of nobles who were landowners of vast terrains and a lack of reforms of state institutions, the country's importance diminished. It gradually lost its territories as a result of wars or on the basis of threats from foreign courts. Poland, in the form of an independent kingdom, existed until the end of the eighteenth century.

In 1795, Poland lost its independence and its territory was partitioned between the Russian Empire, the Kingdom of Prussia and Habsburg Austria. One of the reasons for the fall of the state was the anarchy caused by the nobility, who perceived themselves as being beyond the law, which undermined the state institutions, for example, making it impossible to conduct the necessary military reforms that would have strengthened the country. Attempts at reforms that followed the ideas of the Enlightenment were not sufficient to save Poland, which as a result disappeared from the maps.<sup>7</sup>

Poland regained its independence in 1918 thanks to the favourable political situation following the defeat of Austria and Germany in the First World War and the revolution in Russia. For over 120 years, the Catholic Church, the faith, and education played an important role in maintaining the spirit of independence. Great uprisings – in November 1830 and January 1863 – were bloodily suppressed by the invaders. The Little Treaty of Versailles specifically concerning Poland (1919), signed the same day as the main Treaty of Versailles, 'restored to the Polish nation the independence of which it had been unjustly deprived'.<sup>8</sup>

Poland resurfaced as a republic instead of a monarchy, a unitary instead of a federal state. The Constitution of 1921 ('the March Constitution') proclaimed that 'the Polish state is *Rzeczpospolita*'.<sup>9</sup> *Rzeczpospolita*<sup>10</sup> (Republic of Poland) was the formal name of the country, relating to the tradition that existed before 1795, and thereby underlining the continuity of Polish statehood. The notion of *Rzeczpospolita*, in Latin *res publica* (common good, common wealth), is still used in Poland as a synonym for a republican system and in the official name of the country.

Poland in 1918 was not a newly established state, but rather one that was reborn after a period of suppression and partition. It was the same

<sup>7</sup> See J Bardach, B Leśnodorski and M Pietrzak, *Historia ustroju i praw polskiego* (Warsaw, LexisNexis, 2016).

<sup>8</sup> Minorities Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles (28 June 1919).

<sup>9</sup> Constitution of 17 March 1921, JL 1921 No 44 Pos 267.

<sup>10</sup> Pronounced 'żɛtʂpɔs'pɔlʲita'.

nation that existed at the end of the eighteenth century. This idea was incontestable in terms of public perception. The March Constitution in its preamble confirmed the continuity of the nation and state, referring to, amongst other things, the historic Constitution of 3 May 1791 discussed below. The period between 1918 and 1939 was prosperous: it was possible to merge the territories that were previously under partition, to operate public institutions and to rebuild the economy.

In 1939, Nazi Germany and the Soviet Union, breaching all of their international obligations, invaded Poland. The invaders divided Polish territories between themselves according to the border delineated in the secret Ribbentrop-Molotov Pact of 23 August 1939. The occupiers introduced a system of terror, extermination and deportation of the citizens. The Nazis funded and operated concentration and extermination camps. The largest of the Nazi camps was Auschwitz-Birkenau, where 1.1 million people were killed.<sup>11</sup> The Soviet Union was responsible for a series of crimes, amongst them the infamous Katyń massacre (1940), a mass execution of Polish army officers and a mass deportation of Poles to Siberia. The Second World War was the cruellest experience for the nation and the state.

The peace treaties of Yalta and Potsdam (1945) that ended the Second World War pushed Poland into the Russian sphere of influence. Between 1945 and 1989, Poland functioned as a totalitarian Communist state. The Communists were violently suppressing demonstrations – such as ‘the Poznań 1956 protests’ or ‘December 1970 protests’ – directed against their government. The apogee of the Communist oppression was the introduction of martial law in 1981. The Soviet system of government implied that all power was in the hands of the Polish United Workers’ Party (*Polska Zjednoczona Partia Robotnicza*, PZPR). This party was dependent upon and supported by the Soviet state security apparatus and its military. This situation created a ‘protective umbrella’ over the state authority at the time, which eliminated its enemies and paralysed any social resistance. However, the Catholic Church offered some resistance and fostered the development of social opposition by appealing to the Communist powers for respect towards fundamental human rights and supporting democratic opposition in various forms. At that time, the Catholic Church provided, among other things, an open meeting and discussion space for the opposition.<sup>12</sup> The eventual fall of the Communist system took place in a peaceful manner, manifested in the idea of

<sup>11</sup> See [www.auschwitz.org](http://www.auschwitz.org).

<sup>12</sup> W Roszkowski, *Historia Polski 1914–2015* (Warsaw, PWN, 2017) 380–408.

the ‘Round Table’ talks (February–April 1989), with discussions between the Communist government and the opposition, and was finalised in the Round Table Agreement of 5 April 1989.

