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The Judiciary in the Polish Constitution of 1921 and in Its Historical Precedents in the Light of Primary Sources and the Western European Literature

1. The judiciary in the Polish constitutional framework of 1791

The old Polish public law, with particular reference to the Constitution of May 3, 1791[1] which has become a sort of symbol of the cultural identity of Poland[2] and the foundation of its own constitutional heritage[3], included interesting provisions on the discipline of the judiciary. The Art. 7 of the Constitution established, in fact, that the judicial power cannot be exercised by the legislative authority or by the king, but only by judges chosen and established for this purpose. The constitutional

1 At the time of the First Republic of Poland (1569–1795), or of the Polish-Lithuanian Confederation (so-called Republic of the Two Nations), on which see, lastly, *The Polish-Lithuanian*… For an extensive historical reconstruction, cf. J. Wawrzyniak, *La Polonia*…; M. Chiapetto, *Il diritto*…; B.M. Palka, *La Costituzione*…; L. Kawan, *La Costituzione*…; *Le Costituzioni*…; B. Mirkine-Guetzévitch, A. Tibal, *La Pologne*… For the French influences on the Constitution of 1791 (although this was adopted before the French Constitution of September 1791, and therefore represents the first formal constitution enacted in Europe), see *Die polnische*…; M. Granat, K. Granat, *The Constitution*…, especially p. 9–11. In the comparative perspective, see G.-C. von Unruh, *Die Polnische*…, p. 85 ff. The Constitution of 1791 was the work of the so-called Diet of the Four Years, or Great Diet, in office from 1788 to 1792; the same Constitution was officially called „Governing Law".

2 See M. Hillar, *The Polish*…, p. 185 ff.

3 Cf. M. Granat, K. Granat, *The Constitution*…, p. 20.

norm therefore consecrated the principle of separation of powers[4], with the precise political-institutional meaning, according to which the judiciary is destined to counterbalance the other two political powers, namely the legislative and the executive. The Polish legal doctrine, in the light of the provisions contained in the Constitution of May 1791 on the subject of the judiciary, was talking of a preliminary separation between all political powers, on the one side, and the power of contentious jurisdictions, on the other side[5].

The judicial organization, in force of the Constitution of 1791, was quite complex. At the basic level, we found the jurisdictions of first instance, established within each palatinate and district. The magistrates assigned to them were chosen from the Diets of the corresponding administrative steps. Then there were the higher courts, whose magistrates were also chosen by the Diets of the corresponding level. Free cities had their own municipal jurisdictions. Within each province, second instance courts operated, with jurisdiction also over disputes between free settlers (i.e., the agrarian cases). The Supreme Court had been established, with special jurisdiction relating to crimes committed against the nation and the king, or in other words the so-called crimes of states. For this reason, the Supreme Court was currently indicated as the judge of the Diet.

Finally, with regard to an issue which, as will be seen later in the comment on the 1921 Constitution, is of central importance in the history of the institutions of public law in Poland, namely the control of the constitutionality of laws, in force of the 1791 Constitution this control was not exercisable subsequently, but only as a preventive measure by the Parliament (*Sejm*)[6]. Taking into account that there was no lack of parliamentary attempts to introduce regulations in contrast with the Constitution, the institutional solution accepted by the Polish discipline on the preventive

4 On which see, lastly, *New Challenges*… For the tripartite scheme of separation of powers accepted by the Polish Constitution of 1921, cf. M.F. Brzezinski, *Constitutional*…, p. 49 ff., especially p. 71 ff.

5 See, for the appropriate references, C. Crozat, *Les constitutions*…, *Avertissement* by M. Hauriou, and especially p. 85.

6 On the preventive constitutional control in the system of the Constitution of 1791, see A. Tarnowska, „*To Which*…, p. 113 ff.

control of legislative projects involved, together with the „juridification" of the Constitutional Charter, the acceptance of the assumption of the supremacy of the Constitution, and therefore the innovative effect of accepte the concept of unconstitutionality.

2. The French influence in the Constitution of the Duchy of Warsaw in 1807

Among the *octroyées* constitutional charters of Poland, the 1807 Constitution of the Duchy of Warsaw[7] assumes relevance from the point of view now under examination. The Duchy, which had an area of about one hundred thousand square kilometers with a population of two and a half million inhabitants, was therefore to be considered a „small state", born with the support of Napoleonic France in an anti-Prussian function[8]. We can speak, in fact, of a state dependent on France, a vassal state, a buffer state, a French military bastion, etc.[9] The Constitution of the Duchy of Warsaw is usually considered a Napoleonic constitution[10].

Given these premises, it is not surprising that the discipline of the judiciary contained in the Constitution of the Duchy of Warsaw closely followed the French model[11]. The pyramid of the courts was, in fact, so structured. At the first or basic level, the judicial

7 See B. Winiarski, *Les instituions*…; W. Sobocinski, Le Duché…, p. 365 ff.; P.S. Wandycz, *The Lands*…, p. 43 ff.; A. Dziadzio, *The Constitution*… p. 163 ff.; M. Kallas, M. Kallas, *Konstytucja*…, p. 113 ff. (text in Polish); M. Kallas, M. Kallas, *Ustawa*…, p. 107 ff. (in Polish); W. Sobociński, *Historia*… (in Polish). On a particular aspect, see also A. Mansuy, *Le clergé*…, p. 97 ff. The art. 1 of the Constitutional Statute of the Duchy of Warsaw established that the Catholic, Apostolic and Roman religion is the religion of the State.

8 See J. Stanley, *The Adaptation*…, p. 128 ff.

9 Cf. W. Sobocinski, *Le Duché*…, p. 365. See also B. Grochulska, *Sur la structure*…, p. 349 ff., who refers to the independent Polish State prudently called the Duchy of Warsaw.

