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**Between independence and political subordination.
A brief outline of the constitutional history of the
judiciary in Poland in the years 1918–2018**

Keywords: judiciary, Poland, constitution, 1918–2018

Słowa kluczowe: władza sądownicza, Polska, konstytucja, 1918–2018

Abstract

On November 11, 2018, 100 years have passed since Poland regained its independence. This period, however, was not entirely the period of the peaceful development of a fully independent state, but a relatively short period of freedom (1918–1939) was interrupted by German occupation during World War II, and then by limited sovereignty and subjection to the Soviet Union in the years 1944–1989. It was not until 1989 that Poland entered again the path of political change that led to the democratization of social and political life and to the adoption in 1997 of the democratic Constitution that is still in force today. This difficult time is in line with the equally difficult history of the Polish judiciary, with the changing constitutional foundations of its organization and sometimes dramatic practice of its functioning. The aim of this study is to synthetically outline these issues, including the basic Polish constitutional norms of 1918–2018 regarding the judiciary and a brief description of their impact on the functioning of Polish judicial authorities.

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Streszczenie**Między niezawisłością a politycznym podporządkowaniem. Krótki zarys konstytucyjnej historii władzy sądowniczej w Polsce w latach 1918–2018**

W dniu 11 listopada 2018 r. minęło 100 lat od odzyskania niepodległości przez Polskę. Okres ten nie należał jednak niestety w całości do czasu spokojnego rozwoju niepodległego państwa, ale po stosunkowo krótkim okresie wolności (1918–1939) wiązał się najpierw z niemiecką okupacją w czasie II wojny światowej, a następnie z ograniczoną suwerennością i podległością Związkowi Radzieckiemu w latach 1944–1989. Dopiero w 1989 roku Polska weszła ponownie na drogę przemian ustrojowych, które doprowadziły do demokratyzacji życia społecznego i politycznego i do przyjęcia w 1997 roku obowiązującej do dziś demokratycznej Konstytucji. W ten niełatwy czas wpisuje się równie trudna historia polskiego sądownictwa, ze zmieniającymi się konstytucyjnymi podstawami jego organizacji oraz dramatyczną niekiedy praktyką funkcjonowania. Celem tego opracowania jest syntetyczne zarysowanie tych zagadnień, z uwzględnieniem podstawowych polskich norm konstytucyjnych z lat 1918–2018 dotyczących sądownictwa i krótkim opisem ich wpływu na funkcjonowanie polskich organów sądowniczych.

Three fundamentally different periods in the history of the political system of Poland may be distinguished in the period of 100 years since Poland regained its independence on November 11, 1918. The first of them from 1918–1939 is the period of so-called The Second Republic of Poland, in which the Polish state was rebuilding after 123 years of partitions, and which ended the outbreak of World War II. At that time, the Small Constitution of 1919 was in force, replaced later by the March Constitution of 1921, which in turn was replaced by the April Constitution of 1935. After World War II, the Polish state was in the zone of Soviet influence, which resulted initially in the adoption of the Small Constitution of 1947 constituting a formal confirmation of the takeover of power by the communist regime, and then led to the adoption of the Constitution of the Polish People's Republic of 1952, which was the Constitution characteristic for the communist states. This period is called the period of People's Poland. Next the period of systemic transformations, initiat-

ed in 1989, is the beginning of the formation of the Third Republic of Poland, which after the period of the temporal constitution, still finds the basis for functioning in the Constitution of the Republic of Poland from 1997. Each of the listed periods is characterized by other political conditions, including geopolitical, full and limited sovereignty of the state, which, as shown in the following analysis, directly influenced the constitutional and political position and practice of the functioning of the Polish judicial authorities.

I. The Second Polish Republic

During the Second Polish Republic (1918–1939), as mentioned two Polish full constitutions which regulated the functioning of Polish judicial authorities were in force – the March Constitution of 1921² in the years 1921–1935 and the April Constitution of 1935³ in the years 1935–1939, which also constituted the basis for the functioning of the Polish authorities during World War II, under the so-called Government of the Republic of Poland in exile to 1990. The March Constitution, however, was preceded by the so-called the Small Constitution from 1919, which temporarily defined the functioning of the legislative and executive power, but omitted the judiciary⁴. The organs of the judiciary, including the Supreme Court created in 1917 before the formal regaining of independence⁵, operated in the years 1918–1921 without a constitutional basis (even temporary and provisional) based primarily on the provisions on the temporary organization of courts issued by the Regency Council, and then on the basis of the Decree of the Provisional Head of State Józef Piłsudski of February 8, 1919.