Taking its history into consideration, it is understandable that the Polish Constitution of 1997 underlines the importance of an independent country and the security thereof. The Preamble expresses gratitude to Polish ancestors for ‘their struggle for independence achieved at great sacrifice’ and ‘our culture rooted in the Christian heritage of the Nation and in universal human values’. The Constitution recalls that in 1989, the nation ‘recovered the possibility of a democratic determination of its fate’ after the Communist dictatorship of 1944–89.

According to the Constitution, the first task of the Republic of Poland is to safeguard the independence and integrity of its territory.<sup>13</sup> The Constitution assigns the fulfilment of this task to the Armed Forces, which also ensure the security and inviolability of state borders.<sup>14</sup> At the same time, the Armed Forces remain politically neutral and subject to civil control. The Constitution also involves other state organs in this function. The President is designated as the guardian of sovereignty and security of the state, as well as of the inviolability and integrity of its territory.<sup>15</sup> The government ensures the external security of the state.<sup>16</sup> These provisions prove how important the nation’s independence was for the drafters of the Constitution.

## B. *Rzeczpospolita*

As discussed above, the notion of *Rzeczpospolita* has a rich and specific content. It functions as the name of the Polish state (*Rzeczpospolita Polska*) and features in the full name of the Constitution. In this sense, it can be translated into ‘the Republic of Poland’. However, limiting this notion to this translation would be insufficient. *Rzeczpospolita* functions in a number of other contexts and each of them is meaningful.

First, *Rzeczpospolita* is the name of the Polish state, differentiating it from other countries. The Constitution’s preamble distinguishes between the first, second and third Republics of Poland. The First Republic concerns the early period of the state’s existence until 1795,

<sup>13</sup> Article 5 of the Constitution.

<sup>14</sup> *ibid* art 26.

<sup>15</sup> *ibid* art 126.

<sup>16</sup> *ibid* art 146(4) point 8.

while the Second Republic denotes the interwar period of 1918–45. The Third Republic of Poland is the form of state adopted in the Constitution of 1997. It is the continuation of the ‘best traditions of the First and Second Republics’. However, in the common perception, the notion of the Third Republic of Poland is much broader than that implied by the Constitution. It is understood as the form of the state that had its beginnings in 1989.

The second meaning of the term *Rzeczpospolita* is even more peculiar. It denotes a community of citizens that functions within the state framework that is a common good. According to Article 1 of the Constitution, the Republic of Poland is ‘a common good of all its citizens’. This understanding of the term derives from the country’s history: in the past, Poland existed as a monarchy and the closest translation of this concept is the English *commonwealth*: state as a community or community for a common good.

In its third meaning, *Rzeczpospolita* is a synonym of the republican form of government. Within this meaning, *Rzeczpospolita* is understood as a republic, a political term that is common in many states. *Rzeczpospolita* as a government or republican authority is a constitutional principle. Its positive meaning describes a form of exercise of power that is in the hands of the majority of the citizens (*res publica* as a people’s good or public affair), while its negative meaning excludes hereditary or lifetime power. In contemporary states, the republic takes the form of a state ruled by law, while in the Constitution of 1997 in addition to the rule of law,<sup>17</sup> the republic is also the common good of all its citizens.<sup>18</sup>

### III. DEMOCRATIC TRADITION

#### A. The Nobles’ Democracy

The nobles’ democracy was a system of government that functioned in Poland from the sixteenth century until 1795.<sup>19</sup> The formal beginning of the nobles’ democracy is traced back to 1505, when the parliament adopted the *Nihil Novi* resolution. This act prevented the king from issuing laws without the agreement of the parliament. In addition, the king could not amend the rights and privileges of this class. The main aspects

<sup>17</sup> *ibid* art 2.

<sup>18</sup> See further in ch 2.

<sup>19</sup> See J Tazbir, *Kultura szlachecka w Polsce* (Warsaw, Wiedza Powszechna, 1979).

of nobles' democracy that were decisive for the position of the nobility and, as a consequence, for the functioning of the state concerned the decision-making process in parliament under *liberum veto* (the free veto) and the election system of the king. The question of *liberum veto* and the free election were also among the causes of the fall of the First Republic at the end of the eighteenth century. In Polish constitutionalism, these institutions are therefore often used to make the point that unlimited nobles' democracy led to the dysfunctionality of the state.