10 Cf. M. Kallas, *The Constitutional*…, p. 11 ff.

11 On the „suggestions" proposed by the French model in the history of Polish constitutional law, see J. Sawicki, *La Costituzione*…, p. 157 ff., especially p. 157, with reference to the 1921 Constitution (on which see below, par. 6–9). For the statement that the Constitution of the Duchy of Warsaw was „dictated by Napoleon I", cf. L. Kawan, *La Costituzione*…, p. 17. With specific regard to the judiciary, see A. Bereza, J. Kostrubiec, G. Smyk, *The modernization*…, p. 75 ff., on the circulation of the French, Russian, Prussian and Austrian models. In Polish language, cf. T. Maciejewski, *Historia*…, p. 199-ff.; W. Witkowski, *Uwagi*…, p. 301 ff.

organs of the constituency were constituted, represented by justices of the peace, each of whom was designated by the district Diet from a list of three candidates. At the intermediate level, created in correspondence with the departmental administrative step, a civil court of first instance functioned as well as a criminal court, with the particularity, however, that the criminal courts had jurisdiction over two departments. In matters assigned to the jurisdiction of justices of the peace, the departmental courts performed the functions of appellate judge, while with regard to the other matters (which were more numerous and important), the jurisdiction was attributed in the first instance to the courts of department. In the last indicated matters, the competence in the second instance was attributed to the Court of Appeal, while the third instance (with a judgment of legitimacy and not of merit) belonged to the Court of Cassation. For disputes of an administrative nature (between the citizens and the authorities of the Duchy, or between public administrations), the Council of State was instead established, competent to decide, according to jurisdictional procedures, the appeals that had to be previously submitted in an administrative way to the general administration of the Duchy[12].

In any case, the administrative system of the Duchy of Warsaw followed the French model, and so included prefectures, sub-prefectures and municipalities, but also retained some traces of the Polish tradition, as well as of the Prussian and Austrian regulations[13].

3. The Constitution of the Kingdom of Poland of 1815 and the reception of the Russian model

Following the Congress of Vienna of 1814–1815, the influence on the political and institutional events of Poland marked a decisive point of favor for one of the (three) traditional „powerful neighbors" of Poland itself, namely (Tsarist) Russia[14]. Alexander I, in fact, granted the Constitution

12 Cf. J. Turłukowski, *Administrative*…, p. 124 ff., especially p. 126 ff.

13 See M. Kallas, *Le système*…, p. 259 ff.

14 The Poland's other two „bulky" neighbors are Prussia/Germany and, from a historical perspective, the Austro-Hungarian Empire.

of the Kingdom of Poland of 21 November 1815[15], which established the royal union of the Kingdom of Poland with the Tsarist Empire[16]. In accordance with art. 1 of the Constitutional Charter of the Kingdom of Poland: „The Kingdom of Poland is reunited forever with the Empire of Russia".

The emperor of Russia also became the king of Poland, according to the principle of the so-called personal union. Consequently, the regent of Russia was also the regent of Poland. In particular, foreign policy was attributed to the exclusive competence of Russia. However, the Regency Council of the Russian-Polish Union was not composed only by the members of the Council of the (Russian) Empire, so that there was also a component of Polish jurists and politicians in this organ of the state[17]. It was provided, by art. 55 of the Constitutional Charter of the Kingdom of Poland, that the members of the Regency of the Kingdom are responsible in their person and their property for everything they have done contrary to the Constitution and the laws.

Among the main drafters of the Constitution of the Kingdom of Poland, alternatively known as the „Kingdom of Congress" (in Polish *Królestwo Kongresowe*) due to its historical origins, was the Polish statesman Ignace Sobolewski[18]. Some exponents of the Polish political

15 Cf.: F. Heinicke, *Verwaltung*…; F. Possart, J. Lukaszewicz, A. Mulkowski, *Das Königreich*…; S.S. Igorevich, *Aleksandr I*… (text in Russian).

16 The Constitution of the Kingdom of Poland of the Congress of Vienna of 1815 was „elaborated by Tsar Alexander I" (cf. L. Kawan, *La Costituzione*…, p. 17; acording to M. Chapetto, *I Principi*…, p. 2: „the Tsar was personally involved in the elaboration of constitutional principles"). On the „Polish problem" at the Vienna Congress (and subsequently), see W.H. Zawadzki, *Russia*…, p. 19 ff.; A. Grabowsky, *Die Polnische*…; W. Recke, *Die polnische*…; E. Völkl, *Zar*…, p. 112 ff.; R. Spät, *Die „polnische*…; K. Thakur-Smolarek, *Der Erste*…; S. Filasiewicz, *La Question*…, p. 57 ff.; T. Schramm, *La question*…, p. 439 ff. For the negotiations prior to the Vienna Congress, cf. H. Zawadzki, *Between*…, p. 110 ff.; M.-P. Rey, *Alexandre*…, p. 73 ff. On the geopolitical „vision" of Alexander I, cf. A. Erochin, *Zar*…, p. 120 ff.

17 The discipline of the regency was contained in art. 48–62 of the Constitution of the Kingdom of Poland. Cf. amply J.W. Zdzisław, *Rada*… (text in Polish), on genesis, members, external relations, organizational and regulatory aspects, functional problems, main directions of activity, etc. of the Regency Council. On the administrative structures of the Kingdom (central government, ministries, territorial organisation, etc.), see M. Gałędek, *National*… See also, on the Polish administrative thought of the nineteenth century, the monographic study by M. Gałędek, *Koncepcje*… (text in Polish).

18 Lived between 1770 and 1846.

world, such as the Polish prince Adam Jerzy Czartoryski, were openly in favor of the creation of the Kingdom of Poland within the Russian Empire, in order to guarantee the harmonious coexistence of the two peoples[19]. The basic political idea was to create a single state for the Slavic nation[20].

With regard, therefore, to the judicial system of the Kingdom of Poland[21], it provided for the competence at the basic level of justices of the peace with functions (also) of conciliation of disputes, the courts of first instance, the land courts (specialized on agricultural disputes), the courts of assizes[22] and the commercial courts. This applies to the civil and commercial litigation sector. For the criminal sector, criminal courts were established. In the second instance, two Courts of Appeal operated in the Kingdom of Poland. Finally, the third instance represented by the Supreme Court, competent for both civil, commercial and criminal disputes. The High Court of the Diet was also established, alongside the ordinary judicial hierarchy and with the function of special judge, with the specific task of judging the so-called state crimes.

