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Comparative Constitutional History in Central and Eastern Europe

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# Articles







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# The Role of the Historical Constitution in Hungary<sup>1</sup>

## Introduction

Law school students frequently ask why they have to learn the historical backgrounds of certain institutions although they can never use those backgrounds in litigations or in the courtroom. They scarcely believe the words of their professors that legal history exists neither to put an extra burden on students nor just for curiosity's sake. On the contrary, history has an impact on the present, and certain institutions can only be understood in relation to their historical evolution.

This article argues that constitutional history has a special relevance in contemporary jurisprudence. First, it analyses the evaluation of the historical constitution in Hungary, and then it discusses how that constitution is used in the jurisprudence of the Constitutional Court. The paper concludes that instead of using the spirit of the historical constitution, the Court rather picks out certain elements of Hungarian history and refers to them as the elements of the historical constitution.

## 1. The historical constitution in Hungary

As in other countries, legitimacy has played an important role in the history of Hungary. A key question is where sovereignty and state power come from. From the conquest of the region (896) until the beginning of the fourteenth century, legitimacy was by descent; the power of the kings came from the fact that they were the descendants of Árpád, who led the tribes of the conquest. Apart from this, the country was hardly united in anything else; it was heterogeneous in its nationality, language, and culture.

After the extinction of the House of Árpád (1301), sovereignty and statehood had to be put on a different foundation. The primary basis for this was the doctrine of the Holy Crown. The Holy Crown, as a personality abstracted from the person of the king, was the

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<sup>1</sup> The research was supported by the ICT and Societal Challenges Competence Centre of the Humanities and Social Sciences Cluster of the Centre of Excellence for Interdisciplinary Research, Development and Innovation of the University of Szeged.

supreme subject of state power. The members of a divided legislative and executive were united in it: the current king and the current political nation. Under the conditions of the time, the Holy Crown was also a guarantee of the exercise of power. The Holy Crown, as a legal entity, had full power, which neither of its members (that is, neither the king nor the political nation) can usurp. The doctrine of the Holy Crown, therefore, includes the completeness of the separation of powers, which is a guarantee that legislative and executive powers can only be exercised by the king and the nation together.<sup>2</sup>

The flexibility of the doctrine of the Holy Crown ensured the possibility of regaining the country's sovereignty and returning to its public law traditions in periods when continuity seemed to be broken, especially during the 150 years of Ottoman Turkish aggression when the country was torn into three parts. This openness of the historical constitution made it possible for it to be filled with rich content over the centuries.

The historical constitution is the conceptual framework that enabled the doctrine of the Holy Crown to prevail. During the period of the historical constitution, constitutional rules were put together by various laws, customs, and principles, which were constantly and continuously evolving.

The first half of the nineteenth century was a period of constitutional charters; constitutional laws were adopted in many countries. The Kingdom of Hungary did not follow this path. The main reason for this is that the country was then part of the Habsburg Empire. An imperial constitution would have served the unity of the Empire but not national independence. During the age of reform in the 1820s, Hungarian culture, art, and language evolved greatly, but they did not follow the mainstream European processes in the field of constitution-making. The aspiration to preserve constitutional traditions is completely understandable politically, but the Hungarian process consequently diverged from the Western wave of development. In view of this, Hungary kept the historical constitution within the Habsburg Empire, and this did not change even after the compromise of 1867 (*Ausgleich*), when the country gained more importance within the Empire.

The period following the First World War marked an important stage of the historical constitution. After losing the war, the Habsburg monarchy collapsed and broke up, and Hungary lost two-thirds of its territory as a result of the Trianon Peace Treaty. Under these circumstances, the two main countries of the Habsburg Monarchy, Austria and Hungary, followed fundamentally different paths. Austria created a new state with no connection to the Habsburg Empire. Hungary, on the other hand, maintained the historical constitution and a monarchical form of government in the inter-war period. The political structure of the country was rather similar to a semi-presidential system, the governor exercised the power of the head of state instead of the king, but the country remained a monarchy in name and form. Facts and law differed here. Legally a country remains a kingdom until it constitutionally turns into a republic, and this did not happen at that time, even though the Allies pushed Hungary to become

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<sup>2</sup> I. Kocsis, *A Szent Korona tana. Múltja, jelene, jövője* [The Holy Crown Doctrine. Its Past, Present, and Future], Budapest 1995, pp. 91–92.

a republic.<sup>3</sup> There was a political reason for emphasizing continuity. If Hungary had created a new state, it would have lost its claim on its annexed territories, and giving up the territories was politically unacceptable in the circumstances of that time. In practice, the historical constitution remained on force, as the state continued to function according to previous constitutional traditions.<sup>4</sup>

After the Second World War, in 1946 Hungary proclaimed itself a republic and a state structure was created on a parliamentary basis. However, Hungarian legal history considers the proclamation of the republic to be part of the historical constitution. Thus, the historical constitution survived until 1949, when a communist constitution was introduced.

At the time of the transition period of 1989–1990, Hungary was able to return to its public law traditions that had been abandoned in 1949. However, this kind of return certainly did not take place on the basis of formal legal continuity, since, in this case, an attempt should have been made to repeal the constitution and, together with it, to restore the cardinal statutes. However, it is not possible to create a historical constitution;<sup>5</sup> it is not possible to accept customs, traditions, and unwritten sources of law within the framework of formal legislative procedure, merely through the actions of Parliament.

The obvious purpose of the Basic Law is to restore legal continuity with the legal system before 1949. The National Avowal (the preamble to the Basic Law) leaves little doubt on that: it claims that the Holy Crown represents state continuity. The purpose of the Basic Law is to ‘open to the past’ in order to provide an opportunity for the ‘revival’ of the historical constitution.<sup>6</sup> The narrative of the Basic Law regards the constitutionality between 1990 and 2011 as temporary and seeks to establish continuity with the pre-1949 period. The main explanation is found in substantive legitimacy: there is no social or political consensus beyond the Basic Law, and in their absence, a basis had to be sought in the historical roots.

## 2. Differences between a historical constitution and constitutional charters

The most obvious difference between a historical constitution and a constitutional charter is that, in the case of the latter, the basic rules regarding human rights, the

<sup>3</sup> I. Szabó, *Az államforma rendezése (1920)* [Handling the Form of State in 1920] [in:] *A bonis bona discere. Ünnepi kötet Belovics Ervin 60. születésnapja alkalmából*, eds. T. Barabás, G. Vókó, Budapest 2017, p. 446.

<sup>4</sup> I. Szabó, *The Constitutional Development of Hungary after 1918* [in:] *Comparative Constitutionalism in Central Europe*, eds. L. Csink, L. Trócsányi, Miskolc–Budapest 2022, p. 74.

<sup>5</sup> P. Paczolay, *A történeti alkotmány és a konzervatív jogi gondolkodás* [Historical Constitution and Conservative Legal Thinking] [in:] *Magyar konzervativizmus – Hagyomány és jelenkor*, ed. L. Tőkéczi, Budapest 1994, p. 34.

<sup>6</sup> According to the drafters of the Constitution, ‘we re-tied the broken thread of continuity with slight changes, as we fitted the classic notion of the historical constitution to modern constitutionalism’; see: B. Ablonczy, *Az Alkotmány nyomában* [In Pursuit of the Constitution], Kerepes 2011, p. 83.

structure of the state, and the social system are contained in a single document: the constitution. Exceptionally, it may be that the constitution is not a single document, but even in this case the rules form a unified whole.<sup>7</sup> In the case of a historical constitution, these rules are separated in space and time.

One deeper difference is that a historical constitution is characterised by continuity: its elements are not formed in a revolutionary way, but newer interpretations are connected to earlier ones. A historical constitution is not simply a collection of rules but progress itself.<sup>8</sup>

A historical constitution is more flexible, and, unlike constitutional charters, the provisions of the historical constitution do not have formal supremacy over other provisions. In the case of constitutional charters, the 'constitution' is of a different hierarchical rank, which must be created according to specific procedural rules. It follows from the constitutional provisions that they are superior to other rules. In the case of a historical constitution, there is no formal supremacy. Whether a rule is part of the historical constitution is itself a matter of interpretation (and possible debate). This in itself makes constitutional adjudication impossible: there is no solid ground on which legal provisions can be measured.

Also as a result of flexibility and lack of formal supremacy, the rules of a historical constitution do not form a unified system. In the case of constitutional charters, the presumption is that they form a logically coherent unit, within which there can be no contradiction or *lacunae* (the completeness theory). However, a historical constitution does not have any such pretension. This is one other reason that excludes constitutional adjudication based on a historical constitution.

The differences between a historical constitution and constitutional charters are set out in the following table.

Table. Differences between a historical constitution and constitutional charters

| Listing             | Constitutional charter                     | Historical constitution |
|---------------------|--------------------------------------------|-------------------------|
| Number of documents | generally one                              | numerous                |
| Continuity          | not necessarily,<br>might be revolutionary | continuous              |
| Formal supremacy    | yes                                        | no                      |
| Substantial unity   | yes                                        | no                      |

Source: author's own work.

In what follows, I analyse the use of the Hungarian historical constitution based on the above table.

<sup>7</sup> For instance, in the Czech Republic, the Charter on Fundamental Rights is a separate document from the constitution.

<sup>8</sup> J. Szalma, *A történelmi/történeti és a kartális alkotmány teljességéről és jogalkalmazási kérdéseiről* [On the Completeness and Judicial Issues of the Historical Constitution and Constitutional Charters], "Jogelméleti Szemle" 2017, no. 2, p. 180.

### 3. The historical constitution in the Basic Law

One may find references to the historical constitution in the Hungarian National Avowal.

We honour the achievements of our historic constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.<sup>9</sup>

The next sentence of the National Avowal makes it clear that it considers the Basic Law as continuous with the historical constitution; it states that 'we do not recognize the suspension of our historic constitution due to foreign occupations'.<sup>10</sup> In this theory the German and the Soviet invasions are considered as a suspension (not termination) of continuity that could be resumed in 1990.

References in the National Avowal reflect on the legitimacy and ideology of the Basic Law; they are much more political than they are legal references. Nevertheless, the normative part of the Basic Law also refers to the historical constitution: according to Article R) para (3) 'The provisions of the Basic Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution'.<sup>11</sup>

The historical constitution itself cannot be the basis of constitutional adjudication. On the one hand, the peculiarities of the historical constitution do not support this: it does not form a complete system, it has no formal supremacy, and its content is also disputed. On the other hand, there are also substantive obstacles: there is no doubt that Hungarian public law before 1944 bore many signs of constitutionality, but that is not the same as the rule of law after 1990. Even if the Hungarian public law system met the constitutional requirements of its time up to the middle of the twentieth century (although the preliminaries of the World War also influenced constitutionality), after that the concept of democracy and fundamental rights requirements continued to evolve. The following constitutionality is not continuous with the communist state law, nor with the public law system up to 1944. In the sense of constitutional principles, the development following the regime change is, therefore, a new beginning and not a continuation of an earlier public law system.

Here is why the term achievements gains importance. The Basic Law does not intend to place the judiciary within the historical constitution, yet gives the opportunity for a court to cherry-pick individual elements of the historical constitution and use this in its jurisdiction.

<sup>9</sup> Translation of the Hungarian Law Library: <https://njt.hu/jogszabaly/en/2011-4301-02-00> [accessed: 2025.05.12].

<sup>10</sup> Translation of the Hungarian Law Library: *ibid.*

<sup>11</sup> Translation of the Hungarian Law Library: *ibid.*

#### 4. The invisible constitution and the historical constitution: the role of interpretation

The invisible constitution was one of the important cornerstones of constitutional adjudication under the previous Constitution. The term itself hardly came up in the decisions of the Constitutional Court: Justice Sólyom stated in his concurring opinion on the abolition of the death penalty [Decision 23/1990. (X. 31.) AB] that ‘in the interpretation, the Constitution as a whole is the starting point. The Constitutional Court must continue its work of articulating the principle bases of the Constitution and the rights contained therein in its interpretations, and form a coherent system with its rulings, which serves as a reliable standard of constitutionality over the Constitution, which is still often amended for daily political interests, as an invisible constitution.’<sup>12</sup> In this interpretation, the invisible constitution is an unwritten rule that includes constitutionality, in some cases also against the written constitutional rule. The invisible constitution helps the Constitutional Court’s interpretation and, because of its uncertain content, provides the Constitutional Court with a wide margin of appreciation.