The parliament (*Sejm*) has existed since the end of the fifteenth century. It consisted of three 'deliberating estates': the king, the Chamber of Deputies, and the Senate. The main function of the parliament was to decide on state laws. The Chamber of Deputies consisted of the representatives of the nobility elected in the provincial parliaments (*sejmiki ziemskie*) and bound by the instructions from these bodies.<sup>20</sup> After the end of the session of the parliament, the representatives would report to their provincial parliaments on the issues discussed and decided in the parliament. This represented a means for the nobility to gain influence on state affairs. The Senate consisted of the members of the former Royal Council, including the Roman Catholic archbishops and bishops, and the highest state officials. The king as the third 'deliberating estate' called the sessions of the parliament. In principle, the parliament met every two years for a six-week ordinary session or for a shorter, extraordinary session. The parliament adopted laws – at the time called constitutions – which concerned the income and expenses of the state, its taxes and the military.

The crucial issue for the functioning of the nobles' democracy was that the parliament would take decisions via unanimity. Forcing any decision by the majority against the minority was seen as violating the principle of equality of rights of provincial parliaments. As a consequence, by invoking the *liberum veto*, any member could force an immediate end to the session of the parliament and nullify any piece of legislation approved at the session. In practice, the *liberum veto* meant more than just an objection against an unwanted bill. It was a principle of the state system that protected the nobility from absolute monarchy. It also expressed the core of the freedoms of the nobility: the members of parliament were not obliged to justify the *liberum veto*. In consequence, the *liberum veto* paralysed the decision-making process. None of the attempts to limit the *liberum veto* and introduce majoritarian decision-making succeeded.

<sup>20</sup> See M Borucki, *Sejmy i sejmiki szlacheckie* (Warsaw, Książka i Wiedza, 1972).

In the noble's democracy, the king was chosen in the so-called free election, again granting influence to the noble class alone. The noblemen voted for a candidate from among themselves so that, in practice, anyone from within the class could become king. During the election process, the noblemen would agree with the candidate, in writing, a set of conditions that the future king had to fulfil (*pacta conventa*). These reflected the political and economic programme that the king undertook to implement.<sup>21</sup>

## B. The Constitution of 3 May 1791

The system of nobles' democracy was unsustainable and threatened the independence of the state. In response, a group of patriots gathered around the last King of Poland, Stanisław August Poniatowski, and proposed a reform of the state in the form of the Constitution of 3 May 1791. This act introduced some of the modern principles of a political system of the Enlightenment period, such as the sovereignty of the nation and the separation of powers. In this respect, it followed the French Declaration of the Rights of Man and the Citizen (1789) in that: 'The principle of any sovereignty resides essentially in the Nation.'<sup>22</sup> The Constitution of 3 May 1791, adopted four months earlier than the constitution of revolutionary France of September 1791, made Poland the first country in Europe to enact a formal constitution.

What is the meaning of the Constitution of 3 May 1791 for Poland today? Why do the Poles refer to it whenever a new constitution is drafted? The Constitution of 3 May 1791 – labelled the testament for future generations of Poles – replaced the elective, feudal monarchy with a constitutional one.<sup>23</sup> Even during the period of the Enlightenment, it was seen as the 'real artwork of the nation'.<sup>24</sup> It expressed the idea that the fate of Poland and its citizens depended upon themselves. It was not imposed on the people in the way that happened later in 1807 by Napoleon I for the Duchy of Warsaw or in 1815 by Emperor Alexander I for

<sup>21</sup> See Bardach, Leśnodorski and Pietrzak (n 7).

<sup>22</sup> Article V of the Constitution of 3 May 1791.

<sup>23</sup> W Uruszczak, 'Konstytucja 3 Maja 1791 r. Testament polityczny I Rzeczypospolitej' (2011) 103 *Przegląd Sejmowy* 9.

<sup>24</sup> Z Szczańska, 'Ustawa Rządowa z 1791 r.' in M Kallas (ed), *Konstytucje Polski. Studia monograficzne z dziejów polskiego konstytucjonalizmu: praca zbiorowa* (Warsaw, PWN, 1990) 76.

the Kingdom of Poland. Moreover, the Constitution of 3 May 1791 signified the willingness of the Polish people to reform the political system and to save the country from collapsing. Although the Constitution of 3 May 1791 was in force for less than a year, it is seen in Poland as the foundation of its current constitutional system. The date of 3 May remains a national holiday to this day. Against this background, the discussion of selected principles of the state system under the Constitution of 3 May 1791 seems necessary.

The Constitution of 3 May 1791 designed the legislative branch as a Chamber of Deputies (*Sejm*) and a Senate. The crucial change was that the parliament approved laws by majority vote and no longer by unanimity. Majoritarian decision-making allowed the parliament to fulfil the legislative function more effectively than on the basis of unanimity. The members of the Chamber of Deputies became free in their vote (free mandate) and representative of the entire nation instead of the noble class alone. The Senate, presided over by the king, lost its position at the expense of the Chamber of Deputies.<sup>25</sup> The Senate could only either approve or suspend a bill, without the possibility of exercising a veto.