The principle of the immovability of judges was also sanctioned, placed as a guarantee of the independence of the judiciary. Neither the emperor nor the Council of Regency had the power to dismiss the magistrates, who could be deprived of their institutional office only after a judicial procedure.

19 Cf. M. Kukiel, *Czartoryski*…, p. 606 ff.

20 See P. Brykczynski, *Prince*…, p. 647 ff.; W. Zawadzki, *Prince*…, p. 245 ff.

21 See art. 138–152 of the Constitutional Charter of the Kingdom of Poland.

22 With the consequent popular participation in the administration of justice, a characteristic of the Russian judiciary. On the topic, see: S. Kucherov, *The Jury*…, p. 77 ff.; I. Reshetnikova, *Judicial*…, p. 109 ff.; J. Dubois, *Les institutions*…, p. 210 ff.; F.B. Kaiser, *Die Russische*…; P. Vincenti, *Gli*…, p. 1051 ff. On the Russian judicial reform of 1864 as an expression of Russian „proto-constitutionalism", see R. Valle, *Genealogie*…, p. 11 ff., who speaks of the establishment of a new judicial system, more liberal than European ones (cf. p. 26). For the influence of the ideas of the English philosopher Jeremy Bentham, see K.P. Krakovskiy, *Jeremy*…, p. 61 ff. The models were represented by English and French law, but also by the procedural codes of Geneva and the Kingdom of Sardinia; see I. Petrova *et alii*, *Historical*…, p. 333 ff. The Special Commission for the reform of the judicial system was established by the Tsar on April 7, 1894, on the proposal of the Minister of Justice.

4. The Constitution of the Free City (Republic) of Krakow of 1815: an eclectic model

The Polish city of Krakow has experienced complex historical events. After being a part of Austria, within western Galicia, it returned under the dominion of Poland, being incorporated in 1809 into the Duchy of Warsaw[23]. With the Treaty of Vienna, a compromise solution was reached. This is because three European powers, namely Austria, Prussia and Russia, claimed their control over the city of Krakow. As is sometimes the case, the opposing claims neutralized each other, with the result that Krakow was not attributed to any of the three contenders. In fact, a different political and institutional solution was opted for, consisting in the creation of the Free City or Republic of Krakow, placed under the common Austrian, Prussian and Russian protectorate. The constituency of the Free City/Republic of Krakow[24] was divided into urban and rural municipalities.

The discipline of the judiciary contained in the Constitution of the Free City (or Republic) of Krakow is rather unusual in the comparative panorama[25]. It is necessary to start from the consideration of the higher organs of state power, represented by the Senate and the House of Representatives. As for the judicial organization, it primarily contemplated justices of the peace, appointed by the municipalities (urban and rural). To these were added the judges of the Court of First Instance, predominantly appointed by the House of Representatives, but with a share of competence of the municipal administrations. The Court of Appeal of the Republic of Krakow consisted of four judges, all chosen by the House of Representatives. Finally, the High Court, competent for the so-called State crimes, was composed of five deputies chosen from the House of Representatives, and also of three senators, the presidents of the Court of First

23 In turn constituted, as seen above (see par. 2), in 1807.

24 The official name was: Free, Independent and Neutral City of Krakow with its Territory, or in Polish *Wolne, Niepodległe i Ściśle Neutralne Miasto Kraków z Okręgiem*. The Republican institutions of Krakow were in operation between 1815 and 1846. Cf. J. Bieniarzówna, *Rzeczpospolita*… (text in Polish); S. Kieniewicz, *The Free*…, p. 69 ff.; L. Królikowski, *Mémoire*…; F. Possart, J. Lukaszewicz, A. Mulkowski, *Das Königreich*…

25 On the *status* of judges in the Free City of Krakow, see M. Mataniak, *The Judicial*…, p. 325 ff., with special attention to remuneration, pension, obligations, disciplinary and criminal liability.

Instance and of the Court of Appeal, and still four justices of the peace and three members/arbitrators whose designation belonged to the accused person.

The decisions adopted by the courts of justice of the Free City of Krakow show the application of French rules, using however categories of thought belonging to the Austrian legal tradition. Furthermore, the Faculty of Law of the Jagiellonian University of Krakow collaborated at the request of the parties for the exact application of the law, establishing synergies between the doctrinal and jurisprudential formants[26].

The judiciary legislation of the Constitution of the Free City of Krakow was as complex as it was ephemeral. In fact, in 1833 the constitutional text was revised, with the aim of reducing the institutional powers of the House of Representatives to the advantage of those of the Senate. On the other hand, an insurrectionary movement put an end to the experience of the Republic (or even the State) of Krakow in 1846. The (former) Free City was re-annexed to the Habsburg Empire in that same year. In any case, the Free City of Krakow had always remained under the protection of Austria[27].

5. The multicultural model of the Galician Statute of 1861, between German and French influences

An innovative and in some ways avant-garde discipline, at least from the point of view of the linguistic protection of minorities, took place in force of the Galician Statute of February 26, 1861[28]. The Galician Statute, which was repeatedly amended[29], was integrated and implemented not only by the Imperial Constitution of Austria approved by the constitutional law of 21 December 1867, but specifically as far as is concerned here by the provincial law on the language of 10 June 1866. This provided that the official languages of Galicia were Polish, Ruthenian and German, with the related right to use the same languages both

26 See A. Dziadzio, *Der Code*…, p. 269 ff.

27 See the historical premises in the essay of G. Rankin, *Legal*…, p. 1 ff.

28 See P.S. Wandycz, *The Lands*…, p. 214 ff.

29 With particular exent in 1914.

in schools and in the relations with the public administration as well as in court.