The concept of the invisible constitution was also necessary because the Constitution, which was renewed after the regime change and thought to be temporary in the early 1990s, was ideologically empty and contained no values. This *lacuna* was filled by the practice of the Constitutional Court and the doctrine of the invisible constitution.

The concept of the invisible constitution came under serious political attack in the 2010s: the parliament and the government obviously did not identify themselves with a doctrine limiting legislative power, especially because the doctrine could also limit the constituent power. Emphasising the historical constitution served the purpose of replacing the invisible constitution.

Considering historical aspects was a method widely used by the Constitutional Court, under the previous Constitution too.<sup>13</sup> Imre Vörös adds that the Court has made no distinction between the use of the achievements of the historical constitution and historical interpretation.<sup>14</sup>

There are several references to the historical constitution in constitutional jurisprudence. However, such references are *obiter dicta* elements of the decisions. Some conclude that they help the interpretation of the court;<sup>15</sup> others say that they only have the function of decoration.<sup>16</sup>

<sup>12</sup> An English translation of the decision is available at: [https://media.alkotmanybirosag.hu/sites/3/1990/10/23\\_1990-ab\\_eng.pdf](https://media.alkotmanybirosag.hu/sites/3/1990/10/23_1990-ab_eng.pdf) [accessed: 2025.05.12].

<sup>13</sup> I. Vörös, *A történeti alkotmány az Alkotmánybíróság gyakorlatában* [The Historical Constitution in the Jurisprudence of the Constitutional Court], “Közjogi Szemle” 2016, no. 4, p. 44.

<sup>14</sup> *Ibid.*, p. 50.

<sup>15</sup> L. Csink, J. Fröhlich, *Egy alkotmány margójára* [To the Sidelines of a Constitution], Budapest 2012, p. 134.

<sup>16</sup> I. Vörös, *A történeti alkotmány...*, p. 47.

Because a decision cannot be based on any achievement of the historical constitution by itself, the constitutionality of a law cannot be determined with the help of the historical constitution. This is especially so because, if the historical constitution were the basis in itself, the concept of changeable law would be called into question. The historical constitution would overrule normative provisions.<sup>17</sup>

In Hungarian legal literature, the question is also raised as to whether the achievement of the historical constitution can only be a source created under the historical constitution. According to a more permissive opinions, if there really is legal continuity, then that is not the case, and, for example, the concept of the invisible constitution is also an achievement of the historical constitution.<sup>18</sup> However, this has not come up in constitutional adjudication.

The Constitutional Court referred to the achievements of the historical constitution when developing some important elements of the organisation of the state (for example, judicial independence, self-government, and the separation of powers) and also when defining the content of some basic rights (freedom of religion and freedom of speech).

Remarkably, when referring to the historical constitution, the Constitutional Court takes into account selected elements of Hungarian legal history, and not the historical constitution itself, as a system formed on the basis of continuous development of principles and rules. In this sense, there is a discrepancy between the concept of the historical constitution used by legal historians and that employed by the Constitutional Court.

Decision 33/2012 (VII. 17.) AB analysing the topic of judicial independence was the first to interpret the role of the historical constitution. The decision points out that 'It is a duty of the Constitutional Court to determine on the basis of the [Basic] Law which elements of the historical constitution should be regarded as achievements [...] Therefore when the [Basic] Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions.'<sup>19</sup> The Court adds that 'it is an interpreting principle obligatory to everybody, based on the provisions of the [Basic] Law, and which is to be applied also in the course of exploring other potential contents of the [Basic] Law.'<sup>20</sup> Hungarian legal literature has analysed further decisions

<sup>17</sup> Justice Pokol drew attention to this fact in his dissenting opinion to Decision 33/2012 (VII. 17.) AB.

<sup>18</sup> László Sólyom's foreword to András Jakab's *Az új Alaptörvény keletkezése és gyakorlati következményei* [The Birth of the New Basic Law and its Practical Consequences], Budapest 2011, p. 12.

<sup>19</sup> Reasoning [74]–[75]. Official translation of the Court, [http://89.135.41.81/en/wp-content/uploads/sites/3/2017/11/en\\_0033\\_2012.pdf](http://89.135.41.81/en/wp-content/uploads/sites/3/2017/11/en_0033_2012.pdf) [accessed: 2025.05.12].

<sup>20</sup> Reasoning [80]. Official translation of the Court, [http://89.135.41.81/en/wp-content/uploads/sites/3/2017/11/en\\_0033\\_2012.pdf](http://89.135.41.81/en/wp-content/uploads/sites/3/2017/11/en_0033_2012.pdf) [accessed: 2025.05.12].

of the Constitutional Court.<sup>21</sup> The authors vary on the use of the doctrine, but they agree that the finding of the first decision has been preserved.

The conclusion that can be drawn from the above is that:

- the content of the historical constitution is subject to interpretation; so it is uncertain;
- the doctrine helps the Constitutional Court in its legal interpretation activities;
- its application significantly influences the result of the legal interpretation, and thus the content of statutory law.

These three elements were also valid for the concept of the invisible constitution. Both concepts give priority to abstract constitutionality over normative legal provisions, thereby significantly increasing the margin of appreciation for the Constitutional Court.

The origins and narratives of the two doctrines are radically different. The invisible constitution is considered a product of liberal constitutional law of the 1990s, and the consideration of the historical constitution is attributed to the historicising-conservative narrative that has been dominant in Hungary since the 2010s. The reference base is also different: one refers to abstract principles, the other to rules and solutions that are significant in Hungarian history. Still, the difference in their application is much smaller: the Constitutional Court has been armed to extend its freedom of interpretation and increase its room for manoeuvre. The difference, however, is that in the case of the historical constitution, this weapon was put into the hands of the constitutional court by the constituent power itself.

## Conclusions

The clear references of the Basic Law to the historical constitution has a legitimizing function: it intends to re-establish the continuity of present constitutionalism with that of the past. For this purpose, the Constitutional Court persistently refers to the historical roots of certain institutions.

This article argues that the use of the historical constitution is not equivalent to the reference to historical background. The former is rather an attitude, the acceptance and maintenance of continuity. Such an attitude is still missing from Hungarian constitutional jurisprudence.

This article also concludes that the Basic Law's historical constitution, considering its effect, is rather similar to the invisible constitution, which was the leading doctrine of the previous constitution. Ideology has changed; the effect has not.

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<sup>21</sup> I. Vörös, *A történeti alkotmány...*, p. 45, and D. Juhász, *A történeti alkotmány vívmányai és a Nemzeti Hitvallás szerepe az alkotmányjogi érvelésben gyakorlati szempontból* [The Role of the Achievements of the Historical Constitution and the National Avowal in Constitutional Reasoning in a Practical Aspect], "Alkotmánybírószáji Szemle" 2021, no. 2, p. 28.



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## Summary

**Lóránt Csink**

### The Role of the Historical Constitution in Hungary

Compared to other constitutions, the Hungarian Basic Law relies heavily on extra-legal elements. These include culture, religion, and history. Because of its historical references, some contemporary Hungarian authors consider the Basic Law to be archaic (e.g., Zoltán Szente), while others see it as the core element of sovereignty (e.g., András Zs Varga). This article first presents why the historical constitution was important at different stages in Hungarian history, and then during the creation of the Basic Law itself. The second part of the article describes how contemporary Hungarian constitutionalism refers to the historical constitution, and it gives an overview of how the historical constitution is applied in the practice of the Constitutional Court. Finally, the arti-

cle draws conclusions as to how the historical constitution relates to the doctrine of the invisible constitution, a principle that was used in constitutional jurisprudence in the 1990s.

**Keywords:** constitutional adjudication, historical constitution, interpretation.

## Streszczenie

*Lóránt Csink*

### Znaczenie historycznej konstytucji na Węgrzech

W porównaniu z innymi konstytucjami węgierska ustawa zasadnicza opiera się w dużej mierze na elementach pozaprawnych: kulturze, religii i historii. Ze względu na odniesienia historyczne niektórzy współcześni autorzy węgierscy uważają ustawę zasadniczą za archaiczną (np. Zoltán Szente), podczas gdy inni widzą w niej podstawowy element suwerenności (np. András Zs Varga). W artykule najpierw wyjaśniono, dlaczego „historyczna konstytucja” była ważna na różnych etapach historii Węgier, a następnie podczas tworzenia ustawy zasadniczej. W drugiej części opracowania opisano, w jaki sposób współczesny konstytucjonalizm odnosi się do historycznej konstytucji, i dokonano przeglądu, w jaki sposób historyczna konstytucja jest stosowana w praktyce Sądu Konstytucyjnego. Na koniec zaprezentowano wnioski na temat tego, jak historyczna konstytucja odnosi się do doktryny „niewidzialnej konstytucji”, zasady, która była stosowana w jurysprudencji konstytucyjnej lat 90.

**Słowa kluczowe:** orzecznictwo konstytucyjne, interpretacja, konstytucja historyczna.

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## Methodological Challenges for Constitutional History in Central-Eastern Europe

### Introduction

Contemporary foreign legal historians pretend to thoroughly know two facts about the significant legal reforms made by Romanian legislators in the nineteenth century. First, the Romanian Civil Code of 1864, the cornerstone of Romanian legal modernisation, was heavily influenced by the French Civil Code of 1804; second, the Constitution of 1866, the first modern constitution of Romania, was deeply inspired by the Belgian Constitution of 1831. While the former legal change is usually accurately acknowledged,<sup>1</sup> the latter is sometimes overshadowed or misinterpreted, leading to a skewed academic narrative about Romanian constitutional history.<sup>2</sup> This discrepancy may stem from a lack of genuine scholarly interest, a deficit of information, or a hegemonic epistemological approach towards the periphery. Is this preferable to complete omission?

Similar to the case of the Romanian Civil Code, the most appealing concept used to capture the interplay between Romanian and Belgian modern constitutionalism is

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<sup>1</sup> For example, *The Oxford Handbook of European Legal History*, eds. H. Pihlajamäki, M.D. Dubber, M. Godfrey, Oxford 2018, mention the Romanian Civil Code of 1864 as 'taking the French [Civil] Code as the source of two-thirds of its articles' (p. 917).

<sup>2</sup> For example, in a chapter dedicated to 'National Identity and Constitutions in Modern Europe: Into the Fifth Zone,' Bill Kissane and Nick Sitter, state that 'new constitutions were modelled' in Greece (the 1820s and 1844), Serbia (1835), and the Romanian Principalities of Wallachia and Moravia (sic) (1848/1849) 'on the US and Belgian constitutions'. In the Romanian Principalities' case, this constitution would have been 'shaped by bilateral Russian-Ottoman agreements after the Crimean War'. See: *Comparative Constitution Making*, eds. D. Landau, H. Lerner, Cheltenham–Northampton 2019, p. 412. The information about Romanian constitutional history is flagrantly wrong. Besides the fact that we should talk about the Romanian Principalities of Wallachia and Moldova, no new constitution was 'modelled', in 1848/1849, on US or Belgian or other constitutional sources. The Belgian influence on Romanian constitutionalism was far from certain in 1848.

'imitation'<sup>3</sup> or 'copy'.<sup>4</sup> Others prefer less patronising concepts like 'influence'<sup>5</sup> or 'drawing on'.<sup>6</sup> While these approaches tend to underscore Belgian constitutional exceptionalism, they may be preferable to complete omission.

Strikingly, Romania and its legal history, whether modern or otherwise, are virtually absent from foreign English-speaking and French-speaking legal-historical scholarship as a distinct research focus. Moreover, the legal history of Europe's Central-Eastern region (CEE) is either poorly addressed or entirely overlooked. One telling example may be sufficient. The comprehensive (1,192 pages) *Oxford Handbook of European Legal History* cited earlier does not feature a dedicated chapter on CEE, apart from its treatment of Ancient Greece and the Byzantine Empire. Geographically speaking, the units of analysis are: Western Europe, including England, Scotland, and France; Southern Europe, including Ancient Rome, medieval and modern Italy, the Iberian Peninsula, and Southern France; Central Europe, including the Holy Roman Empire, medieval and modern Germany; and Northern Europe, including medieval and modern Scandinavia. Russia is a notable exception, but its inclusion in a separate chapter could be partially justified by the editor's interest in mapping global legal history, following the active actors of European legal expansion through conquest, colonisation, and powerful influence. This may explain why CEE is not visible on this map of legal Europe. One may blame again the country and Western-European diffusionism, which pinpoints the central-eastern periphery as a mere passive receptor of high quality Western European law. Others may notice once more that these regions are not far and exotic enough to warrant exceptional case study. Situated at the periphery of Europe, yet part of Europe, they naturally circle around the Western centre and could be pictured, when necessary, as exemplary instances of successful Western European legal domination.