Within the executive branch, the Constitution of 3 May 1791 abolished the election of the king by the nobles.<sup>26</sup> Instead, the throne was to be passed on by the right of succession, thereby re-establishing a hereditary monarchy. The king became the commander in chief of the army during wartime. The executive power was vested in the king and the ministers nominated by the king to the Royal Council ('Guardians of the Laws'). Every resolution of the king needed to be signed by one of the ministers of the Royal Council, which in practice took away much of the executive power from the king. The parliament could hold the ministers of the Royal Council politically accountable, as well as constitutionally accountable before the Chamber of Deputies' court. Overall, these relatively modern approaches enabled the creation of an effective executive around the king, without granting the latter absolute power.

The judicial power was anchored in the civil and criminal courts.<sup>27</sup> The Constitution highlighted that neither the legislature nor the executive could exercise judicial power. Despite this formal introduction of the principle of the separation of powers, certain judicial activities were reserved to Chamber of Deputies' committees as well as to the Chamber's court dealing with constitutional accountability.

<sup>25</sup> Article VI of the Constitution of 3 May 1791.

<sup>26</sup> *ibid* art VII.

<sup>27</sup> *ibid* art VIII.

It is worth highlighting that the neighbouring absolutist European powers of the time – the Russian Empire, the Kingdom of Prussia and Habsburg Austria – perceived the Constitution of 3 May 1791 as a product of the French Revolution and thus as a threat. The resulting military attack destroyed the Polish state. In 1795, Poland was divided up between the neighbouring powers in the third partition of Poland and lost its independence for the next 123 years.

### C. Peaceful Conflict Resolution

The Constitution of 3 May 1791 positioned itself against extreme solutions. Its drafters chose to take an inclusive path that would gain the greatest support at the time. The Constitution aimed at political and social change through peaceful reforms rather than a revolution that would end in bloodshed. Later on, Poland again relied on the heritage of the Constitution of 3 May 1791 in a crucial moment of its history: the fall of Communism and the adoption of a new constitution for the democratic state.

After 1945, Poland did not become an independent country, but instead came under Soviet influence. The imposed Communist state was politically and economically dependent upon the Soviet Union. These conditions also found an expression in the constitutional law of the time. The Constitution of the Polish People's Republic (which was the name of the state at the time) adopted in 1952 mirrored the Constitution of the Soviet Union of 1936.<sup>28</sup> The main idea of the 1952 Constitution, as well as the whole concept of constitutionalism of real socialism, was to express the notion of a 'constitution of results'. The constitution was understood predominantly as a political act, aimed at registering achievements in the process of the building of socialism rather than having any significance as a legal act.

After 1956, the political environment became somewhat freer. Yet, when 'Solidarity', a widely supported trade union and social movement, was created in 1980, the Communists did not hesitate to introduce martial law in 1981 with the aim of suppressing the aspirations of freedom of the nation. During that period, the Communist government tightened the screw on society by conducting a curfew, 'pacifications' of workplaces, disappearances and politically motivated murders. Despite

<sup>28</sup> Constitution of the Polish People's Republic of 22 July 1952, JL 1952 No 33 Pos 232.

this, 'Solidarity' decided to force the overthrow of the system through an evolutionary, rather than revolutionary, process. This led to talks between the democratic opposition and the Communist government, and the Round Table Agreement of 5 April 1989. The Communist Party, the power of which was diminishing, sought some form of co-governance, in order to share with the opposition the responsibility for the disastrous social and economic situation in Poland that was becoming evident. The first, partially free elections on 4 June 1989 played a key role in the peaceful removal of the Communist government. The elections for the reinstated Senate were fully free, while the Communist Party was guaranteed 65 per cent of seats in the Chamber of Deputies. The change in the system was not sudden; it did not immediately destroy the socialist order, but allowed for a gradual accession to power by the opposition.

The changes that took place in Poland concerning the peaceful transition from the Communist system to a democratic regime can be seen as a 'revolution without a revolution'.<sup>29</sup> Communist parties collapsed first in Poland in 1989 and subsequently in other Eastern European states during the so-called Autumn of Nations. Democratic and parliamentary institutions replaced legal concepts of Soviet origin. In Poland, this development manifested itself in the amendment of the old Constitution of 1952 on 29 December 1989, reinstating the traditional name of the state, the Republic of Poland, and the introduction of the principle of democratic state ruled by law. This principle, expressed in Article 1 of the amended Constitution of 1952, symbolically replaced the provision stating that Poland was a socialist state.