The situation of Galicia was emblematic of the legal system of the Polish state, as it was restored in 1918[30]. In fact, five legal systems coexisted in it. In the southern part of Poland, formerly part of the Austrian province of Galicia, Austrian legislation was applied. In the western provinces, formerly belonging to Prussia, German law was still in force. In the Eastern Provinces[31], Russian law had not been repealed. In the former territories of the Duchy of Warsaw (where the Napoleonic code was introduced[32]) rules of French law were observed, as well as in some territories already forming part of Russia. Finally, in some portions of the Polish territory, Hungarian legal norms were applied. Overall, the influences of the German model in the public law sector[33] and of the French model in the private law sector[34] were predominant.

Now, with particular regard to the judiciary, according to the Galician Statute of 1861 (subsequently amended), not only the organs of ordinary

30 For brief notes dedicated to the consequences on the judicial system, see Z. Kühn, *The Judiciary*…, especially p. 6–7.

31 Where the Ukrainian national minority lived; cf. E. Massis, *Les Ukrainiens*…, p. 140 ff. On Polish-Ukrainian relations, which were rather strained in the period of the Second Polish Republic, see B. Myciek, *La minoranza*…, p. 97 ff. There were two approaches in Poland to the Ukrainian national minority. The first proposed the incorporation of the minority itself, through its so-called polonization; the second was a supporter, however, of the so-called federalist program, which provided for the maintenance of multiple national (minority) identities. See the detailed analysis of B. Budirowycz, *Poland*…, p. 473 ff. On the „uncomfortable" geographical and historical position of the Ukrainians, see, for example, T. Chynczewska-Hennel, *L'Ucraina*…, p. 85 ff., who wonders, in light of the annexation of the Ukrainian territories by the Polish-Lithuanian Republic, if it was no longer correct to speak of the Republic of the Three (instead of Two) Nations (see also above). In truth, the „nations" were even more numerous, being represented not only by Poles, Lithuanians and Ukrainians/Ruthenians, but also by Germans, Tartars, Armenians, Jews and Gypsies, and there was no lack of Scots, Italians and Dutch; cf. W. Tygielski, *'Le Indie*… The Second Polish Republic, therefore, was a multinational state; see G. Dehnert, *Die nationalen*…, p. 285 ff., according to whom two thirds of the population identified themselves as Poles, 14 percent as Ukrainians, 10 percent as Jews, 2 percent as Germans. In some territories, these minorities represented the majority of the population. Among the national minorities; in this sense, cf. P.D. Stachura, *National*…, p. 60 ff.

32 Cf. D. Kempter, *Code*…, p. 28–31; J. Heyde, *Geschichte*…, p. 53–57.

33 Criminal law is included.

34 The *Code Napoleon* served as the undisputed model of reference.

jurisdiction operated in the territory, but also two particular courts, represented by the Tribunal of the Empire (*Reichsgericht*) and the Administrative Court (*Verwaltungsgerichtshof*)[35].

As for the first, it drew its own normative discipline from the constitutional law of December 21, 1867[36], completed by the special law of April 18, 1869[37]. Its main institutional function was to resolve conflicts of jurisdiction between local and central authorities, as well as between administrative and judicial authorities. In any event, these were matters relating to public law litigation. In the appellate against the decisions of the administrative authorities, the Tribunal of the Empire also decided, as a last resort, the disputes initiated by the citizens concerning the (alleged) violation of the political rights guaranteed by the Constitution.

With regard to the second, the composition of the Administrative Court, formed by the judges of the Crown and, therefore, also of Polish mother-tongue magistrates, was such as to ensure accessibility to the proceedings by those belonging to the Polish nation (or linguistic community). The jurisdiction of the Administrative Court included the decision of the disputes between private individuals and administrative bodies, both of the State and Provinces, Districts or Municipalities. The Administrative Court had elaborated the notion of the right to be heard, even in the absence of a specific legislative prescription, through the connection to the principles of natural justice[38].

35 The VwGH was established in 1875. On it, see A. Ferrari Zumbini, *Judicial*…, p. 9 ff.; A. Ferrari Zumbini, *Standards*…, 2019; A. Ferrari Zumbini, *Alle*…; A. Ferrari Zumbini, *Standards*…, 2021, p. 41 ff.; K. Ringhofer, *Der Verwaltungsgerichtshof*… The VwGH was a Court of single instance and had only cassatory power.

36 Staatsgrundgestez vom 21. Dezember 1867 über die Einsetzung eines Reichsgerichtes (R.G.BL. 143/1867).

37 The seat of the Tribunal of the Empire was in Vienna (cf. the art. 5 of the law cited in the preceding note, which stated: „Das Reichsgericht hat seinen Sitz in Wien"). About the *Reichsgericht*, see J. von Spaun, *Das Reichsgericht*…; *Das östreichische*…, p. 193 ff. For a study of the *Reichtsgericht* and the *Verwaltungsgerichtshof*, see also K. von Kissling, *Reichsgericht*…

38 See A. Ferrari Zumbini, *Il diritto*…, p. 101 ff. According to the Administrative Court, whenever the administration carries out a proceeding, it must also ensure that it is a fair proceeding, which includes the so-called participatory rights.

6. Justice in the Polish Constitution of 1921: an effective synthesis between different judicial traditions (with a conspicuous gap in terms of judicial control of the constitutionality of laws)

Coming now to examine the Polish Constitution whose 100th anniversary is celebrated in 2021[39], adopted by the Constituent Diet[40], elected for the term 1919–1922, on March 17, 1921[41], the discipline of the judiciary is mainly contained in articles 74 to 86, enclosed in Chapter IV, entitled „Justice".