At this point, following Michał Gałędek's example,<sup>7</sup> one may ask: 'Is there anything outstanding about the history of (constitutional) law in Romania?' Is the superficial interest or the silence of Comparative Legal History scholarship perhaps justified? This may sound like a strategic trap, as no Polish or Romanian legal historian needs to claim to be exceptional to write about their nation's legal history. The question may also be a cry for justice and ethics in legal historical and legal comparative scholarship or the result of a sterile inferiority complex. After all, Romanian constitutional modernisation occurred through massive imitation and borrowing under the powerful influence of Western European constitutional models and may be appreciated as a contributor to the globalisation of liberal-democratic constitutionalism before the Second World

<sup>3</sup> J. Gilissen, *La Constitution belge de 1831: ses sources, son influence*, "Res Publica" 1968, vol. 10, p. 138; R.C. van Caenegem, *A Historical Introduction to Western Constitutional Law*, Cambridge 1996, pp. 237–238.

<sup>4</sup> See: A. Padoa-Schioppa, *A History of Law in Europe. From the Early Middle Ages to the Twentieth Century*, Cambridge 2017, p. 498.

<sup>5</sup> F. Delpérée, *Le droit constitutionnel de la Belgique*, Bruxelles 2000, p. 74.

<sup>6</sup> D. Gosewinkel, *The Constitutional State* [in:] *The Oxford Handbook of European Legal History*..., p. 965.

<sup>7</sup> M. Gałędek, *Remarks on the Methodology of Comparative Legal Research in the Context of the History of Law in Poland*, "Acta Universitatis Lodziensis. Folia Iuridica" 2022, vol. 99, p. 65.

War. Nevertheless, in terms used by William E. Butler and Oleksiy V. Kresin,<sup>8</sup> the same question may be an invitation to 'discover the unexpected'. This is not a different way of saying that there is something outstanding in Romanian constitutional history. It is an invitation to assess a particular (albeit not necessarily unique) Romanian approach to constitutional change that needs a greater degree of interdisciplinarity than the methodological patterns currently recommended in comparative legal history and (global) legal history can provide.

Constitutional modernisation in Romania during the nineteenth century and at the beginning of the twentieth century was paralleled by the construction of the Romanian nation-state and national identity. This was primarily a matter of choice among the Romanian ruling elites, mainly former aristocrats with legal education in Western Europe, perpetuating the legal autonomy granted under Ottoman suzerainty since the sixteenth century. While a part of the Ottoman Empire, the Tanzimat (1839–1876) had no effects on the Romanian Principalities Moldova and Wallachia or unified Romania (after 1862). Temporary military, political, and administrative control by Russia resulted in the imposition of two Russian-like constitutions, that is, the Organic Regulations (1831–32–1858). European powers managed to impose, in turn, a new constitution in 1858, that is, the Paris Convention. However, the Romanian elites eventually succeeded in pursuing their path towards a nation-state and constitutional modernisation, following their own sense of identity. This identity was constructed in favour of and against Western constitutional civilisation and identity. Romanian national identity was born out of frustration, forged into the desire to become (Western) European and strengthened by the fear of losing its Eastern roots. Political modernisation by imitation of Western constitutional models expressed, in 1866, the need for a complete change in Romanian politics; the constitutional identity crisis that followed emphasised the difficulty of becoming entirely European in constitutional matters. This explains why the constitution-making process and application constitutional norms constantly became a matter of (national) identity.

This paper discusses the Romanian process of constitutional modernisation against a background of the Romanian elites' quest for identity. It tries to explain why Romanian national and constitutional identity was disputed by multiple competing narratives constructed by the Romanian intelligentsia, and it explores the best methodological tools to assess it. The paper briefly evaluates the methodological resources of comparative legal history and global legal history and calls for a greater degree of interdisciplinarity. In my opinion, social sciences may provide the proper analytical background, facilitating an approach to Romanian constitutional history comparatively (in space), historically (in time), and psycho-sociologically (in minds).

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<sup>8</sup> *Discovering the Unexpected. Comparative Legal Studies in Eastern and Central Europe*, eds. W.E. Butler, O.V. Kresin, New Jersey 2021.

## 1. The endless Romanian road to (legal) Europeanization

The most frequently recurring question of Romanian historians, philosophers, sociologists of culture, political scientists, politicians, and even lay people in recent decades has been, 'Why is Romania different?'.<sup>9</sup> This acute sense of distinctiveness makes a strong case for Romanian exceptionalism, but more often than not, it also questions an insufficiency. From a comparative standpoint, it mirrors a deep and perpetual Romanian frustration of not yet being really and entirely European. Romanians' incapacity to become European could be a possible cause; nevertheless, their fear of becoming too (West) European could be a proper explanation.

From the beginning of the nineteenth century, Romanian national identity was born out of strong inferiority complexes manifested within a changing cultural comparative framework. The shocking cultural encounters with Central-Western Europe gave Romanian self-perception new spatial and temporal coordinates.<sup>10</sup> The centre-periphery balance was recalibrated, and an unbearable sense of backwardness developed. Eventually, modernisation clearly and irreversibly meant Europeanization. Accepting the intimate connection between national identity, national culture, and national language, the Romanian intellectual elites started to strongly question established Greek-Phanariot and Ottoman cultural influences and the predominance of the ancient Greek language in Romanian education. Against this backdrop, a modern Romanian culture had to be constructed, and a Romanian-speaking educational system had to be built. Nevertheless, cultural inferiority complexes and pressing political interests made cultural, civilisational, and political modernisation urgent. Gradually, the spatial and temporal cultural gaps were formally covered through shock therapy. The quest for Western Latin roots, French culture's strong influence, and the powerful example of the Belgian people's successful nation-state building determined a process of massive imitation and borrowing, especially from French and Belgian (legal) cultures. As long as civilisation and (political-legal) institutions were easy to transfer, the Romanian elites succeeded in rapidly changing certain aspects of Romanian society. Constantly tending to imitate Western Europe's 'civilised' nations, especially the French and Belgian ones, marked a crucial identity switch towards Europeanization. A formal institutional transformation was undeniable in the last decades of the nineteenth century, while the predominant rural Romania remained untouched by modernity. Illiteracy, misery, and lack of the basic elements of civilisation were omnipresent in Romanian peasants' lives. This reality slowly and only partially changed right up to the mid-twentieth century. Inevitably, Romanian

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<sup>9</sup> See, e.g., L. Boia, *De ce este România altfel?* [Why is it Romania Different?], 2<sup>nd</sup> ed., București 2013; *De ce este România altfel. Avaturile excepționalismului Românesc* [Why is it Romania Different? The Avatars of Romanian Exceptionalism], ed. V. Mihailescu, Iași 2017.

<sup>10</sup> See: A. Drace-Francis, *The Making of Modern Romanian Culture. Literacy and the Development of National Identity*, London–New York 2006, pp. 15–91.

Europeanization was an elitist, ineffective top-down phenomenon, and its adverse effects soon became apparent.

In the last decades of the nineteenth century, a coherent section of the Romanian intellectual elite became aware of the forced and somehow inconsistent process of Europeanization, a process that ignored the old commitment to the national Romanian cultural agenda. From the mid-nineteenth century, German romantic historicism and Spencerian originalism started to ideologically underpin the Romanian national agenda.<sup>11</sup> An interest in the ethno-cultural elements of the Romanian nations prompted a questioning not only of the substantial institutional architectures built on Western European blueprints but also their efficacy. As might be expected, the institutions lavishly transferred from the West did not produce overnight a radical or effective transformation of Romanian society. The endemic corruption of the state's apparatus, the abiding lucrative interests of the political elites, and the misery of the peasants (ninety per cent of the population) transformed the whole process of Europeanization into a chimaera. The conservative elites did not necessarily look for explanations in the medieval-Phanariot layers of the Romanian culture. Indeed, they did not predominantly blame Romanian society's lack of mentality. They found the causes of modernisation's failure in the forced Europeanization or, at least, in too much Europeanization. The massive imitative and borrowing processes were prone to failure because the Romanian spirit/soul was ignored.

Since the 1870s, a heated intellectual debate opposing conservatives and modernists developed in Romania and lasted until the mid-twentieth century. Many Romanian historians, economists, jurists, sociologists, ethno-psychologists, philosophers, theologians, and philologists discussed so-called 'forms without substance'<sup>12</sup> and offered different explanations.<sup>13</sup> The necessity of a rational process of institutional cultural borrowing, made with a critical eye to protect the Romanian cultural substance, was already advanced at the end of the nineteenth century as a blueprint for the future. A Romanian nation, culture, and state built on French/Belgian culture and language were not Romanian. The Romanian national agenda was interested in making a nation-state and culture based on the objective elements of Romanian ethnicity. A small people and culture surrounded by powerful empires could not construct modernity on a foreign cultural institutional basis; this would lead to denationalisation. Against this backdrop, a general hunt for the Romanian soul/spirit/identity/way of being took place, one that expected to establish strong borders

<sup>11</sup> See: V. Neumann, *Conceptually Mystified: East-Central Europe Torn between Ethnocentrism and Recognition of Multiple Identities*, București 2004, pp. 81–110.

<sup>12</sup> See: M. Guțan, *Legal Transplant as Socio-Cultural Engineering in Modern Romania* [in:] *Konflikt und Koexistenz. Die Rechtsordnungen Südosteuropas im 19. und 20. Jahrhundert. Band I: Rumänien, Bulgarien, Griechenland*, eds. M. Stolleis, G. Bender, J. Kirov, Frankfurt am Main 2015, pp. 481–530.

<sup>13</sup> This Romanian intellectual turmoil about the path to modernity generated multiple interdisciplinary analyses at home and abroad. For a relatively recent one, see: P.A. Blokker's PhD thesis *Modernity and its varieties. A historical, sociological analysis of the Romanian modern experience*, Florence 2004, <https://cadmus.eui.eu/handle/1814/5240> [accessed: 2024.05.17].

of distinctiveness. Conservative circles advanced different solutions, frequently pointing to Romanian 'ancestral' peasant, traditional (Christian Orthodox) culture and civilisation.<sup>14</sup>

Nevertheless, legal modernisation through Europeanization was at stake as long as no other alternative was acceptable and as long as Romanian society had no time and poor inner resources to acquire institutional modernity by itself. Removing the already imitated or borrowed Western legal norms and institutions was not a solution. This is why Romanian legal modernisation and identity should not be merely assessed against the binary analytical framework of modern liberal versus traditionalist conservative (identity) stances. The main challenge for both Romanian modernists and conservatives was how to effectively modernise Romanian society using massively imitated or borrowed institutions while preserving a Romanian national (ethnic) identity. Many found the identity-driven response in the idea of the original re-creation of legal institutions, meaning their Gabriel Tarde-like adaptation to the Romanian spirit/soul/substance.<sup>15</sup> Theoretically, the idea was very appealing: having European legal institutions and preserving Romanian national identity simultaneously. 'Europeanization in our Romanian way' was born out of anxiety about being seen as a backward periphery and the fear of losing the Romanian (ethnic) self.<sup>16</sup> At the political-constitutional level, this pattern became effective by placing at the core of the Romanian Constitutions of 1866 and 1923 the elements of Romanian ethnic identity and by enshrining constitutional guarantees for their protection.

Overall, the Romanians' identity-centred road towards constitutional modernity through Europeanization was always a quest for their 'Romanianity'. This is deceptive in that it was neither unidirectional (from periphery to centre, from traditional to modern, from East to West, from Romania to Western Europe) nor bidirectional (also from centre to periphery, from modern to traditional, from West to East, from Western Europe to Romania). Metaphorically, it was instead an identity-focused pendulum: it constantly advanced towards and interacted with an idealised Western Europe to perpetually press back and return to the Romanian ethnic self. This is why it was mainly a tendential constitutional identity, meaning the constant desire of the Romanian elites to belong to Western European liberal constitutional identity doubled by a perpetual inability to renounce the Romanian ethnocentric national identity. The Romanian elites constantly tended towards West European constitutional modernity, but never had the interest to fully acquire it. This explains why Romanian national

<sup>14</sup> See: A. Drace-Francis, *The Traditions of Invention Romanian Ethnic and Social Stereotypes in Historical Context*, Leiden 2013, pp. 11–59.