The 1989 political transition necessitated the adoption of a new constitution. Work on this document began in 1989. It continued in 1989–91, 1992–93 and then again during 1993–97. Between 1992 and 1997, the so-called Small Constitution was in force.<sup>30</sup> From the outset, it had a temporary character. The ongoing work on a 'big' constitution was lagging because of, among other things, the lack of clarity about the procedure for the drafting and adoption of the constitution. In the end, the Chamber of Deputies adopted the Act of 23 April 1992 establishing a procedural framework for the drafting and adoption of the new constitution by the National Assembly and its approval by the nation

<sup>29</sup> See A Dudek, *Reglamentowana Rewolucja: rozkład dyktatury komunistycznej w Polsce 1988–1990* (Kraków, Wydawnictwo Znak Horyzont, 2014).

<sup>30</sup> Constitutional Statute of 17 October 1992 on mutual relations between the legislative and executive power in the Republic of Poland and on the local self-government ('Small Constitution'), JL 1992 No 84 Pos 426, JL 1995 No 38 Pos 184 and 150, Pos 729, JL 1996 No 106 Pos 488.

in a referendum.<sup>31</sup> As a reflection of the period and the conditions of its drafting, the adopted Constitution of 1997 has an extremely consensual character.

#### IV. FREEDOM IN POLISH CONSTITUTIONALISM

The political effort to safeguard Poland's freedom – understood as independence from outside interference – represented a long struggle for the Polish nation throughout its history. Initial attempts to prevent the government from overstepping the rule of law took many years to manifest themselves in the constitution. Progress in the struggle for freedom was intertwined with periods of failure. The above-mentioned insurrections of 1831 and 1863 were examples of this struggle. Despite early success, both uprisings failed, worsening the situation of the people as a result. Later, during the Second World War, a major operation of the Polish resistance, the Warsaw Uprising of 1944, presented an attempt, albeit ultimately a failed one, to liberate Poland's capital from Nazi Germany. Even earlier, the 1943 uprising in the Warsaw ghetto was an armed resistance of Jewish underground organisations, opposing the liquidation of the ghetto by Nazi Germany.<sup>32</sup> In the period after 1945, despite the strength of Communist power, there were open forms of civic resistance, such as manifestations and violent street fights, for example, in Poznań (1956) and Gdańsk (1970). Despite the casualties incurred, seen in retrospect, these events aided the movement for freedom. Specifically, the workers' manifestations of 1970 enabled the creation of free trade unions, and in 1980, after another wave of strikes, the 'Solidarity' movement was born. Between August 1980 and December 1981, 'Solidarity' developed from a trade union into a massive social independence movement, demanding respect for human dignity, free speech and the social rights for workers. It grew into a movement of 10 million people in 1981 and became one of the pillars of Poland's independence.

The freedom regained presents a characteristic element of Polish constitutionalism in the sense that it finds explicit reflection in the constitutional text. When Poland became an independent state in 1918, the euphoria of freedom was transferred into the March Constitution, which described the state as an organisation protecting the individual

<sup>31</sup> Constitutional Statute of 23 April 1992 on the preparation and adoption of the Constitution of Poland, JL 1992 No 67 Pos 336.

<sup>32</sup> N Davies, *Boże Igrzysko* (Kraków, Znak, 2010) 927.

interests of its citizens as well as the freedom of the whole state. The March Constitution granted the individual a wide freedom for political, economic, social and cultural activity, reflected in a catalogue of rights and freedoms, protected by the principle of non-discrimination. In addition, the March Constitution introduced voting rights for women. It already contained almost all of the elements, known at the time, that were necessary for the functioning of the state and for maintaining the freedoms of its citizens. The only missing element known to and supported by legal scholars at that time was constitutional review.<sup>33</sup> Another issue was the lack of legislators' capability to combine 'the traditional, Polish attention to freedom' with the need for a strong government to keep the Polish territories unified after years of partition.<sup>34</sup> In 1926, the executive power was strengthened in the so-called August reform of the March Constitution by increasing the powers of the executive at the expense of the legislature.

Today's 1997 Constitution also expresses the elements of freedom. First, its origin is rooted in a deep political and social consensus. The drafters aimed at implementing the demands of different political powers. Sometimes the fact that the Constitution reflects different compromises is seen as a weakness or a drawback. Specifically, it is, wrongly, argued that the Constitution has a number of loopholes or that the Round Table was to some extent the 'patron' of the Constitution. Second, the Constitution of 1997 treats freedom as the natural state of the citizens. The Constitution does not define freedom; instead, its text implies that freedom enjoys primacy vis-a-vis the law and the law only endorses it. The law protects rather than guarantees freedoms that are already in the individual's possession. Freedom stands before the law and before the Constitution. The protection of human dignity contained in the Constitution of 1997 further strengthens this understanding of freedom. Both of these principles are discussed in Chapter 8, but it can already be highlighted at this point that the Constitution's approach to freedom has a positive influence on human rights and the social system of the state. Third, the Constitution created strong fundamentals for the judicial power, discussed in Chapters 5 and 6. However, the separation

<sup>33</sup> See M Granat, 'Problem kontroli konstytucyjności prawa Polsce międzywojennej' in P Sarnecki (ed), *Prawo konstytucyjne II Rzeczypospolitej Polskiej. Nauka i konstytucja* (Kraków, Wydawnictwo Uniwersytetu Jagiellońskiego, 2006) 101. See section VI in this chapter.