With reference, first of all, to the mechanisms for the appointment (recruitment) of judges, they draw their foundation from the different legal and judicial traditions established in Poland throughout its history. On the one hand, ordinary magistrates were appointed by the President of the Republic. On the other hand, justices of the peace were elected by the population. It follows that both an „elitist" tradition of choosing judges (carried out, so to speak, from above), and the opposite tradition according to which judges are an expression of popular will (i.e., voted by the people)[42] were maintained. In any case, justice was to be rendered in the name of the Republic of Poland[43]. In the exercise of judicial functions, judges are independent and subject only to the laws; their

39 The Polish Constitution of 1921 (March Constitution/*Konstytucja Marcowa*) was largely inspired by the French model, in particular by that of the Third Republic (Constitution of 1875). See: S. Ceccanti, *Il costituzionalismo*…; A. Peretiatkowicz, *La Constitution*…, p. 609 ff.; J. Blociszewski, *Les nouvelles*…, p. 28 ff.; A. Kohl, *Die neue*…, p. 419 ff.; W. Komarnicki, *Polskie*… (text in Polish); M. Marcinkiewicz, *O konstytucji*… It is a constitutional text of the so-called Second Polish Republic, i.e. of Poland in the period between the two world wars. Cf. J. Pajewski, *Budowa*… (in Polish); A. Kulig, *Kształtowanie*… (in Polish).

40 For the distinction between (the functions of the) Legislative *Sejm* and (those of the) Constituent *Sejm*, see L. Kawan, *La Costituzione*…, p. 80.

41 In January 1919, the Office for the Constitution was created at the Presidency of the Council of Ministers. It developed three projects: the first influenced by the American (US) model; the second oriented towards the popular socialist model; the third which incorporated the French model. It was the latter that represented the backbone of the new Constitution of 1921. The approval of the Constitution of 1921 „was celebrated with a solemn function in the Cathedral of San Giovanni. The deputies, the Head of State and the government went in procession through the streets of Warsaw" (cf. J. Wawrzyniak, *La Polonia*…, p. 75).

42 See the provisions of the first paragraph of art. 76 of the Constitution of the Polish Republic of 1921.

43 See art. 74 of the 1921 Constitution.

decisions cannot be modified by the legislative power or even by the executive power[44].

With further regard to the *status* of judges, they cannot be dismissed, suspended from the exercise of their duties, or transferred or placed *ex officio* on retirement (before the established age), except following a judicial proceeding and only in the cases provided for by law. However, the guarantee of immovability established by art. 78 of the 1921 Constitution was tempered by the provision, contained in the final part of the same art. 78, for which the transfer or retirement of magistrates is allowed if contemplated by a law that was intervened to modify the organization of the courts.

In terms of personal immunities, judges, not unlike members of Parliament, could not be subjected to judicial proceedings or arrested, unless there is a prior favorable decision of the court indicated by law[45]. Even in the event of the arrest of a member of the judiciary caught in the fragrance of a crime, the court could nevertheless order his immediate release[46].

Of fundamental importance was the provision contained in art. 81 of the 1921 Constitution. It established that the courts cannot decide on the validity of a law that has been duly promulgated. Without prejudice, therefore, to the possibility of asserting any irregularity in the legislative procedure before the courts, once the legislative act was duly entered into force, the courts could no longer decide on whether or not the law complies with the Constitution. It follows that the courts themselves could not be considered as guarantors of the constitutional principles. Ultimately, there was a lack of alignment between the provisions of art. 38 and those of art. 81 of the 1921 Constitution. This insofar as, for the first of the provisions just mentioned, the laws could not be contrary to the Constitution, while on the basis of the second of the provisions now under exam, the „defense" of the Constitution, in face of a legislative power that hypothetically aimed at „violating" the constitutional norms, could not be provided by the courts. Ultimately, the possible

44 According to the provisions of paragraphs 1 and 2 of art. 77 of the 1921 Constitution.

45 Thus was provides by art. 79 of the Constitution of 1921.

46 The (possible) release of the judge in the hypothesis indicated in the text is established by the final part of the article mentioned in the note above.

violations of individual rights that were put in place by the Parliament could not be contested by the citizens, with the further consequence that the constitutional statute remained without sanctions.

From the point of view of the judicial organization, civil courts and (criminal) courts of assizes were established in force of the Polish Constitution of 1921, the latter with jurisdiction extended to crimes of greater gravity as well as political offenses. At the top of both the civil and criminal judicial pyramid was the Supreme Court. There were also special jurisdictions, represented by the military courts. The conflict court completed the legal framework. The latter, provided for by art. 86 of the 1921 Constitution, was a so-called Court of jurisdiction[47], in the sense that it had the task of resolving disputes that arose in matters of jurisdiction between the administrative and judicial authorities[48]. Further provisions on the subject of the judicial system[49] and, above all, on the subject of judicial procedures, were naturally contained in *ad hoc* laws, without their constitutionalisation.

7. The peculiarities of the administrative and accounting jurisdiction, in the Constitutional Charter of 1921

Outside of Chapter IV of the 1921 Constitution dedicated to „Justice"[50], and precisely in the context of Chapter III which deals with the executive power[51], there were some provisions concerning the administrative justice system. The art. 73 has contemplated the administrative courts, to which it attributed the competence to decide on the legality of administrative acts adopted by both the state authorities and those of territorial decentralization[52]. There was only one degree of appeal, pursuant

47 For the use of this expression, cf. L. Kawan, *La Costituzione*…, p. 44.

48 It is a body which, as we have seen above, can count on a consolidated tradition in Polish constitutional law regarding the judiciary. On the constitutional traditions in Poland, see the pioneering study of A. Giannini, *Le Costituzioni*…, p. 447 ff. For the correct observation that „the tradition of free political order in Poland is noble and ancient", see A. Carena, *Problemi*…, p. 291 ff., especially p. 291.

49 So-called complementary issues of judicial organization.

50 See the paragraph above.

51 See articles 39 to 73 of the 1921 Constitution.

52 Namely, by local authorities.

to art. 71 of the Constitutional Charter of 1921. In this latter regard, as well as in implementation of art. 73 of the Constitution now under examination, the law of August 2, 1922 intervened, establishing the Supreme Administrative Court, placed at the top of the Polish system of administrative justice. The magistrates of the Supreme Administrative Court, including the President, were all appointed by the President of the Republic. In the hypothesis that the administrative litigation bodies had annulled the acts adopted by the public administrations, they were required to provide, „without delay", to the issuance of the administrative acts in accordance with the indications contained in the judicial annulment rulings.