The entry into force of the March Constitution ended the period of the provisional constitutional system and introduced the full constitutional ba-

² The Act of 17 March 1921 – Constitution of the Republic of Poland (Dz.U. 1942, No. 44, item 267, as amended).

³ Constitutional Act of 23 April 1935 (Dz.U. No. 30, item 227).

⁴ Resolution of the Sejm of 20 February 1919 on entrusting Józef Piłsudski with continued office of the Head of State (Dz.U. No. 19, item 226).

⁵ A. Lityński, *History of the Supreme Court of the Republic of Poland*, <http://www.sn.pl/en/about/SitePages/History.aspx> (22.11.2018), R. Jastrzębski, *O stu latach Sądu Najwyższego (1917–2017)*, "Palestra" 2017, No. 4, pp. 70–76.

sis for the functioning of the Polish judicial authorities. The March Constitution, indirectly basing the system of the state on the principle of division and balance of power, made primarily from the judiciary a separate segment of power, whose main task was to administer justice on behalf of the state (Art. 74 and 75). The Constitution guaranteed full independence for the judges appointed by the President (apart from the magistrates appointed by the citizens) and ensured the final nature of court decisions (Art. 76–78). In Art. 81 the Constitution also pointed out that the courts do not have the right to “examine the validity of statutes”, which meant the lack of even the beginnings of the Polish model of constitutional review of the law. At the same time, the Constitution called for special courts of jurisdiction to adjudicate on crimes threatened with the highest penalties and political crimes (Art. 83), as well as the Supreme Court (Art. 84), military courts (Art. 85), as well as the administrative court with the Supreme Administrative Court, to adjudicate on the legality of administrative acts in the field of administration and self-government, and the Competence Court to settle disputes over jurisdiction between administrative authorities and courts (Art. 86), which were in fact the beginning of the Polish administrative judiciary after regaining independence⁶. The Constitution also provided for in Art. 64 The State Tribunal, which was to adjudicate on constitutional crimes and torts of the President and ministers. Among the constitutional rights, the March Constitution also provided for a broad right to court, which guaranteed not only citizens (Art. 98).

Another of the full constitutions of the Second Polish Republic – the April Constitution of 1935, the adoption of which was in fact held in violation of the predecessor’s provisions, fundamentally changed the system of Poland at that time. On the basis of the authoritarian tendencies of the ruling sanitation camp, it introduced first of all the principle of uniformity of state power with the superior political position of the President (Art. 2 sec. 1). Courts became the organs of the state, which, like others, were subordinate to the President and whose main task became “serving of the Republic”. The constitutional position of the courts has been weakened generally, which is also vividly illustrated by the fact that the April Constitution regulated their sys-

⁶ D. Malec, *Najwyższy Trybunał Administracyjny 1922–1939. Rozważania z dziejów sądownictwa administracyjnego w Polsce*, [In:] *XXV-lecie Naczelnego Sądu Administracyjnego na tle dziejów sądownictwa administracyjnego w Polsce*, ed. M. Sawicka-Jezierczuk, Warsaw 2005.

tem (Chapter IX) after the Armed Forces, which also became the organs of the state. In spite of these changes, the discussed Constitution maintained the basic detailed regulations of the previous basic law and guaranteed judges independence and final decisions of the courts (Art. 64). President, under the law of grace, could, however, forgive or mitigate the conviction (Art. 69). The April Constitution reiterated in Art. 70 The Supreme Court for civil and criminal court cases, the Supreme Administrative Tribunal to adjudicate on the legality of administrative acts and the Competence Tribunal for resolving disputes over jurisdiction between courts and other authorities. In addition, it appointed military courts and the State Tribunal for ministers and parliamentarians, but not for the President.