<sup>34</sup> See W Komarnicki, *Ustrój państwowy Rzeczypospolitej Polskiej* (Warsaw, nakł Księg F Hoesicka, 1934) 24.

and independence of the judiciary have been threatened, as shown by the constitutional crisis that began in 2015.<sup>35</sup>

## V. THE EVOLUTION OF HUMAN RIGHTS IN POLAND

The Communist Constitution of the Polish People's Republic – discussed earlier – degraded human rights. Most of all, in what was a one-party state, while in power the ruling Communist Party often violated human rights in a brutal fashion. The Constitution and legal doctrine of the time did not employ the notion of 'human rights' or 'freedoms and rights of the person'. Instead, the term 'citizens' rights' was applied, implying that the rights were collective rights which stemmed from the government in power at the time rather than being based on the protection of individual human rights set out in the constitution. Specifically, it was characteristic for a Soviet-type constitution to declare citizens' rights such as the right to work – implying that employment for everyone would be ensured – but not to grant that right the character of a subjective right.<sup>36</sup> Moreover, these types of constitutions encompassed elaborate programmes and previews of citizens' rights.<sup>37</sup> Yet, in fact, these were only political declarations; they did not have any legal meaning as justiciable constitutional provisions. For example, on the one hand, the 1952 Constitution declared that the state authorities cared about and supported the development of art and literature,<sup>38</sup> while on the other hand, censorship was strongly present in the Polish People's Republic, and many artists were forced to emigrate. As a consequence, the process of developing human rights in Poland post-1989 had to begin with the rejection of the Communist doctrine.

Thus, it is quite unsurprising that resistance to the Communist authorities in Poland developed against the background of a general proposal that people be treated subjectively as individuals. This idea was expressed in the establishment of the first organisations committed to the fight for human rights, including labour rights. In particular, this trend was evident with the emergence of illegal organisations such as the Movement for the Defence of Human and Civic Rights (*Ruch Obrony Praw Człowieka i Obywatela*, ROPCiO), and the Worker's Defence

<sup>35</sup> See further in chs 5 and 6.

<sup>36</sup> Article 58(1) of the Constitution of 1952.

<sup>37</sup> See, eg, *ibid* arts 62 and 63.

<sup>38</sup> *ibid* art 64.

Committee (*Komitet Obrony Robotników*, KOR), which were fought by the government.<sup>39</sup> Of particular significance was the establishment of ‘Solidarity’, which put forward economic and human rights proposals. Moreover, the Helsinki Final Act of the Conference on Security and Co-operation in Europe (1975) offered an important contribution, especially its third ‘basket’, which focused on human rights. Similarly crucial was the 1977 ratification of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights. The fight for human rights was one of the main aspects of the opposition movement that led to the fall of the Communist system at the end of the 1980s. During that time, similar changes took place in other post-Communist states.<sup>40</sup>

In the 1990s, the recognition of human rights began to flourish in Poland. The case law of the Constitutional Court played an important role in this regard. The Constitutional Court began to invoke the European Convention on Human Rights (ECHR), ratified by Poland in 1993, in its judgments. Before 1997, some of the key legal principles crucial in human rights adjudication, such as the proportionality principle, were as yet unknown in Poland, and rights like the right to privacy had their source in the ECHR.<sup>41</sup> Moreover, at that time, the legal scholarship dealing with human rights was very active.<sup>42</sup> The impact of the ECHR and other international human rights instruments was crucial for the shaping of the concept of human rights in a free Poland. The Constitution of 1997 ‘consumed’ those concepts to a large extent, with a major emphasis on the avenues for claiming individual rights.

The decisive step towards better protection of human rights was the regulation of freedoms and rights in the new Constitution of 1997. The Constitution delivered a completely new set of general principles of human rights (human dignity, freedom of the person and equality) and

<sup>39</sup> See A Paczkowski, *Pół wieku dziejów Polski 1939–1989* (Warsaw, Wydawnictwo Naukowe PWN, 2005); G Waligóra, *ROPCiO. Ruch Obrony Praw Człowieka i Obywatela 1977–1981* (Warsaw, Instytut Pamięci Narodowej, 2006).

<sup>40</sup> M Granat, *Likwidacja monopolistycznej pozycji partii komunistycznych* (Lublin, Centrum Samorządu i Administracji, 1992) 41.