<sup>15</sup> See: R. Carp, *Responsabilitatea ministerială* [Ministerial Accountability], București 2003, pp. 192–208; A. Banciu, *Constituție și identitate la români* [Constitution and Identity in Romania], "Sfera Politicii" 2018, no. 3–4, p. 23; M. Duțu, *Un secol de știință a dreptului și de cultură juridică în România (1918–2018)* [A Century of Romanian Legal Science and Culture (1918–2018)], "Studii și Cercetări Juridice – Serie Nouă" 2018, no. 4, p. 7.

<sup>16</sup> See: M. Guțan, *The Legal Transplant and the Building of the Romanian Legal Identity in the Second Half of the 19<sup>th</sup> Century and the Beginning of the 20<sup>th</sup> Century*, "Romanian Journal of Comparative Law" 2018, vol. 8, p. 62.



constitutional identity was simultaneously pressured to change and to preserve itself. This mirrors both Romanians' state of incertitude about themselves and their state of incertitude about Europe. In other words, the boundaries between the Romanian national (constitutional) identity of belongingness and the identity of differentiation were of primary concern and very misty.

## **2. The obsession with identity in Romanian constitutional history**

The context mentioned above explains why Romanian constitutional modernisation as Europeanization during the nineteenth and early twentieth centuries was not merely a matter of successful/unsuccessful constitutional imitation or borrowing from Western European constitutional models. Although the proper reception and good functioning of foreign constitutional values, principles, and institutions were a deep concern among the intelligentsia, at the end of the day Romanian intellectuals, politicians, constitution-makers, and legal scholars focused on their identity-related relevance in Romanian society. The identity of belongingness, underpinning Europeanization, was balanced against the identity of differentiation underpinning the national identity. Ethnocentric (illiberal) constitutional identity set specific limits to Eurocentric (liberal) constitutional identity, making it perpetually tendential. The meeting and particular intermingling between the former and the latter from the mid-nineteenth century onwards is relevant to understanding what was at stake in Romanian constitutional modernisation process.

First, at stake was the constitutional modernisation agenda of the two Romanian Principalities of Moldova and Wallachia, and after that of an autonomous unitary Romania (between 1862 and 1878), of an independent Romania (after 1878), and of the so-called Greater Romania (between 1918 and 1940). Under the influence of (mainly) French and Belgian constitutional models, many Wallachian/Moldavian/Romanian intellectual and political elites adopted concepts, principles, values, and institutions of liberal constitutionalism. This approach was more visible after the revolution of 1848 when, particularly in Wallachia, an authentic liberal spirit was apparent. A constitution, constituent assembly, national/popular sovereignty, representative government, limitation of political power, separation of powers, a parliamentary system of government, ministerial responsibility, dissolution of parliament, the central but symbolic place of the prince in constitutional architecture, freedom, equality, human rights, in particular freedom of conscience, freedom of expression, freedom of assembly, inviolability of residence, and the census vote, the right to life, a unicameral parliament, the independence and immovability of judges, administrative decentralization, all of which lay at the heart of the revolutionary programmes and constitutional projects of 1848, the debates of ad-hoc assemblies of 1857, the debates on the 1859 constitutional project of the Central Committee of Focșani, the parliamentary debates between 1859 and 1864, the debates of the 1866

constituent assembly, and the parliamentary debates during the reign of King Carol I (1866–1914). The Romanian elites gradually adopted these values and principles as a constitutional and political response to monarchic authoritarianism, whether it involved the neo-absolutism of the Romanian princes under the Organic Regulations (1831–1858)<sup>17</sup> or the ‘tyranny’ of Prince Al. I. Cuza (1859–1866); they were enshrined, in their overwhelming majority, in the first modern constitution of Romania, that of 1866. Although they were usually parts of a massive constitutional transplant,<sup>18</sup> they were eventually accepted and adopted as part of the Romanian constitutional identity. It was an identity of belongingness that clearly revealed that, for many Romanian elites, constitutional modernisation meant constitutional Europeanization, that is, the adoption of constitutional and political standards of Western European liberal democracies.

It could not be more wrong, however, to assume that the constitutional identity of Romanians was reduced to these principles, values, and institutions throughout the nineteenth and early twentieth centuries. In addition to the constitutional modernisation agenda of the Romanian states/state, the national agenda left another mark on Romanian constitutional identity. Under the influence of the French Revolution, the idea of self-determination and liberation from Ottoman rule intertwined with an obsessive concern for the unification of the two Romanian Principalities and the formation of a Romanian unitary national state. Thus, constitutional modernisation based on liberal constitutionalism and the establishment of a Romanian nation-state became two sides of the same coin: constitution and constitutionalism had no meaning outside the nation-state, and the latter could only be built on the pillars of liberal constitutionalism. However, combining the two agendas was not as straightforward as it would seem. Gradually, after 1848, the national agenda was influenced not only by the values, principles, and institutions of liberal constitutionalism but also by the ideas of German romanticism and historicism. After a phase of ‘pre-nationalist civic patriotism rooted in strong Christian morals’ in the early decades of the nineteenth century<sup>19</sup> and a genuine moment of civic nationalism in 1848 (especially in Wallachia), Romanian public discourse was captured beyond retrieval by ethnic nationalism.<sup>20</sup> The nation, understood as a historical ethnic community, became the primary ideological support of the national agenda. Inevitably, national consciousness focused on the perennial and ‘objective’<sup>21</sup> elements of Romanian national identity: shared biological

<sup>17</sup> See: M. Guțan, *A Failed Constitutional Experiment: The Monarchical Constitutionalism and the Organic Regulations of 1831–1832*, “Journal of Constitutional History” 2021, vol. 42, pp. 25–39.

<sup>18</sup> For details, see: M. Guțan, *Transplant constituțional și constituționalism în România modernă 1802–1866* [Constitutional Transplant and Constitutionalism in Modern Romania], București 2013.

<sup>19</sup> M.S. Rusu, *Memoria națională românească. Facerea și prefacerile discursive ale trecutului național* [The National Romanian Memor: The Making and the Discursive Changes of the Past], Iași 2015, p. 90 ff.

<sup>20</sup> See: V. Neumann, *Essays on Romanian Intellectual History*, Iași 2013, p. 41 ff.

<sup>21</sup> As L. Greenfeld puts it, any national identity is a matter of self-perception and subjective projection, even related to ethnic nationalism. As such, the so-called objective elements of ethnicity are not automatically captured in the national identity and may have a different significance. See: L. Greenfeld, *Nationalism. Five Roads to Modernity*, Cambridge, Massachusetts 1993, pp. 12–13. In the

origins (Latin and/or Dacian), shared language (Romanian, as a Latin language), shared religion (Orthodox Christianity), shared cultural (legal) traditions, and territory as the cradle of the nation (the Carpathian-Danubian space). This aspect had a decisive impact on establishing the nation-state and the constitution-making process. According to Ulrich K. Preuss, building a unitary nation-state was not a 'constitutive' moment for Romanians but a true political and legal success of a pre-existing ethnic community.<sup>22</sup> That is precisely why the constitution had a particular expressivist function for Romanians; it had to reflect an ethnic Romanian identity besides the Romanian people's values, principles, and constitutional hopes.

It is not by chance, therefore, that the Romanian constitutional debates of 1857, 1859, and 1866 focused primarily on issues closely related to elements of Romanian national identity, such as the definition of citizenship and criteria for naturalisation, freedom of religion and the place of the Orthodox Church in the constitutional architecture, as well as Romanian constitutional traditions. Since Orthodox Christianity represented the essence of national identity in Romanian self-perception, it was placed, irrefutably, at the heart of the very definition of Romanian citizenship. Discussed initially in 1857, a radical version of national identity equated the Romanian citizen with Romanian ethnicity and Orthodox Christianity, so that a more inclusive version would finally be adopted in the 1866 Constitution: the famous Article 7(2) strictly conditioned the naturalisation of foreigners on their belonging to the Christian religion. The provision was not less ethnocentric; on the contrary, in addition to an expressivist function, it also performed an exclusive and protective function. It was meant to prevent the alteration of uniformity and ethnic unity on Romanian territory by the imagined enemies of Romanians, that is, Muslims and, most of all, Jews. Inevitably, the sentiment of national uniqueness and the presence of ethnic alterity shaped the Romanian national identity of the time.<sup>23</sup> An increasingly malignant antisemitism,<sup>24</sup> in particular, succeeded in intertwining the obsession with preserving the national being with the social and economic frustrations of Romanians. The tendency of Jewish immigrants to present themselves as a bourgeois layer was seen as a new form of (economic) imperialism in a Romanian society dominated by poor and illiterate peasants. Without being directly connected to the Jewish issue at hand, Article 3 of the 1866 Constitution strengthened the Romanian ethnic nation against (actual) external dangers: 'The territory of Romania cannot be colonised with populations of foreign race.'<sup>25</sup> Eventually, the 1866 Constitution added Romanian ethnocentric national

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case of Romanians, religious identity and linguistic identity were usually at the heart of ethnocentric national identity.

<sup>22</sup> U.K. Preuss, *The Exercise of Constituent Power in Central and Eastern Europe* [in:] *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, eds. M. Loughlin, N. Walker, Oxford 2008, p. 227.

<sup>23</sup> R. Cinpoș, *Nationalism and Identity in Romania*, London 2010, pp. 41–43; L. Boia, *Istorie și mit în conștiința românească* [History and Myth in Romanian Consciousness], București 2010, p. 301 ff.

<sup>24</sup> For details, see: C. Iordachi, *Liberalism, Constitutional Nationalism, and Minorities*, Brill 2019, p. 265 ff.

<sup>25</sup> In 1866, this Article was primarily connected to the economic protection of disadvantaged social layers since, during the reign of Cuza, the problem of bringing thousands of German settlers into the

identity to the foundations of Romanian constitutional identity. In this respect, the text of the Constitution enshrined some of its essential, objective elements: a shared biological origin, the national territory, and Orthodox Christianity. The first national symbol (the flag) also squeezed its way within the framework of Article 124.

No one should understand from this process that an ethnocentric constitutional identity erased an initially assumed Eurocentric constitutional identity. The 1866 Constitution addressed the two major issues that concerned the Romanian elites at the time: first, the limitation of the prince's power, which had been manifested abusively during the reign of Al. I. Cuza; second, the expression and protection of Romanian national identity at the constitutional level. The former was solved with the help of liberal constitutionalism and a massive transplant of values, principles, and institutions from the Belgian Constitution of 1831. The mechanisms of the parliamentary regime, the rule of law, representative democracy, and the rights and freedoms of the citizens, to the degree that the conservative spirit of the time allowed, were adopted as fundamental pillars of constitutional modernisation. The latter was solved by introducing illiberal elements and adopting an ethnocentric constitutional ethos.

I believe the 1866 Constitution had two identity poles: a Eurocentric (liberal) one and an ethnocentric (illiberal) one, held in a delicate balance. A constitutional identity of belongingness (type  $A = B$ ) was counterbalanced by a constitutional identity of differentiation (type  $A \neq B$ ). The two were not necessarily mutually exclusive, but they were not outside any conflicting model either. On the contrary, when the Congress of Berlin (1878) conditioned the recognition of the Romanian state independence by the amendment of Article 7 of the Constitution to make it more inclusive, the adverse reactions of the Romanian political elites were powerful. The article was eventually amended for pragmatic reasons, and the ethnocentric constitutional identity lost ground to the Eurocentric one in the constitutional text.<sup>26</sup> However, the event highlighted a clear limit of the Romanians' appetite for Europeanization, and preserving Romanian national identity was a priority. Romanian elites expressed significant interest in assuming a European (constitutional) identity without accepting a decisive identity shift that would undermine the essence of the Romanian ethnocentric identity. That is to say, they were interested in being European, though in a specifically Romanian way.

In my opinion, this bipolar, Eurocentric and ethnocentric constitutional identity should not be understood as showing an interest among the Romanian people in promoting and developing a (constitutional) identity on multiple levels.<sup>27</sup> Given the

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country had been raised. However, the provision acquired a strong ethnocentric meaning over time. See: M. Guțan, *Națiunea asediată: constituționalismul etnocentric românesc și migrația contemporană* [The Nation under Siege: Romanian Ethnocentric Constitutionalism and Contemporary Migration], "Revista de drept public" 2017, special issue, p. 80.

<sup>26</sup> However, the amended Article 7 allowed the naturalisation of non-Christians only individually and only by law.