In a still different place, represented by the constitutional discipline of the legislative power, i.e. in the articles from 3 to 38[53], the Supreme Court of Auditors was located, provided for by art. 9 of the Fundamental Charter. The inclusion of the provisions on the Supreme Court of Auditors among the rules dedicated to the legislative power was justified in the light of the fact that this judicial body had auxiliary functions with respect to the Parliament, with which it collaborated in order to guarantee the financial control of the administrations of the Polish state. The members of the Supreme Court of Auditors enjoyed the immunity granted to ordinary magistrates, with the particularity, however, that they could be revoked by the Parliament (Diet) with the favorable vote of the majority of three fifths of the deputies. The hybrid nature of the Supreme Court of Auditors contemplated by the Polish Constitution of 1921 also resulted from the fact that the President of the Court, despite having the rank of Minister, was not a member of the Council of Ministers, and was also directly responsible to the Parliament[54]. Ultimately, the figure of the President of the Supreme Court of Auditors was (partially) comparable both to that of the ordinary magistrate, in terms of immunity and independence, and also to that of the minister, in terms of responsibility before the Diet. Furthermore, from the point of view of the functions exercised, it was more than a judicial body, a technical service, charged with assisting the Parliament in its supervisory tasks.

53 *Sub* Chapter II of the *lex fundamentalis* of 1921.

54 See paragraph 2 of art. 9 of the Constitution of 1921.

8. The High Court of State and the impeachment procedure, in the version of Polish constitutionalism of the twenties of the last century. Notes on electoral litigation

In Chapter III of the 1921 Constitution, dedicated to the executive power as a whole[55], there are some interesting provisions relating to the jurisdictional functions exercised by the High Court of State[56]. In this regard, art. 51, 59 and 64 of the Constitutional Charter are relevant.

The first of the provisions just mentioned contemplated the Polish version of the process of impeachment of the President of the Republic. Given, in fact, that pursuant to art. 51, paragraph 1, of the 1921 Constitution, the Head of State did not incur, in the exercise of his institutional functions, in any civil or parliamentary responsibilities, otherwise things gone in terms of criminal responsibility. Paragraph 2 of art. 51 established that, in the event of high treason, violation of the Constitution, or in the case of the commission[57] of common crimes, the President of the Republic was indicted following a resolution adopted by the Diet[58], with the constituting *quorum* of an absolute majority (half plus one) of its members and with the deliberating *quorum* of a majority of two thirds of the voters. In this case, the Head of State, who *medio tempore* was suspended from the exercise of his functions, was judged by a special High Court of the State[59].

With regard to the composition of the High Court of State, it included the First President of the Court of Cassation, who performs the function of President of the High Court itself, and also twelve other judges, who

55 See *ante*, in paragraph 7.

56 Sometimes simply referred to in the doctrine as State Court; cf. A. Carena, *Problemi*…, p. 304.

57 *Rectius*, in case of commission charges.

58 From 1921, the term Diet (*Sejm*) was no longer used, as in the past, to indicate the entire bicameral Parliament, but only the Lower House, made up of 444 deputies, distinct from the Senate (Upper House), made up of 111 senators. The Senate, however, continued to maintain a recessive position with respect to the Diet, both in terms of the relationship of trust with the national government, and also in the context of the legislative process. See, in detail, C. Filippini, *Polonia*…, p. 25–26. As for the political justification, it was observed that „in old Poland the name of *Sejm* belonged to the whole Parliament. On the other hand, in the current Constitution [1921] the name of *Sejm* was given only to the Chamber of Deputies, wanting the left parties to identify it, symbolically, with regard to its power, with the whole Parliament". See the quoted passage in L. Kawan, *La Costituzione*…, p. 24, note 1.

59 Qualifiable as (Polish variant of) an impeachment court; see, for all, the complete historical reconstruction carried out by M. Oliviero, *L'*impeachment…

are elected, outside the two Houses of the Polish Parliament, in number of eight judges by the Diet and the remaining four by the Senate[60]. The election of the judges of the High State Court[61], both by the Diet and the Senate, took place for the entire duration of the legislature[62]. In addition to the full enjoyment of civil rights, the requirements[63] for being part of the State High Court included not holding[64] any public function. The constitutional provisions on the jurisdiction of the High Court of State were completed by the provisions pursuant to art. 59 of the Fundamental Charter of 1921. They established that, in order to assert the constitutional responsibility of the ministers, a resolution to that effect of the Diet was necessary, adopted[65] with the favorable vote of two thirds of the voters, provided that the absolute majority of members of the Lower House was present. The ministers, who were suspended in the exercise of their functions following the Parliamentary resolution (of impeachment), were then to be judged by the High Court of the State, without the possibility – as specified by the second part of paragraph 3 of the art. 59 of the 1921 Constitution – to avoid constitutional responsibility by resigning from office.

Finally, a few words only on the electoral dispute, to remind that, in force of the Polish Constitution of 1921, the verification of powers was the responsibility, in the absence of disputes, of the respective Chambers to which the (newly elected) deputies or senators belonged, while in hypothesis of dispute, the relative competence for the decision in respect of the same issues belonged to Court of Cassation[66].

60 See art. 64 of the Constitution of 1921.

61 Naturally, the President of the High State Court is excluded, since this office is attributed by right (as mentioned earlier in the text) to the First President of the Court of Cassation.

62 Fixed in five years, both for the Diet (Lower House) pursuant to art. 11 of the 1921 Constitution, and for the Senate (Upper House), on the basis of paragraph 3 of art. 36 of the same constitutional text, which made an express reference for the Senate to the duration of the legislature of the Diet. On the other hand, as the paragraph 4 of art. 36 of the 1921 Constitutional Charter stated, no one could be a member of the Diet and the Senate at the same time.

63 Constitutionally provided for (see art. 64, par. 2).

64 At least, at the time of the election.

65 As is the case with the impeachment of the President of the Republic (see what has already been seen above, in this same paragraph).

66 In this sense, with specific regard to the Diet, see art. 19 of the 1921 Constitution, the provisions of which were however recalled and made applicable also to the Senate by art. 37 of the same *lex fundamentalis*.