<sup>41</sup> Constitutional Court, judgment of 24 June 1997, K 21/96, OTK ZU 2/1997, poz 23. On the early case law concerning the application of the right to privacy, see M Safjan, ‘Prawo do ochrony życia prywatnego’ in L Wiśniewski (ed), *Podstawowe prawa jednostki i ich sądowa ochrona* (Warsaw, Wydawnictwo Sejmowe, 1997).

<sup>42</sup> B Banzak, *Prawa jednostki i systemy ich ochrony* (Wrocław, Kolonia, 1995); P Hofmański, *Ochrona praw człowieka* (Białystok, Temida 2, 1994); M Piechowiak, ‘Pojęcie praw człowieka’ in L Wiśniewski (ed), *Podstawowe prawa jednostki i ich sądowa ochrona* (Warsaw, Wydawnictwo Sejmowe, 1997).

provided a catalogue of rights, following in this regard a scheme typical of United Nations (UN) human rights acts. The broad catalogue therein incorporates three clusters: (1) personal; (2) political; and (3) economic, social and cultural freedoms and rights. In addition, the catalogue of rights was supported by specific institutions dedicated to safeguarding human rights: the right of access to the court; the right to appeal a judgment; and the right to constitutional complaint. A crucial achievement was the establishment of the Ombudsman as early as 1987, at the end of the Communist period.<sup>43</sup> This office was then introduced in the Constitution of the Polish People's Republic in 1989.

The new approach to freedoms and rights embodied in the Constitution of 1997 and the contrast to the pre-1989 citizens' rights model is evident in many areas. The Constitution uses the notion of 'freedoms and rights' in that particular order. The sequence of those words is not accidental. First, it presents a reaction to the application of the notion of citizens' rights present in the Soviet-type constitutions, which de-emphasised the freedoms of those citizens. Second, this particular sequence – freedoms before rights – highlights that the human condition is more fundamental than that of the citizen, thereby also stressing the natural character of human rights. In addition, the Constitution set aside the notion that any exercise of rights is conditional upon fulfilling obligations towards the state, which was characteristic of the approach under Communism.

## VI. THE DEVELOPMENT – AND CRISIS – OF CONSTITUTIONAL REVIEW

One of the most fascinating events in Polish constitutional law has been the establishment of constitutional review, a process that started even before the fall of Communism. The Constitutional Court was established in 1985. The 'Polish way' towards constitutional review took a trial-and-error approach to the adoption of the Kelsenian model of constitutional review. In this respect, it differed from other Central and Eastern European states, which introduced constitutional review later and based on ready-made concepts from Austria and Germany. In addition, already in the inter-war period (1918–39), both the March Constitution

<sup>43</sup> Law of 15 July 1987 on the Ombudsman, *JL* 2018 Pos 2179. See ch 8.

of 1921 and the April Constitution of 1935 prescribed that no statute could be contrary to the Constitution. However, neither a constitutional court nor a specific procedure for review of unconstitutional statutes was foreseen, although the scholarship of various legal traditions and political backgrounds underlined the value of a constitutional court.<sup>44</sup>

During the Polish People's Republic (1944–89), constitutional review was obviously not foreseen as part of the undemocratic Communist state. Formally, the Constitutional Court was introduced in 1982 by an amendment to the Constitution of the Polish People's Republic. Subsequently, in 1985, the Law on the Constitutional Tribunal offered a basis for the Court's functioning, and it began operating in January 1986 and pronounced its first judgment within the few first months. The creation of the Constitutional Court was a controlled concession of the Communist Party, which would have far-reaching consequences. The Communist authority formally accepted that laws had to comply with the Constitution. However, there was a safeguard, as judgments of the Constitutional Court declaring laws as unconstitutional were not final. Until 1997, the Chamber of Deputies, as the highest organ of state power, could, by a two-thirds majority, vote to reject such judgments of the Constitutional Court. As such, the establishment of the Constitutional Court was an achievement of the period of political liberalisation in late 1980s. Nonetheless, it remained a defective institution – a Kelsenian idea built in an undemocratic system of government. Despite this major flaw, the Constitutional Court even before 1989 represented the core idea of constitutionalism: the primacy of the Constitution and the importance of human rights protection.

The Constitution of 1997 finally introduced a fully independent Constitutional Court and a centralised model of constitutional review. The Constitution includes the Constitutional Court among the organs of the judicial power.<sup>45</sup> Its name (*Trybunał*), its members (described as judges), their independence and the judgments that follow hearings are all typical of an organ of the judiciary. Calling the Constitutional Court a 'court' is therefore uncontroversial. The Constitutional Court often labels itself as a 'court of law' (*sąd nad prawem*). In this sense, it does not deal with the facts of the case, with the sole exception of controlling the compliance of political parties' activities with the Constitution.

<sup>44</sup>See especially the writings of Władysław L. Jaworski, Stefan Starzyński and Waclaw Komarnicki.