<sup>27</sup> As a solution to European constitutional integration through the concept of constitutional identity, a 'constitutional identity in 3D' model was proposed. It implies the development of a nation's

obsession with Western Europe and the high degree of interest in the Romanian 'national being' within the intellectual and political elites, I argue that Romanian (constitutional) identity was not developed at both European and ethnic-national levels but in between them. This perspective calls for adequately capturing Romanian dynamic national (constitutional) identity. Romanian elites transferred the Western-European liberal constitutionalism in the text of the 1866 Constitution only as long as it made room for elements of a Romanian ethnocentric national identity. The Romanian intellectual and political elites constantly desired to adopt a Western European constitutional identity; if this did not happen, it was not necessarily due to any inherent weakness but to an existential anxiety that anchored the constitution in the Romanian national (ethnic) being. This tendency was manifested as a permanent but unsuccessful challenge to Romanian ethnocentric core identity following a need for a pro-European identity shift. Any turn towards a Eurocentric constitutional identity was usually made by looking back to the ethnocentric constitutional identity. Conversely, any return to the ethnocentric constitutional identity was made by longing for a Eurocentric one. As far as the entire process of modernisation of Romanian society is concerned, this intricate mechanism is best expressed by sociologist Vintilă Mihăilescu:

The ideology of [Romanian national] change has taken the Occident as a reference and purpose and generated a family of Occidentalist exceptionalisms having the imperative aim of filling the gaps at its core [...] As far as the ideology of perpetuation is concerned, it also took the National Being as its reference; however, it was still defined by the Occident: the autochthonous definition of this National Being, of the 'soul of the people' would not have been possible without the use of the Herderian *Volksgeist* and the whole romantic ideas woven around it. In this case, the fear of lagging behind the Occident was replaced by the fear of drifting toward the Occident, but the Occident remained the 'mirror' in which we were watching our identity. It could thus be said that, in a way, even our nationalisms were [...] Occidentalist.<sup>28</sup>

'The fear of lagging behind the Occident' explains the panic of being too far from European liberal-democratic standards; it demonstrates a quest for European ideological recognition concerning Romanian ethnocentrism, and the conscious packaging of Western European liberal constitutional standards in a Romanian historical box. Historicism<sup>29</sup> helped the Romanian elites to project European 'civilised' values and institutions in Romanian traditions and Romanianize them. Romanian constitutional modernity had to be achieved in the future with the help of those

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constitutional identity in a multi-centric manner, being 'shaped simultaneously in different spheres of communication', that is, individual, relational, and collective, which interact with one another. See: A. Śledzińska-Simon, *Constitutional identity in 3D: A model of individual, relational and collective self and its application in Poland*, "I-CON" 2015, vol. 13, p. 124.

<sup>28</sup> V. Mihăilescu, *Despre excepționalism și ipostazele sale românești* [About Exceptionalism and its Romanian Facets] [in:] *idem, De ce este România altfel...*, p. 58.

<sup>29</sup> See: S. Marton, *La construction politique de la nation. La nation dans les débats du Parlement de la Roumanie (1866–1871)*, Iași 2009, p. 33, n. 1. See also: M. Guțan, *Transplant constituțional și constituționalism...*, pp. 418–420.

modern European elements discovered in the Romanian past. As long as specific European liberal values and liberties were uncovered by the purposeful 'archaeology of the past'<sup>30</sup> in 'imagined' Romanian constitutional traditions, they did not contribute to constructing the modern free citizen but strengthened the positive exceptionalism of the Romanian nation and securing the existence and unity of the state.<sup>31</sup> The constant use of the terms 'Romanian' and 'Romanians' instead of citizen or citizens throughout constitutional debates and in the constitutional text mirrors the primary interest in the ethnic collectivity. Even the most radical Romanian liberals of the nineteenth century were less interested in human rights than in the French-origin idea of national self-determination and nation-state building.<sup>32</sup> Built on ethnic (collectivistic) nationalism, the state became an inalienable asset belonging to the Romanian ethnic nation.<sup>33</sup> Nevertheless, the quest for Romanian national constitutional identity remained tendential in perpetually having Western liberal constitutionalism as a reference. The latter was valued as the proper institutional blueprint to inspire the building of the modern unitary and indestructible Romanian nation-state.

'The fears of drifting towards the Occident' reflects the intimate link between the need for distinctiveness, the quest for national unity and ethnic purity and, last, the need to protect the ethnic nation-state from the dangerous and 'barbaric' other. It follows that opposing Europe in the sensitive affair of Jews was not a matter of anti-Europeanism but simply a matter of protecting the nation and conserving its identity. As Silvia Marton puts it, 'defining against alterity became the core mechanism to produce national identity under the impact of modernisation'.<sup>34</sup> However, European pressures on Romanian core ethnocentric identity never triggered overwhelming anti-European feelings. Western Europe was perceived as an institutional model and a decisive guarantee of the Romanian nation-state's existence. Except for the communist period, modern Romanians usually looked for their national enemies first and foremost inside their state borders. As regards external ones, Romanians felt primarily threatened by those aiming to keep Romania away from Western Europe/Occident, that is, Phanariot Greeks, Turks, and Russians.<sup>35</sup>

All these factors explain why the permanent tendency of Eurocentric (constitutional) identity to occupy the core of Romanian (constitutional) identity at the expense of Romanian ethnocentric (constitutional) identity failed in 1886. The mixture of liberal and illiberal elements in the two identities within the 1866 Constitution gave birth

<sup>30</sup> M. Guțan, *Transplant constituțional și constituționalism...*, p. 253 ff.

<sup>31</sup> *Ibid.*, p. 158.

<sup>32</sup> See: G. Platon, *Liberalismul românesc în secolul al XIX-lea. Emergență, etape, forme de expresie* [Romanian Liberalism in 19<sup>th</sup> Century. Emergence, Steps, Forms of Expression] [in:] *idem, De la constituirea națiunii la marea unire. Studii de istorie modernă*, vol. 2, Iași 1998, p. 208; P. Blokker, *Modernity and its varieties...*; C. Matiuța, *Naționalism și liberalism la mijlocul secolului XIX* [Nationalism and Liberalism at mid-19<sup>th</sup> Century] [in:] *Liberalismul românesc și valențele sale europene* [Romanian Liberalism at mid-19<sup>th</sup> Century], ed. L. Brătescu, 2<sup>nd</sup> ed., Iași 2013, p. 62.

<sup>33</sup> S. Marton, *La construction politique de la nation...*, p. 311.

<sup>34</sup> *Ibid.*

<sup>35</sup> See: L. Boia, *Istorie și mit în conștiința românească...*, pp. 310–314, 333–341.

to a pro-European, illiberal Romanian constitutional identity. This perspective also allows us to understand that any severe unsettling of the balance between the two identity poles was always detrimental to the Eurocentric identity. An ethnocentric identity always offered Romanians more powerful emotional elements of cohesion and distinctiveness in moments of crisis than a Eurocentric identity. This paradigm may explain Romanian constitutional developments in the interwar period and during the Second World War.

At first glance, the 1923 Constitution, known as the Constitution of Greater Romania, seems to have perpetuated the balance between Romanian identity poles established in 1866 with the 1879 amendment. More than sixty per cent of the 1866 constitutional text was preserved, and many of the new provisions strengthened the commitment to West-European liberal-democratic constitutionalism, for example, male universal suffrage and *a posteriori* constitutional review entrusted to the Supreme Court. However, the elements of ethnocentric constitutional identity were preserved and amplified.

Although they had fulfilled the national agenda and although the vast majority of ethnic Romanians lived within the borders of the Romanian state, the Romanian political elites had to face an unexpected challenge. On 9 December 1919, Romania was obliged to sign the Treaty on the Rights of Ethnic Minorities. A generous set of rights and freedoms was granted to ethnic minorities, amongst them the complete protection of life and liberty, freedom of religion and expression, the right to Romanian citizenship, freedom to use their mother tongue in court, the right to establish confessional private schools and, especially for ethnic Hungarians (Széklers) and Transylvanian Saxons, the right to local autonomy concerning religious and educational matters. The fathers of the 1923 Constitution not only tackled the process of constitution-making in the same ethnocentric spirit as in 1866, but they also did their best to disregard the existing ethnic heterogeneity in the new Romanian state. The idea of expressing the 'objective' elements of Romanian national identity was accompanied by the clear notion that only the ethnic Romanian majority had the right to express its identity, proclaim its symbols in the Constitution, and establish its values and principles. Consequently, Romania was declared a 'national state' (Article 1); no foreign populations could have been colonised on the territory of the state (Article 3); the Orthodox Church was declared the 'dominant church', and the Greek Catholic Church, the other historical church of Romanians, gained priority over other religious denominations (Article 22); Romanian was proclaimed the official language of the state (Article 126).

The only concession to the 1919 Treaty was to grant Romanian citizenship to all residents of the new Romanian provinces regardless of denomination and to generally recognise their civil and political rights 'without distinction of ethnic origin, language



or religion.<sup>36</sup> Instead of widely opening the constitutional text to the rights of ethnic minorities for the sake of their identity, all these revealed limits that Romanians were not prepared to go beyond. It is no wonder that any demands made by ethnic minorities' representatives in favour of a more inclusive character of the constitution were rejected during constitutional debates. The conceptual confusion between 'Romanians' and 'Romanian citizens' was perpetuated in the Constitution despite the insistence by ethnic minorities that it be removed. Last, their demand for recognition of group rights was firmly rejected. Above all, the 1923 Constitution was built as a national constitutional cathedral of the majority ethnic Romanian community in which individual members of ethnic minorities were accepted as humble visitors. They had the same rights as Romanian citizens but were no more than shadow citizens. This approach expressed the wish of the Romanian people to build an ethnically pure national state on the historical territory of the Romanian ethnic nation.<sup>37</sup> A Eurocentric constitutional identity, although present, was strongly counterbalanced and overshadowed by the need of the Romanian people, more imperative than ever, to assert and protect the elements which distinguished them in terms of national and constitutional identity. Instead, the foundation was laid for an ethnocracy sustained by a powerful, illiberal constitutional ethos that was inherently authoritarian.

Paradoxically, despite everything that had been said about the liberal exceptionalism of the 1923 Constitution, it was, in legal terms, one of the essential factors that triggered an identity-centred dynamic that favoured and strengthened the ethnocentric constitutional identity of Romanians in the coming decades, at the expense of an identity based on the values and principles of Western European liberal constitutionalism. From a cultural, social and political point of view, the interwar period was not one of joy and celebration but of anxiety. Given the cultural diversity of Romanian people living in historically Romanian provinces, Romanian national identity was uncertain and not well-defined, and therefore susceptible to collapse. This 'fragmented [cultural] nature of the unitary national state'<sup>38</sup> needed cultural and educational policies meant to remove regional identities and to build a clear, unified concept of national identity.<sup>39</sup> The obsession with ethnocentric identity was

<sup>36</sup> For comparison, the 1921 Constitution of Poland, Section V, not only recognised ethnic minorities as a constitutional subject but also preserved important provisions of the Treaty regarding minorities signed by Poland with the main Allies on 28 June 1919. In turn, the 1920 Constitution of Czechoslovakia dedicated a whole section (VI) to the protection of national, religious, and racial minorities, adopting the provisions of the Treaty regarding minorities signed with the main Allies on 10 September 1919. See: A. Theodoresco, *La nouvelle constitution de la Roumanie*, "Bulletin mensuel de la Société de Législation Comparée" 1926, no. 4–6, p. 337.

<sup>37</sup> The banner welcoming the visitors of the Romanian National Pavilion at the 1939 New York World's Fair was quite relevant here: 'Romania has more than 20 million inhabitants, fully united in language, tradition and culture'. See: I. Livezeanu, *Cultură și naționalism în România Mare* [Culture and Nationalism in Greater Romania], București 1998, p. 9.

<sup>38</sup> *Ibid.*, p. 347.