9. Some concluding remarks, from the historical-comparative perspective

In a concise assessment, as well as on the basis of the Polish constitutional documents prior to the 1921 Constitutional Charter, both (prevailing) lights and (residual) shadows of the Constitutional framework of the twentieth century appear.

Positive aspects were certainly the acceptance of the principle of separation of powers, the guarantees of the independence of judges (including their immovability), the protection of citizens against the public administration, the constitutional rules protecting the rights of linguistic minorities, the provisions on the Special Court for the impeachment proceedings[67].

The problematic profile concerns above all the absence, and indeed the explicit exclusion, of the judicial control of the constitutionality of the laws, whether it is entrusted to the bodies of general jurisdiction (decentralized control) or to a special court (centralized control). As has already been observed in a very early period[68], since it is not possible, according to the Polish Constitutional Charter of 1921, to challenge the constitutionality of the law, it follows that there is no barrier of democracy against itself. So, we could ask[69], what are all the guarantees set out in the Constitution itself worth, if then there are no sanctions against the omnipotence of the deliberative power?

This last aspect ultimately reveals a constitutional lacuna[70], or – as has been said – an „essential shortcoming"[71], especially if one takes into account, on the historical-comparative perspective and from the specific point of view of comparative constitutional justice, not only of the US

67 See the direct testimony of the Italian ambassador of the time in Poland, F. Tommasini, *La risurrezione*…; see the comment of K. Żaboklicki, *Un diplomatico*…, p. 397 ff. Tommasini was ambassador to Poland from 1919 to 1923; cf. L. Monzali, *Francesco*…, 2018; L. Monzali, *Francesco*…, 2014, p. 15 ff.; A. Gionfrida, *Missioni*…

68 Cf. C. Crozat, *Les constitutions*…, p. 192.

69 In this sense, see C. Crozat, *Les constitutions*…, p. 201–202.

70 As a partial „excuse" for this, L. Garlicki, *Constitutional*…, p. 713 ff., especially p. 713, noted that, before the Second World War, the example of the Austrian Constitutional Tribunal had been completely neglected in Europe.

71 Cf. J. Wawrzyniak, *La Polonia*…, p. 79.

experience in the field of judicial review of legislation[72], but also of the presence of European models of judicial review of the constitutionality of laws (slightly earlier and, in any case, contemplated) at the time of the adoption of the Polish Constitution of 1921. These models were represented both by the famous Austrian prototype[73] and, to a comparatively less studied extent[74], by the Czechoslovakian constitutional system[75], whose original configurations date back, in both cases, to 1920[76].

There was also a concrete case in which a law of the Parliament, not in conformity with the 1921 Constitution, remained in force, in the lacking a body authorized to examine the constitutionality of the laws. This happened, in particular, for the law on state control of June 3, 1921, which established the responsibility of the President of the Supreme Court of Auditors towards both the Diet and the Senate, although the Constitution, in the paragraph 2 of art. 9, expressly provided for the responsibility of the President himself only before the Lower House[77].

It is therefore entirely justified to affirm – as has already been done in the past – that:

72 On which see, for all and in the specific comparative perspective, H. Kelsen, *Judicial*…, p. 183 ff.; S.L. Paulson, *Constitutional*…, p. 223 ff.

73 On which see, on the centenary of the establishment of the Austrian Constitutional Court, L. Pegoraro, „*Politico*"…, p. 903 ff.; M. Cartabia, E. Lamarque, *La giustizia*…, p. 799 ff.; M. Cartabia, E. Lamarque, *Il retaggio*…, p. 731 ff.; F. Politi, *La nascita*…, p. 63 ff. For the observation that „the importance of the Austrian Constitutional Court (*Verfassungsgerichtshof*) far exceeds that of the State whose Constitution it is called to 'guard'", see M. Olivetti, *La Giustizia*…, p. 25, particularly p. 25. The creation of the Austrian Constitutional Court was already provided for by the law of 3 April 1919, no. 212, relating to the transitional period (prior to the 1920 Constitution). For this reason, the Austrian Constitutional Court can be considered the first body to control the constitutionality of the laws on the European continent. See T. Öhlinger, *The Genesis*…, p. 206 ff.

74 And, we could safely add, less relevant, since it does not seem that the Czechoslovakian Constitutional Tribunal has ever had concrete opportunities to exercise the judicial control of the constitutionality of the laws entrusted to it (in this sense, see the works: M. Mazza, *La giustizia*…; M. Cappelletti, *Il controllo*…, while M. Olivetti, *La Giustizia*…, affirms that „the Czechoslovakian Court had a limited role to play in the years between 1920 and 1938").

75 With regard to the Constitutional Tribunal contemplated by the Czechoslovakian Constitution of 1920, it is permitted here to refer to M. Mazza, *La giustizia*…, p. 103 ff., as well as before the hint contained in the analysis of M. Cappelletti, *Il controllo*…, p. 57, text and notes no. 14–16.

76 Respectively, October 1st 1920 and February 29th of the same year.

77 The case is recalled by J. Wawrzyniak, *La Polonia*…, p. 79–80.

> In implementing the fundamental principle of the Polish Constitution on the sovereignty and omnipotence of the *Sejm*, the Constituent Assembly proceeded logically to the last consequences. The culmination of this process was the most complete and strictest implementation of the principle that besides the *Sejm* there is no other body in the Polish State which has the right or the authority to check the constitutionality of duly published laws, or to decide whether these are in conformity to the letter or the spirit of the Constitution. The *Sejm* is absolutely sovereign in this matter[78].

Moreover, it is of considerable interest to specify that the draft constitutional revision elaborated (but not definitively approved by the Diet) in 1929 provided for the creation, in art. 94, of the Constitutional Tribunal, with the task of reviewing the compliance of laws with the Constitution[79]. The project contemplated the appointment of the President of the Constitutional Court by the President of the Republic, from a shortlist of three names proposed by the Diet. To hold the office of President of the Constitutional Court it would have been necessary to possess the requisites to carry out the judicial functions. The second paragraph of art. 94 of the draft constitutional revision referred to a special law the definition of both the composition of the Constitutional Court and the modalities of execution of its decisions[80].