The period of the Second Republic of Poland is the time of initial independence for the Polish judicial authorities and playing the role of the equivalent power segment compared to legislative and executive. It was also a time of permanent process aimed at unifying the jurisprudence based in part on the legal systems of the former partitioning states. However, so-called The May coup of 1926 had begun political pressure on the judiciary, symbolized by the unconstitutional removal in 1929 of the First President of the Supreme Court, Władysław Seyda and the President of the Criminal Court of the Supreme Court, Aleksander Mogilnicki. The pressure of politicians on the judiciary then gained a constitutional basis in the April Constitution because, as mentioned, it introduced the principle of uniformity of state power with the superior position of the President. This constitution, however, became at the same time the basis of the unique Polish judiciary system during World War II as part of the so-called Polish Underground State⁷.

II. People's Poland

The end of the Second World War unfortunately did not mean a return to full sovereignty for Poland. The German occupation was replaced by a far-reach-

⁷ W. Rosłonec, *Wymiar sprawiedliwości Polskiego Państwa Podziemnego (1939–1945)*, "Palestra" 1989, No. 8, pp. 19–38, [http://bazhum.muzhp.pl/media//files/Palestra/Palestra-r1989-t33-n8_10\(380_382\)/Palestra-r1989-t33-n8_10\(380_382\)-s19-38/Palestra-r1989-t33-n8_10\(380_382\)-s19-38.pdf](http://bazhum.muzhp.pl/media//files/Palestra/Palestra-r1989-t33-n8_10(380_382)/Palestra-r1989-t33-n8_10(380_382)-s19-38/Palestra-r1989-t33-n8_10(380_382)-s19-38.pdf) (22.11.2018).

ing dependence on the Soviet Union, which led to a large extent to the constitutional determination of the political position of the courts and their functioning in the period of the so-called People's Poland in the years 1944–1989. Originally, the new Polish communist authorities referred to the provisions of the March Constitution, but only in the formal sphere, because it did not affect the functioning of the courts in the smallest degree. This period (1944–1947) formally ended with the entry into force of the Small Constitution of 1947⁸, became the period of the common judicial crimes and death sentences pronounced and performed against representatives of the political opposition (judicial murders). The Small Constitution of 1947 also declared the independence of the courts (Art. 2 and 24), however, the practice of their functioning did not change significantly, and also on the basis of this constitutional act there were cases of using courts for political struggle against opponents of the new authorities and further judicial murders.

The Constitution of the Polish People's Republic of 1952⁹ became the first full constitution of this period. Like the April Constitution of 1935, it introduced the principle of uniformity of state power with a formally superior political position of Sejm. The Constitution entrusted the administration of justice to the Supreme Court, provincial courts, county courts and special courts (Art. 46), in addition, in Art. 48 it indicated that the role of courts was also to “protect the gains of the Polish working people, safeguard the rule of law, social rights and citizens' rights”. Despite the formally guaranteed independence of judges (Art. 52), unfortunately also during the period of application of this fundamental law there were frequent cases of politicization of courts, which in particular took place during periods of intensified social protests (1956 – Poznań events, 1968 – March events, 1970 Strikes, 1981–1983 – martial law period¹⁰).

The period of the Constitution of the Polish People's Republic, however, has also become, paradoxically, a period of certain changes in the system of Polish judicial authorities, which should be assessed positively. In 1980, the

⁸ The Constitutional Act of 19 February 1947 on the system and scope of activity of the highest authorities of the Republic of Poland (Dz.U. No. 18, item 71).

⁹ Constitution of the Polish People's Republic of 22 July 1952 (Dz.U. No. 33, item 232, as amended).

¹⁰ A. Strzembosz, M. Stanowska, *Sędziowie warszawscy w czasie próby 1981–1988*, Warsaw 2005.

administrative court in the form of the Supreme Administrative Court was reinstated in the Polish judicial system¹¹. In turn, in 1982 the amendment to the Constitution of the Polish People's Republic restored the State Tribunal in Poland, but first and foremost, it provided for the first time the Constitutional Tribunal, which by its first ruling from 1986 began the history of the Polish constitutional review system¹².