<sup>39</sup> See: M.S. Rusu, *Memoria națională românească...*, p. 197 ff.; K. Verdery, *National Ideology and National Character in Interwar Romania* [in:] *National Ideology and National Character in Interwar Eastern Europe*, eds. I. Banac, K. Verdery, Yale 1995, p. 126 ff.; A. Momoc, *Capcanele politice ale sociologiei*



spurred by the continuous unease among Romanian political elites about internal and external dangers threatening the unitary character of the Romanian national state. The city-under-siege mentality linked the traditional ethnocentric nationalism to new ideological and political extremisms (Orthodoxism, Legionarism, Fascism), which glorified a national (Christian) identity and advocated the subordination of the state and its law to the struggle for the unity and purity of the Romanian nation<sup>40</sup> in its ethnic sense. In particular, the Christian-Orthodox essence of Romanian national identity, favoured and popularised by numerous Romanian intellectuals, created a public discourse that undermined Western European values and underpinned the authoritarian public policies of the Romanian state.<sup>41</sup>

This identity-based turn towards ethnic Romanians should be primarily assessed against the Romanian ethnocentric nationalist background of the nineteenth century and the particular geopolitical context in the aftermath of the First World War. Some ideological influences from fascist Italy and Nazi Germany undoubtedly played a role. Still, the climax of Romanian ethnocentric identity in the interwar period had powerful internal roots directly connected to the building of a unitary Romanian state and the survival of the Romanian ethnic nation.<sup>42</sup> Unfortunately, political-constitutional practice in interwar Romania did not itself make a strong case for Western liberal democracy and gave room for sound critiques from the monarchy, some political circles, and academia.<sup>43</sup> Against the backdrop of endemic bureaucratic corruption, manipulation of parliamentary and local elections, the money-focused agenda of political parties, the authoritarian behaviour of prime ministers, and the global economic crisis, it is not surprising that this ethnocentric, antisemitic, and xenophobic discourse managed to dominate the period, and eventually to become the official ideology of the state. This ideology uniquely lay at the basis of the 1938 Constitution and the constitutional ethos of the dictatorial Antonescu regime<sup>44</sup> against the background of a profoundly illiberal and authoritarian constitutional architecture. The close connection between authoritarianism, ethnocracy, law, and nationalist ideology was fully exposed in infra-constitutional law of the time. The *Decree-Law* n° 2650 *on the legal status of Romanian Jews* of August 8, 1940, clearly outlined the basic principles of the Romanian

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*interbelice. Școala gustiană între carlism și Legionarism* [The Pitfalls of Interwar Political Sociology: The School of Gusti between the Carlism and Legionarism], București 2012.

<sup>40</sup> It is unsurprising that the interest in eugenics studies reached an unprecedented level in interwar Romania. See: M. Turda, *Eugenism și modernitate. Națiune, rasă și biopolitică în Europa (1870–1950)* [Eugenics and Modernity. Nation, Race and Biopolitics in Europe (1870–1950)], Iași 2014, p. 122.

<sup>41</sup> H.-C. Maner, *Parlamentarismul în România 1930–1940* [Parliamentarianism in Romania 1930–1940], București 2004, p. 303 ff.

<sup>42</sup> I. Livezeanu, *Cultură și naționalism în România Mare...*, p. 361.

<sup>43</sup> See: M. Guțan, *Administrative (Authoritarian) Monarchy – A Paradigm for the Constitutional Realism in Modern Romania?* [in:] *Iustitia et Pax. Gedächtnisschrift für prof. Dr. Dieter Blumenwitz*, eds. G. Gornig, B. Schöbener, W. Bausback, T.H. Irmscher, Berlin 2008, p. 1169.

<sup>44</sup> Marshall Ion Antonescu was Romanian prime minister between September 1940 and August 1944. The young King Michael I proclaimed him 'Leader of the State'. His pro-Nazi beliefs made him a faithful ally of Adolf Hitler.

constitutional order: the law of blood; the (ethnic) Romanian nation as the founder of the national state; and the legal distinction between a biological Romanian and a Romanian citizen. The complete equation of Romanian constitutional identity with an ethnocentric national one, against the backdrop of aggressive populism and nationalism, xenophobia, and antisemitism, made Romania one of the states that perpetrated the Holocaust. This is the clearest historical example of abandoning an essentially liberal Eurocentric identity (of belongingness) and the harmful exploitation of a Romanian ethnocentric identity (of differentiation).

### **3. Competing Romanian constitutional identity narratives**

The storyline of Romanian constitutional modernisation in the nineteenth and early twentieth centuries (until the beginning of the communist era) reveals an earnest confrontation of ideas backing up the direction and content of the constitutional reforms. They gelled distinct narratives about Romanian national and constitutional identity, narratives that competed for recognition and prevalence in Romanian society.

The dominant one was especially endorsed by the constitution-makers of 1866. The bargaining between the unconditioned imitators of civilised Western Europe's constitutional values and defenders of Romanian ethnic national identity concluded in a bipolar constitutional identity. While the desire to replicate as much as possible the constitutional means (institutions and practices) and goals of Western constitutional models gave the process of constitutional modernisation a tendential dynamic between the poles (from the ethnocentric identity of differentiation to the Eurocentric identity of belongingness); an obsession for expressing and protecting the national (ethnic) soul made the Romanian constitutional Europeanisation endlessly tendential. The desire to imitate the civilised West long after 1866 witnessed the need on the part of some Romanian intellectuals to achieve a radical change in constitutional identity, even if the parliamentary monarchy and democracy they wanted to transfer from Western Europe did not function well. They naively thought that the desire of a few to identify themselves as European from the constitutional and political point of view would automatically trigger top-to-bottom influenced Western European constitutional and political behaviour on the part of the many. The idea of imitation was less present in the 1923 constitution-making process, but Western European constitutional models remained the beacons of Romanian constitutional modernisation.

The second narrative about Romanian constitutional identity was born not long after the constitutional moment of 1866 out of deep dissatisfaction with the complete and unconditional embracing of a Eurocentric identity of belongingness. Its proponents, mainly conservative politicians and intellectuals, saw no problem following Western European constitutional modernity; instead of imitation, however, they accepted only the idea of borrowing. They rejected the idea of transforming the Romanians into French or Belgians; their primary interest was in the reception

and adaptation of Western European democratic-liberal constitutionalism to the Romanian ethnic soul/spirit/culture. 'Constitutional Europeanisation in our way' became their motto far beyond the beginning of the twentieth century. Embodied in a mild parliamentary-political version and also in a harder one among sociologists, ethno-psychologists, and philosophers of culture, this identity-based narrative had a real challenge in establishing how much constitutional-cultural change was needed so that a European identity would not suffocate the Romanian ethnic one and how strong the domestic cultural resistance must be so as the Romanian ethnic identity would not eclipse the European one. It was not a real competitor to the previous narrative but rather a variant. Its main shortcomings came from the same quest for true Romanianity against European (constitutional) identity and from valuing adaptation of foreign constitutional models *per se*.

The third narrative about Romanian constitutional identity had its roots in the forceful reaction against constitutional modernisation as Europeanisation, which developed in the second half of the nineteenth century. Its proponents saw the key to Romanian constitutional and political change only in Romanian constitutional traditions and the cultural resources of the Romanian peasantry. Born out of the ethnocentric nationalism of the century, the anti-European identity-centred narrative was nourished in the interwar period by the illiberal and xenophobic aims of Fascism and Orthodoxism. In propitious political, geopolitical, and cultural contexts, it succeeded in replacing the previous official narrative established in 1866. The bipolar Romanian constitutional identity and the tendency towards European constitutional identity were replaced by the constitution-makers of 1938 with a fully ethnocentric constitutional identity. This narrative reveals the perils of the Romanian tendential identity as a back-and-forth between the Eurocentric and the ethnocentric; in specific contexts, Romanian constitutional identity may be reduced to its hard ethnocentric core.

All these narratives about Romanian constitutional identity were constructed by the Romanian intelligentsia, the majority of them former aristocrats with liberal and/or conservative beliefs, competing for the attention of a small number of literate people in specific political, geopolitical, social, religious, and cultural contexts. They reflected not only the identity-driven character of any constitution-making process, but also the perpetual indeterminacy of Romanian national and constitutional identity, its endless attempt to strike a balance between the traditional and modern, between self and European other. In the Romanian case, political identity was not begot in a founding moment, as this did not properly exist;<sup>45</sup> however, the Romanian constitution-making process cannot be reduced to merely expressing a pre-existing ethnic national identity in the constitutional text of 1866. Romanian constitutional identity has been constantly built and rebuilt afterwards by competing epistemic communities, concomitantly against the Romanian ethnic self and West-European constitutional identity.

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<sup>45</sup> See: U.K. Preuss, *The Exercise of Constituent Power...*, p. 227.

#### 4. Which methodology

Any methodological approach to the constitutional modernisation process in Romania during the nineteenth and early twentieth centuries could be anchored either in comparative legal history or global legal history. There are multiple reasons why the analyses should go beyond merely national legal history. Romanian constitutional modernisation involved a massive transfer of ideas, values, principles, concepts, and institutions from Western European constitutional models, especially the French and Belgian ones. Any purely Romanian exercise in national legal history, ignoring or underestimating this reality, is highly sterile. However, from my point of view, it is not easy to find proper methodological tools to approach the complex Romanian process of constitutional modernisation in the period studied, either in comparative legal history or global legal history.

As Heikki Pihlajamäki puts it, ‘the periphery is constantly measured against the centre’ and ‘that is forcing “peripherals” to look at our legal past with comparative glasses on.’<sup>46</sup> This comparative approach is not an option in the Romanian case. As long as Romanian constitutional identity was at stake, it was inescapably defined against the centre. For this reason, the centre cannot be ignored, blamed, or suppressed. It essentially determined the Romanians’ struggle to define their constitutional self, no matter whether it was imitated or contested. What Romanian elites understood as Western European constitutional identity was always balanced against Romanians’ perception of their national and constitutional identity. Nevertheless, it is vital to establish the proper comparative historical approach. At first glance, the toolkit offered by legal transplant studies seems to be adequate for research. The comparative legal historian may question the causes, models, actors, mechanisms, quantity, and items of the 1866 constitutional transplant. A textual comparison between the Belgian and Romanian constitutions may be also necessary. An analysis of the effects may imply a contextual-cultural approach. It may measure the success or failure of the constitutional transplant against the envisaged constitutional goals of Western origin and Romanian general culture and legal culture’s capacity to adapt/integrate the foreign constitutional items. Others may be interested in measuring the level of constitutional *mixité* in the post-transplantation Romanian constitutional system and culture, for example, the percentages of Romanian, French, and Belgian constitutional items and their degree of intermingling.

These approaches may help one understand the differences between the Belgian and Romanian constitutions and constitutionalism of the nineteenth century. They may help to understand the stunning discrepancy between the foreign constitutional items transferred from Belgium and the Romanian legal culture analysed by the proponents of ‘the forms without substance theory’. They may elucidate the problematic reception of liberal constitutionalism’s values and principles, the sham parliamentary regime

<sup>46</sup> H. Pihlajamäki, *Comparative Contexts in Legal History: Are We All Comparatists Now?* [in:] *The Method and Culture of Comparative Law*, eds. M. Adams, D. Heirbaut, Oxford–Portland, Oregon 2015, p. 126.

which developed after 1866, and the irritation of many with regard to the foreignness and inadequacy of the new constitutional setup.<sup>47</sup> However, legal transplant studies have limited resources to fully explain the role of imitation and complex identity-centred dilemmas and competition in modern Romanian constitutional history. As I have discussed elsewhere, the concept of imitation used in comparative law underpins an epistemologically biased 'country, Western, and innovation' process of legal diffusion<sup>48</sup> and may be seen as a form of non-coercive (scholarly) hegemony.<sup>49</sup> It is usually used to capture the transfer of a large quantity and a high fidelity amount of legal items from Western legal models to the periphery.

This fuzzy concept of imitation must be replaced with one capable of rendering the intimate relationship between the constitutional imitator and the constitutional model, the complex identity crisis which triggers the need for constitutional change, the obstinate reproduction of the constitutional model's means (ideas, concepts, institutions, texts, practices) and goals, and the perpetual tendency to replicate these means and goals regardless of any concrete constitutional or political achievements. Finally, one must consider the identity crisis that backfired on the constitutional model. Besides, a proper analytical background is needed to assess the competition and intermingling between the multiple narratives about the Romanian national identity and constitutional identity present in the period discussed. The Romanian road towards constitutional and political modernity was far from a triumphal march of Europeanization. Many domestic goals were at stake, and other constitutional identity-centred narratives not only challenged the official one but succeeded in replacing it in the interwar period.

From a global legal-historical perspective, it is evident that Romanian constitutional modernisation is part and parcel of European constitutional modernisation. Romanian constitutional history cannot be grasped outside the birth, development, and spread of West-European liberal constitutionalism. However, it is essential to establish clearly what this assertion means. Should Romania be defined in terms of the strategy of leaving Eurocentrism behind, or must it be approached in the context of Western-European constitutional expansion? In the first case, Romania can become irrelevant again; in the second case, it may count as Western Europe's partner in constitutional entanglements.<sup>50</sup> Globalization and its methodological prioritisation of the local<sup>51</sup> may do justice to Romanian constitutional history. It may help uncover the utmost relevance of identity in determining and implementing modern Romania's constitutional law.