Finally, from the point of view of the „performance"", or even of the „resilience", of the republican institutions founded on the Polish Constitution of 1921, although in the same *lex fundamentalis* a good synthesis of the Polish constitutional traditions had been made, they nevertheless gave rise to a situation of parliamentary inefficiency, initially destined to lead to the search for corrective measures introduced

78 Cf. L. Kawan, *La Costituzione*…, p. 62.

79 See W. Bitner, *La Constitution*…, p. 209 ff., and therein cf. *Annexe: Texte du projet de révision de la constitution de mars 1921 en comparaison avec celle d'avril 1935*, p. 213 ff. (the author, at the time a member of the Diet, was one of the principal drafters of the draft law on the revision of the 1921 Constitution, as amended in 1926).

80 In the 1929 project, art. 94 closed the series of provisions, opened by art. 82, dedicated, sub Chapter V, to „Justice", and represented the only innovation with respect to the text (then) in force.

with the constitutional law of August 2, 1926[81] and, shortly thereafter, to the approval of the new Polish Constitutional Charter of April 23, 1935[82], around which the Authoritarian state[83], or in any case a constitutional order characterized by the so-called democratic caesarism[84], was edificated. Ultimately, the amendment of August 1926 prepared the subsequent institutional transformation of 1935[85], with the departure from the principle of the tripartite division of state power in favor of the concentration of power in the hands of the Head of State[86]. The po-

81 So-called August Amendment, on which see G.M. Kowalski, *The Amendment*…, p. 317 ff. The so-called August *Novella* consisted of eight articles, which amended six articles of the Constitution, on the subject of: budget, issuing of decrees with the force of law, early dissolution of the Chambers, procedure for the vote of no confidence and loss of parliamentary mandate. In the opinion of V. Perna, *Storia*…, p. 175, the constitutional revision law revalued the powers of the Head of State and changed the relationship between Government and Parliament.

82 Following the parliamentary failure to adopt the constitutional revision project referred to in the note above, which was aimed precisely at avoiding the approval of a new Constitution.

83 For comment, see A. Giannini, *La Costituzione*…; U. Baldi Papini, *I principi*…, p. 255 ff.; J. Holzer, *Poland*…, p. 335 ff.; H. Wegener, *Das Polnische*…, p. 552 ff. For the observation of an almost complete analogy with the Austrian constitutional experience, where there was „a text modeled on the laws of the French Third Republic in 1920, a Weimar correction in 1929, an authoritarian state since 1934 and finally the loss of independence in 1938", cf. S. Ceccanti, *Il costituzionalismo*… The argumentation (and the relative comparison) is reproposed by K. Staudigl-Ciechowicz, *Zum Ende*…, p. 183 ff. In Polish, see A. Chmurski, *Nowa*… The main architect of the constitutional revision of 1926 was the jurist Stanisław Car, on whom see *Stanisław*… (text in Polish). By Stanisław Car, see S. Car, *Vorwort*… (the preface).

84 For this (fitting) expression, see A. Peretiatkowicz, *Le césarisme*…, p. 309 ff. In the opinion of P.J. Wróbel, *The Rise*…, p. 110, spec. p. 150, the Constitution of 1935 (the so-called April Constitution) abandoned the liberalism of the Polish constitutional tradition, assuming instead an elitist, anti-democratic, anti-parliamentary and authoritarian character.

85 In this regard, see G.M. Kowalski, *The Amendment*…, where the author states that: „The 1926 Amendment paved the way for a new constitution of the Republic of Poland, which was adopted on the 26th January 1934 and which came into force on the 23rd April 1935" (cf. p. 321).

86 The intention, in particular, was to block the so-called dietocracy, that is, the omnipotence of the Lower House. With regard to the Diet, the ministers were mere „clerks of Parliament" (cf. B. Mirkine-Guetzévitch, A. Tibal, *La Pologne*…, p. 39). In other words, the 1921 Constitution accepted the principle of „omnipotence" of Parliament and especially of the Chamber of Deputies. The three „characteristic elements" of the Constitution were, therefore: „the weakening of the power of the President of the Republic, the very limited functions of the Senate and, on the other hand, the almost omnipotence of the Sejm" (see L. Kawan, *La Costituzione*…, p. 66). On the Sejmocacry/*Sejmokracja*, see also T. Inglot, *The Role*…, p. 15 ff., and before R.M. Watt, *Bitter*…, p. 175 ff.

litical system, from democratic[87], parliamentary and multi-party, became authoritarian-presidential.

Wanting to draw a further concise conclusion, if the May Constitution of the First Polish Republic accepted the principle of separation and balancing of powers, and if the March Constitution of the Second Polish Republic substantially retained the same principle, the April Constitution of the Second Republic did not, starting the change by the August *Novella*, so that ultimately more than of the evolution of the guarantees of the judiciary, in the passage of time from the First to the Second Republic[88], it seems appropriate to speak rather of involution or regression[89].

Summary

The history of public and constitutional law in Poland has known multiple influences, which derive from the circulation of French, German, Austrian, Russian, and Hungarian legal models. This is also relevant for the specific sector of the administration of justice. In this context, the peculiarities of the judiciary as regulated in the Polish Constitution of 1921 marked an important step in affirming the principle of the separation of powers and the independence of the judiciary not only in Poland but throughout Europe.

Keywords: Constitutional history, Polish Constitution of 1921, judiciary, circulation of legal models

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87 There has been talk of an „ultra-democratic character" of the 1921 Constitution; cf. the *Foreword* to L. Kawan, *La Costituzione*…, p. 2, where it is written that: „Among the modern constitutions, the Polish Constitution is one of the most democratic, and contains almost all the postulates of democracy" (see p. 23).

88 See P. Wiśniewski, *The Principle*…, p. 167 ff.

89 The phenomenon, unfortunately, will experience replicas, even very recent ones in the course of Polish history: see, for all, W. Sadurski, *Poland's*…

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