III. The Third Polish Republic

In 1989, a process of intense social and political changes related to the "Round Table" talks began in Poland, which led to significant constitutional changes, including the area of judicial bodies. Already in April 1989, on the basis of the April amendment to the Constitution of the PRL¹³, the National Council of the Judiciary was introduced, which gained the right to present candidates for judges to the President. At the end of 1989, as a result of the revision of the Constitution of the Polish People's Republic¹⁴, the traditional name of the state was restored – the Republic of Poland, which according to art. 1 of the Constitution was defined as a democratic state of law. In particular, it allowed the Constitutional Tribunal to interpret from this provision many norms characterizing the system of states referring to the concept of the rule of law. The revision introduced also into Art. 56 sec. 1 of the Constitution, division of judicial authorities into the Supreme Court, common courts and special courts. In 1992 in the subsequently adopted Small Constitution¹⁵ the

¹¹ See more: <http://www.nsa.gov.pl/historia/25-lat-dzialalnosci-naczelnego-sadu-administracyjnego-artykul-z-2005-r,news,15,5.php> (22.11.2018).

¹² See more: S. Soja, *Trybunał Konstytucyjny RP – geneza i rozwój instytucji*, "Studia z Zakresu Nauk Prawnoustrojowych. Miscellanea" 2016, No.VI, pp. 303–322 and <http://niezniknelo.pl/trybunal/en/about-the-tribunal/constitutional-tribunal/historical-outline/index.html> (22.11.2018).

¹³ Constitutional Act of 7 April 1989 amending the Constitution of the Polish People's Republic (Dz.U. item 101).

¹⁴ Constitutional Act of 29 December 1989 amending the Constitution of the Polish People's Republic (Dz.U. No. 75, item 444).

¹⁵ Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive authorities and on local self-government (Dz.U. No. 84, item 426, as amended).

principle of uniformity of state power was replaced by the principle of the division of powers, and independent courts were made state authorities in the area of judicial power (Art. 1). At the same time works on a new full constitution were in progress. These works ended with the enactment of the of the Constitution of April 2, 1997, which entered into force on October 17, 1997 and which remains in force until today.

The Constitution in force creates a formal framework for the full independence of the judiciary, which it makes a separate authority and which includes courts and tribunals (Art. 10 and 173). The courts that deal with justice include the Supreme Court, common courts, administrative courts and military courts. The Polish tribunals are the Constitutional Tribunal and the State Tribunal. The Constitution also provides for full formal guarantees of judges' independence, who are appointed by the President at the request of the National Council of the Judiciary. The Polish constitutional regulations regarding the third authority also refer to European standards in the field of the judiciary, including the relevant case law of the European Court of Human Rights. These regulations, as well as the practice of their application, did not constitute an obstacle to Poland's accession to the European Union in 2004. Despite various problems, such as excessive length of court proceedings, the Polish judiciary from 1997–2015 should be generally assessed as meeting the requirements of the rule of law principle and international and European standards in this area.

Unfortunately, the last very important accent of the constitutional history of the judiciary in Poland is the ongoing constitutional crisis initiated in 2015 by the paralysis of the Constitutional Tribunal. The Sejm of the current term, contrary to constitutional norms and the ruling of the Polish constitutional court, elected three judges for places already occupied by persons elected by the Sejm in the previous term, and unauthorized persons took oath in front of the present President. Equally controversial and equally dubious in terms of compliance with the current Constitution were successively changes in the appointment of presidents of common courts, the election of all members of the National Council of Judiciary by politicians, and finally changes in the Supreme Court, including abridging the constitutionally guaranteed six-year term of the First President of the Supreme Court and transferring part of the Supreme Court's judges contrary to constitutional guarantees to state

of rest. However, unconstitutional changes in the Supreme Court have been prevented by the interim measures decision of the Vice-President of the Court of Justice of the European Union¹⁶, which does not end the constitutional crisis, but allows to state that the Polish judiciary is by now not only a national judiciary, but also a European one and in this context its politicization is not as easy as in the discussed above difficult history of the Polish state and its third power. It is puzzling at the same time that some kind of the “Polish historical tendency” still leads some politicians to attempt to politicize the judicial organs, which certainly, as history shows, will not improve the efficiency of judicial proceedings and the level of justice¹⁷.

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¹⁶ See <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf> (22.11.2018).

¹⁷ See <http://niezniknelo.pl/OK2/arttykul/historia-lubi-sie-powtarzac/1/index.html> (22.11.2018).