<sup>47</sup> For details, see: M. Guțan, *The Challenges of the Romanian Constitutional Tradition. II. Between Constitutional Transplant and (Failed) Cultural Engineering*, "Journal of Constitutional History" 2013, vol. 26, pp. 217–240.

<sup>48</sup> See: M. Guțan, *The Concept of Imitation and Its Epistemological Relevance in Comparative Law and Comparative Legal History*, "The Journal of Comparative Law" 2024, vol. 19(1), pp. 259–310.

<sup>49</sup> See: V. Corcodel, *Modern Law and Otherness*, Cheltenham–Northampton 2019, p. 12 ff.

<sup>50</sup> T. Duve, *Entanglements in Legal History. Introductory Remarks* [in:] *Entanglements in Legal History: Conceptual Approaches*, ed. *idem*, Frankfurt am Main 2014, p. 3 ff.

<sup>51</sup> T. Duve, *Global Legal History: A Methodological Approach* [in:] *Oxford Handbook: Topics in Law*, 2017, <https://doi.org/10.1093/oxfordhb/9780199935352.013.25> [accessed: 2024.05.17].

Using the lens of ‘translation’ may also have particular significance in grappling with the capacity of the Romanian constitutional imitator to transfer the model’s ‘systems of significance’ and effectively identify itself with it, but a wider epistemological frame is needed. Both the refusal of creative reproduction of constitutional models and interest in their original creative replication in relation to the delicate issue of identity need careful assessment.

All these issues suggest the necessity of fresh methodological inquiries. More interdisciplinarity, primarily, may provide a properly working concept of (constitutional) imitation in comparative legal history, one capable of highlighting that imitation is not a simple diffusion of legal innovations or a trigger of legal globalisation, but a complex psycho-sociological attitude towards the constitution-making process and constitutional change, constitutional models, constitutional means, outcomes, and goals, and, last, an identity crisis. Social sciences, especially diffusion studies and developmental psychology, may help this endeavour. With their help, constitutional imitation can be understood as a perpetual voluntary and intentional attempt to reproduce at home the means (texts, institutions, and practices), outcomes and, possibly, the goals of one or more constitutional models. It usually starts with a stringent need for (constitutional) identity change. It may end in political and social frustration of identity and in despair. This approach can transform comparative constitutional history into research in space (comparative), time (historical), and minds (psychological). Research into minds would not be limited to a jurisprudential approach focused on educated legal doctrinaires. It would examine the deep social, intellectual, and psycho-social turmoil positioning individuals (politicians, legal scholars, intellectuals, people in business, etc.) in the balance between the constitutional self and the constitutional other. As Katharina Isabel Schmidt puts it, this would transform ‘the people involved in creating legal meaning’ into a central focus for analysis.<sup>52</sup> I agree with Schmidt’s idea that ‘foreign concepts and ideas (and institutions, I may say) help jurists in one place to construct and reconstruct their legal identities;<sup>53</sup> however, what is at stake is not only ‘to provide national legal imaginations with innovative content’ but also the faithful replication (imitation) of foreign concepts, ideas, and institutions. This is moving the accent from ‘the jurisprudential mentality’ to psychology. Global legal history may also benefit from this interdisciplinary work. It sheds new light on the (limits of) globalisation of constitutional law and constitutionalism in the nineteenth and twentieth centuries.

Finally, the same interdisciplinary approach may help to avoid essentialism in constitutional history. The constitution-making process is about mediating competing identities. However, searching in Romanian constitutional history for a unified national and constitutional identity is misleading. The constant plurality of competing identity-

<sup>52</sup> K.I. Schmidt, *From Evolutionary Functionalism to Critical Transnationalism. Comparative Legal History, Aristotle to Present* [in:] *The Oxford Handbook of Legal History*, eds. M.D. Dubber, C. Tomlins, Oxford 2018, p. 284.

<sup>53</sup> *Ibid.*

centred narratives conducive to constitutional and political change can be grasped with the help of constructivist sociology and psycho-sociology.<sup>54</sup> This highlights that, in Romania, liberal-constitutional modernisation as Europeanisation was not a unidirectional, unquestioned, and fully accomplished process.

## Conclusions

Romanian constitutional history of the nineteenth and early twentieth centuries can only be approached comparatively. Romanian constitutional modernisation occurred through intense imitation and borrowing from Western European liberal constitutional models. Legal transplant studies within the methodological framework of comparative legal history and the study of the globalisation of liberal constitutionalism within global legal history certainly help one to grasp the Romanian case. The increasing interest of such approaches in the 'peripheral' and 'local' recalibrates the epistemological balance between constitutional diffusion and reception. Thus, they can reveal the special place of (national) identity in the Romanian process of constitutional change in the period studied. The intimate links among the need to change social and political identity, imitation of the West, the fear of the West, and the identity crisis that followed gave the Romanian process of constitutional modernisation as Europeanisation a perpetual dynamic, tendential (from East to West) character. Not only the bipolar identity-focused narrative of the 1866 makers of the constitution was at stake, but also the competing narratives that challenged either the imitation of the West or interest in the West. All these narratives had a more or less powerful impact on Romanian constitutional normativity, constitutional thinking, and constitutional-political practice between 1866 and 1940. Despite their methodological resources, comparative legal history and global legal history need a greater degree of interdisciplinarity to understand the whole picture. The social sciences, especially diffusion studies, developmental psychology, social psychology, and constructivist sociology offer valuable methodological guidance. Thus, Romanian constitutional history may be approached comparatively (in space), historically (in time), and psycho-sociologically (in minds). The research focus is on Romanian elites and their interest in borrowing or imitating foreign constitutional ideas, concepts, institutions, and practices to construct and reconstruct their national and constitutional identities.

The Romanian case of constitutional modernisation may encourage further inquiries about the presence of CEE as a distinct unit of research in comparative legal history and global legal history. CEE may be of interest to comparative constitutional history not only as an imitator, receptor, and adaptor of Western constitutionalism and constitutional models, but also as a constructor of identity in reaction to them.

<sup>54</sup> See: M. Guţan, *Constitutional Identity as Competing Historically Driven Narratives: Central and European Perspectives* [in:] *Law, Culture and Identity in Central and Eastern Europe: A Comparative Engagement*, eds. C. Cercel, A. Mercescu, M.M. Sadowski, New York 2023, pp. 137–163.



From the perspective of global legal history, CEE may prove that Western Europe was not as influential as it was once thought to be. CEE is characterised by a purposive in-betweenness not fully explored historically or comparatively. A fascination with Western constitutional/legal modernity was and still is counter-balanced by a fear or suspicion of that same Western modernity. Despite the need to reach Western European constitutional modernity, CEE nations have always had a propensity to defend their Polish-ness, Hungarian-ness, Bulgarian-ness, etc., rendering the constitutional modernisation as (Western) Europeanisation unaccomplished. This is a very interesting research hypothesis that needs further investigation. It may prove that CEE's 'internalised marginality' or 'internalised irrelevance'<sup>55</sup> *vis-à-vis* Western Europe is, to a certain degree, a matter of self-preservation.

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<sup>55</sup> See: M. Milanov, *The Region Without Qualities. Fiction, International Law and Internalized Irrelevance of Central and Eastern Europe* [in:] *Law, Culture and Identity in Central and Eastern Europe...*, p. 63.



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## Summary

**Manuel Guțan**

### Methodological Challenges for Constitutional History in Central-Eastern Europe

This paper discusses the Romanian process of constitutional modernisation against the background of Romanian elites' quest for identity during the nineteenth and early twentieth centuries. It considers why Romanian national and constitutional identity was shaped by multiple competing narratives constructed by the Romanian intelligentsia and it explores the best methodological tools to assess this process. This article briefly evaluates the methodological resources of comparative legal history and global legal history and strongly emphasises the acute need for greater interdisciplinarity. Social sciences may provide a necessary analytical background, facilitating an approach to Romanian constitutional history, comparatively (in space), historically (in time), and psycho-sociologically (in minds).

**Keywords:** Romanian constitutional history, comparative legal history, global legal history, tentential constitutional identity, imitation, interdisciplinarity.

## Streszczenie

*Manuel Guțan*

### **Wyzwania metodologiczne historii konstytucyjnej w Europie Środkowo-Wschodniej**

W artykule dokonano pogłębionej analizy rumuńskiego procesu modernizacji konstytucyjnej w kontekście dążenia rumuńskich elit do uformowania tożsamości w XIX i na początku XX w. Autor dąży do rozwikłania problemu, dlaczego rumuńska tożsamość narodowa i konstytucyjna została ukształtowana przez wiele konkurujących narracji skonstruowanych przez rumuńską inteligencję – w tym celu analizuje najlepsze narzędzia metodologiczne do oceny tego procesu. W opracowaniu skrótkowo oceniono metodologiczną bazę porównawczej historii prawa i powszechnej historii prawa oraz mocno podkreślono pilną potrzebę większej interdyscyplinarności. Nauki społeczne mogą zapewnić niezbędne tło analityczne, ułatwiając podejście do rumuńskiej historii konstytucyjnej w sposób porównawczy (w przestrzeni), historyczny (w czasie) i psychosocjologiczny (w umysłach).

**Słowa kluczowe:** rumuńska historia konstytucyjna, porównawcza historia prawa, powszechna historia prawa, tendencja tożsamości konstytucyjnej, imitacja, interdyscyplinarność.

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## **Reflections on the Croatian Constitutional Tradition from 1848 to 1918**

### **Introduction**

This article discusses the Croatian constitutional tradition from 1848 to 1918. Here I mean the constitutional tradition of the Kingdoms of Croatia and Slavonia, which retained old Croatian institutions from an earlier period.

The aim of the article is to identify the main features of the concept of the constitution in Croatia and Slavonia from the revolutionary year 1848 until the end of the Austro-Hungarian Monarchy in 1918. The article is divided into five sections. In the first section, I comment on the Croatian constitutional tradition on the eve of 1848. Understanding the basic assumptions of that tradition represents an initial point of reference for understanding the constitutional development in the later period. In four following sections, I discuss the issue of the constitution in the revolutionary years 1848–1849, the March constitution of 1849, constitutional development until 1860, the constitution in Croatia and Slavonia from 1860 until 1868, and the concept of the constitution from the conclusion of the Austro-Hungarian and Croatian-Hungarian compromises until the end of the Habsburg Monarchy. Since the article only considers the main features of the concept of the constitution in Croatia and Slavonia, it does not discuss all the constitutional regulations that were relevant in Croatia and Slavonia at that time.

### **1. Comments on the Croatian Feudal Constitution on the Eve of 1848**

On the eve of the revolutionary year 1848, the Kingdoms of Croatia and Slavonia (officially called the Kingdoms of Dalmatia, Croatia, and Slavonia)<sup>1</sup> were part of the Lands of the Hungarian Crown. The Kingdoms kept their institutions such as the *ban*,

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<sup>1</sup> The name reflected only virtual unity since Dalmatia belonged to the Austrian part of the Habsburg Monarchy.

the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia, and municipal organisation with counties as bulwarks of the old constitution.<sup>2</sup>

However, at the time, the power of the *ban* was significantly limited, because, from 1790, he could not summon the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia without the king's consent.<sup>3</sup> Moreover, from 1790, the Hungarian regency council had supreme executive power in Croatia and Slavonia and in this way superseded the *ban*, who became one of the members of the council. From 1790, the traditional competences of the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia were also limited because the Hungarian Diet<sup>4</sup> also acquired supreme jurisdiction in the matter of raising war tax in Croatia and Slavonia.<sup>5</sup>

Despite such a constitutional setting, many specific Croatian constitutional rules were still relevant. These rules were collectively named *iura municipalia*. Traditionally, *iura municipalia* included: the right to the independent election of the ruler in the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia; the legislative power of the Diet (which was implemented with the king); independent decision-making on religious issues; the right to decide on the official language; the cooperation of the *ban* and the Diet; and the representation of the Kingdoms of Dalmatia, Croatia, and Slavonia in the Hungarian Diet via *nuncios* who held the right of veto, etc.<sup>6</sup>

The rules are listed by prothonotary Josip Kušević in *De municipalibus iuribus et statutis regnorum Dalmatiae, Croatiae et Slavoniae*, published in Zagreb in 1830.<sup>7</sup> Listing these specific Croatian constitutional rules at the time had an important political function in political clashes with the Hungarian liberal nobility who advocated transformation of Hungary (meaning the Lands of the Hungarian Crown) into a modern Hungarian national state.<sup>8</sup> So, although after 1790 the practical relevance of some of *iura municipalia* was reduced, the concept of *iura municipalia* played an important role in defending the specific Croatian constitutional position within the Lands of the Hungarian Crown.