<sup>45</sup>Article 10(2) of the Constitution.

The Constitution of 1997 rendered the judgments of the Constitutional Court final and universally binding. Thanks to the new competences enshrined in the Constitution of 1997 and through the development of its own case law, the Constitutional Court achieved an important position in the constitutional system of Poland. It was the sole and unquestioned instance of constitutional review. Its role and judgments were not called into question or rejected. The Constitutional Court, exercising constitutional review, decided on key issues for the young state's institutional system such as Poland's membership in the EU, as well as issues concerning day-to-day aspects of life, such as the retirement and pension system or the character of penalties for illegal tree cutting.<sup>46</sup> The existence of the Constitutional Court itself was a safeguard against the enactment of unconstitutional laws. As such, the value of constitutional review might obscure its possible disadvantages, failures in its functioning or other allegations, such as judicial activism. Over the years, the Constitutional Court maintained the rigour of rationality in its jurisprudence, something that is evident from its meticulously justified judgments and public hearings of cases. Although the Court attempted to maintain judicial self-restraint, this did not shield it from political attacks.

In 2015, the governing majority of the Law and Justice party began questioning the fundamental role of the Constitutional Court for maintaining the supreme position of the Constitution, underlining instead the role of the Chamber of Deputies and of the nation as the sovereign. This was illustrated by some politicians with the slogan: 'It is the nation that stands above the law, not the law above the nation.' Accordingly, the parliament in November and December 2015 adopted a series of laws that aimed at disrupting and blocking the issuing of judgments by the Constitutional Court. The governing majority labelled these statutes 'remedy laws', while in fact they had the effect of slowing down or even paralysing the work of the Court. The 'remedy laws', rather than being an incidental action of the legislature, aimed at extorting a constitutional change on the basis of a statute. Attempting to paralyse the work of the Constitutional Court, the 'remedy laws' moved the position of the Constitutional Court towards the legislative power. However, the governing majority repealed these 'remedy laws' at the end of 2016, with the entry into force of three new statutes that regulate the status of the

<sup>46</sup> Constitutional Court, judgment of 24 November 2010, K 32/09, OTK ZU 9A/2010, poz 108; judgment of 19 December 2012, K 9/12, OTK ZU 11A/2012, poz 136; judgment of 1 July 2014, SK 6/12, OTK ZU 7A/2014, poz 68, respectively.

Constitutional Court.<sup>47</sup> These laws do not end the conflict around the Constitutional Court, the position of which, as a consequence, has been marginalised. The situation of the Constitutional Court after 2015 is discussed further in Chapter 6.

## VII. CONCLUSION

Poland has its own constitutional heritage, with the Constitution of 3 May 1791 as its foundation. This heritage had practical meaning after the Second World War, when Poland was incorporated into the group of Communist states, and in spite of this process people did not succumb to the Communist system. The society maintained its culture, tradition and awareness of being connected to *Rzeczpospolita*. This was evident in the respect shown towards the cultural and legal achievements of the state referred to as *Rzeczpospolita*. For over 40 years – until 1989 – the Communist government in power did not succeed in eradicating this heritage. Following this, the ‘Solidarity’ movement and the efforts of civil society, as well as attachment to freedom, played a crucial role in the shaping of a fully independent state post-1989. Without any doubt, thanks to the constitutional heritage, the transition from a Communist system to a parliamentary democracy took a relatively smooth and non-conflictual form compared to other states in the Communist Bloc. As a result of these efforts and circumstances, Poland again became part of a free Europe, further expressed in its membership of the EU.

Nowadays, it is hard to imagine Poland as a system of government other than a republic and a democratic state ruled by law. Even the weakening of the rule of law after 2015 – which is discussed in the following chapters – did not annihilate these fundamental principles of the state system. Polish constitutionalism experienced – and continues to experience – defeats and periods of regression. Ignoring the more distant times of the First Republic, such retrogression notably took place during the Second Republic, especially evident in the May Coup (1926), and in the circumstances of adoption of the April Constitution of 1935

<sup>47</sup>Law of 13 December 2016 on Introductory Provisions on the Law on Organisation and Procedure before the Constitutional Court, JL 2016 Pos 2074, JL 2018 Pos 849; Law of 30 November 2016 on the Status of the Judges of Constitutional Court, JL 2018 Pos 1142; Law of 30 November 2016 on the Organisation and Procedure before the Constitutional Court, JL 2016 Pos 2072.

in which some principles were undemocratic in character. In addition, the Communist period as a whole represented a negation of democratic constitutionalism. So-called socialist constitutionalism was simply a doctrine of the exercise of power by the Communist Party and should not be called constitutionalism at all.

Finally, the attack of the governing majority on the judicial power after 2015 presents another period of retrogression that is best described as constitutional violence.

#### FURTHER READING

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