<sup>2</sup> Three counties were Croatian counties (Zagreb county, Varaždin county, and Križevci county), while the other three were Slavonian (Virovitica county, Požega county, and Syrmia county). On the powers and work of the counties see: F. Potrebica, *Županije u Hrvatskoj i Slavoniji u 18. i prvoj polovici 19. stoljeća* [in:] *Hrvatske županije kroz stoljeća*, ed. I. Goldstein et al., Zagreb 1996, pp. 53–61.

<sup>3</sup> Cf. B. Šulek, *Hrvatski ustav ili konstitucija godine 1882.*, Zagreb 1883, p. 59.

<sup>4</sup> It was the Diet for the lands of the Hungarian Crown. The Kingdoms of Dalmatia, Croatia, and Slavonia participated in the Diet through representatives called *nuncios*.

<sup>5</sup> B. Šulek, *Hrvatski ustav...*, p. 59; I. Beuc, *Povijest država i prava na području SFRJ*, 3. izd., Zagreb 1989, p. 70; H. Sirotković, *Ustavni položaj i organizacija rada Sabora Kraljevina Hrvatske i Slavonije u građanskom razdoblju njegova djelovanja (1848–1918)*, Rad JAZU 393, Zagreb 1981, p. 44.

<sup>6</sup> Municipal rights are listed in: B. Šulek, *Hrvatski ustav...*, pp. 80–81. The most important rights are mentioned in: D. Čepulo, *Hrvatska pravna povijest u europskom kontekstu od srednjeg vijeka do suvremenog doba*, Zagreb 2023, p. 137.

<sup>7</sup> J. Kušević, *O samosvojnih pravih i pravilih kraljevina Dalmacije, Hrvatske i Slavonije* (transl. from Latin: Fr.X.Ž. Pretočki), Zagreb 1883, pp. 18–39.

<sup>8</sup> D. Čepulo, *Hrvatska pravna...*, p. 138. For more on some of the conflicts, see: D. Šokčević, *Hrvatska od stoljeća 7. do danas*, Zagreb 2016, pp. 215–252.

From the Croatian point of view, the constitution in Croatia and Slavonia consisted of rules relevant for the Lands of the Hungarian Crown, but also of specific rules relevant for the Kingdoms of Dalmatia, Croatia, and Slavonia.<sup>9</sup> However, these rules were scattered in numerous sources that regulated constitutional matters.<sup>10</sup>

Constitutional diversities within the Lands of the Hungarian Crown reflected the situation of the early modern period, in which the state was fragmented and laws within the state differed significantly. This means that there was no one unified set of laws which defined relations among the king, the estates, and the population, but a number of laws which were often in conflict with each other.<sup>11</sup>

## 2. 1848–1849 in Croatia and Slavonia and the Constitution

The years 1848 and 1849 in Croatia and Slavonia as well as in the rest of the lands of the Habsburg Monarchy were marked by revolution. However, revolution as well as revolutionary requests were specific in each of the lands. In Croatia and Slavonia, the revolution began in the second half of March 1848 and was prompted by events in Hungary.<sup>12</sup> The main impetus was the drafts accepted by the Hungarian Diet in March 1848 which aimed to transform Hungary (with Croatia and Slavonia) into a modern country. The drafts, approved by the king in April, contained constitutional rules on the establishment of responsible government, and other rules on the organisation of government and citizens' rights.<sup>13</sup> From a Croatian perspective, the laws were in opposition to the old constitution of the lands of the Hungarian Crown, which gave specific autonomy to Croatia and Slavonia.<sup>14</sup>

The reaction in Croatia and Slavonia was summarised in the form of a document entitled the Demands of the People (*Zahtjevanja naroda*) of 25 March 1848.<sup>15</sup> Some of the demands asked for the territorial unity of the Kingdoms of Dalmatia, Croatia, and Slavonia (Croatia and Slavonia, Dalmatia, the Military Border, and other Croatian territories that were under Austrian and Hungarian rule), for the formation of

<sup>9</sup> This opinion is found in B. Šulek, *Hrvatski ustav...*, pp. 40–42.

<sup>10</sup> On the sources of historical constitution in the Kingdoms of Dalmatia, Croatia, and Slavonia, see: L. Polić, *Nacrt hrv.-ugarskog državnog prava*, Zagreb 1912, pp. 3–32; J. Pliverić, *Hrvatsko-ugarsko državno pravo*, Zagreb 1908, pp. 33–199.

<sup>11</sup> I. Horbec, *Prema modernoj državi. Uprava i politika u Banskjoj Hrvatskoj 18. stoljeća*, Zagreb 2018, p. 39.

<sup>12</sup> Cf. J. Šidak, *Studije iz hrvatske povijesti za revolucije 1848–49.*, Zagreb 1979, pp. 33–37.

<sup>13</sup> For the laws see: *Reformtörvények Magyarországon 1848-ban. The Acts of 1848 in Hungary*, ed. N. Varga, Szeged 2012, pp. 11–95.

<sup>14</sup> One of novelties introduced by the April laws that was evidently in contrast with the old constitution was the abolition of the concept of the representation of Croatia and Slavonia in the Hungarian Diet via nuncios.

<sup>15</sup> J. Šidak, *Studije iz hrvatske povijesti...*, pp. 51–57.

a responsible government for the Kingdoms of Dalmatia, Croatia, and Slavonia, for legal equality, and for numerous civil and political rights.<sup>16</sup>

Nevertheless, the Demands of the People were only a political declaration issued by the Croatian political elite of the People's Party (*Narodna stranka*). Constitutional norms still had to be enacted. That is why the Croatian political elite gathered in the People's Party asked for elections and the convocation of the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia, which at the time was not in session.

During May 1848, the new *ban* Josip Jelačić passed a new electoral law and called elections for the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia.<sup>17</sup> The Diet was in session from 5 June to 9 July 1848, and it passed numerous acts that defined the constitutional position of the Kingdoms of Dalmatia, Croatia, and Slavonia within the Habsburg Monarchy and regulated domestic affairs including the abolition of serfdom.<sup>18</sup> One of the acts stated that the Kingdoms of Croatia, Slavonia, and Dalmatia were independent from Hungary, while another act proposed to the king a constitutional relation of the Kingdoms with Austria, which retained a wide sphere of competences.<sup>19</sup> Still, most of the acts could be considered merely political declarations and not laws, since only one, on the relations of the Kingdoms with Hungary, was later accepted by the king.

From a conceptual point of view, the initial work of the Diet aimed to regulate constitutional matters via specific laws and not via a formal constitution in the shape of one single act. This practice was a reflection of the urgency of the situation, but also a reflection of an earlier tradition in which constitutional matters were not regulated by one single act. In parallel to that, however, the *ban* in May 1848 received a proposal of a draft of a constitution for the Triune Kingdom (by an unknown author).<sup>20</sup> Although the draft was never debated in the Diet, it is interesting from the conceptual point of view since it reflects the idea of regulation of constitutional matters via one single act.

<sup>16</sup> See the document in: *Constitutions of the World from the late 18th Century to the Middle of the 19th Century. Croatian, Slovenian and Czech Constitutional Documents 1818–1849*, eds. D. Čepulo, M. Krešić, M. Hlavačka, I. Reiter, Berlin–New York 2009, pp. 39–46. Cf. H. Sirotković, *Ustavni položaj...*, pp. 45–46.

<sup>17</sup> T. Markus, *Hrvatski politički pokret 1848.–1949. godine: ustanove, ideje, ciljevi, politička kultura*, Zagreb 2000, pp. 108–110.

<sup>18</sup> On the sessions of the Diet see: *ibid.*, pp. 115–164. See the acts in: B. Šulek, *Naše pravice. Izbor zakonah, poveljah i spisah, znamenitih za državno pravo kraljevine dalmatinsko-hrvatsko-slavonske od g. 1202–1868.*, Zagreb 1868, pp. 247–299. The most important acts are published in: *Constitutions of the World...*, pp. 51–112.

<sup>19</sup> Cf. I. Beuc, *Povijest institucija državne vlasti Kraljevine Hrvatske, Slavonije i Dalmacije*, Zagreb 1985, pp. 254–255.

<sup>20</sup> See the proposal in: J. Kolanović, *Hrvatski državni sabor 1848.*, vol. 2, Zagreb 2007, pp. 548–564. The name the Triune Kingdom was used as shorter version of the name the Kingdoms of Dalmatia, Croatia, and Slavonia.

### 3. Constitutional development in Croatia and Slavonia from 1849 to 1860

Parallel with attempts at constitutional regulation in the Kingdoms of Dalmatia, Croatia, and Slavonia, and also in Hungary, the king in Vienna had his own vision of a constitution. Thus, on 4 March 1849 Franz Joseph I proclaimed a constitution and a separate constitutional law on the civil and political rights of citizens for all the Monarchy.<sup>21</sup>

The co-called March constitution defined the Habsburg Monarchy as a centrally organised state. Specifically, the constitution speaks of the Austrian Empire and its crown lands. But these crown lands were supposed to be uniformly organized with only limited autonomy. The March constitution also predicted the enactment of constitutions for each of the crown lands.<sup>22</sup> The Constitution did not recognise the concept of the Lands of the Hungarian Crown, but divided this territory into several parts (Hungary, Croatia and Slavonia, Transylvania, and the Serbian Voivodeship). The Constitution thus separated Croatia and Slavonia from Hungary.<sup>23</sup>

The king proclaimed the Constitution under circumstances when it seemed that the Hungarian revolution had been defeated. However, subsequent events were not in line with Franz Joseph's expectations. On the contrary, reaction to the new constitution was quite negative in Hungary and produced further tensions and a new impetus for revolution that lasted until the final defeat of the revolution in August 1849.

The situation of political and the social uncertainty and continuing revolution in Hungary, but also the centralist character of the March constitution also affected its promulgation in Croatia and Slavonia. Specifically, because the March constitution did not match Croatian revolutionary demands in 1848, the *Bans' Council* (*Bansko vijeće*) initially refused to promulgate it.<sup>24</sup>

Nevertheless, after the defeat of the Hungarian revolution, the *Bans' Council* on 6 September 1849 promulgated the March constitution.<sup>25</sup> Still, its implementation within the legal order was only partial. This was specifically due to the non-convocation of the central parliament but also of regional assemblies including the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia. The March constitution remained in force only until 31 December 1851 when Franz Joseph issued the patents by which he repealed the Constitution.<sup>26</sup>

<sup>21</sup> See the constitution and the relevant constitutional law in: *Die österreichischen Verfassungsgesetze*, hrsg. E. Bernatzik, Wien 1911, pp. 150–168.

<sup>22</sup> Cf. M. Gross, *Počeci moderne Hrvatske: neoapsolutizam u civilnoj Hrvatskoj i Slavoniji 1850–1860.*, Zagreb 1985, p. 15.

<sup>23</sup> Cf. *ibid.*, pp. 15–16.

<sup>24</sup> F. Šišić, *Povijest Hrvata. Pregled povijesti hrvatskoga naroda 600.–1918.*, Split 2004, p. 437. For the reasons for rejecting the promulgation of the Constitution, see also: M. Smrekar, *Ustavno zakonodavlje. Sbirka ustavnih zakona i propisa valjanih za Kraljevine Hrvatsku i Slavoniju*, Zagreb 1901, p. 6.

<sup>25</sup> F. Šišić, *Povijest Hrvata...*, p. 439.

<sup>26</sup> *Die österreichischen Verfassungsgesetze...*, pp. 208–210; M. Smrekar, *Ustavno zakonodavlje...*, p. 6.



From then on, Franz Joseph ruled without a formal constitution and without parliament or regional assemblies. The period of open absolutism lasted until 1860. The basic determinants of the period from the constitutional point of view were manifested in the king's rule through decrees and an attempt to transform the Monarchy into a unified state. Although the new formal constitution had not been enacted at that time, an important novelty of the period, in terms of unification of the legal order of the Monarchy, was that numerous laws entered into force. The Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*) was introduced in Croatia and Slavonia in 1853.<sup>27</sup> This code, as Wilhelm Brauner argues, was styled as a fundamental law and was at that time understood as part of the constitution.<sup>28</sup>

Thus, it is evident that in the period from 1849 until 1860, constitutional development in Croatia and Slavonia was very similar to that in the rest of the Monarchy. During the period, the authorities promoted values and norms that were obviously in contrast with the old Croatian feudal constitution and municipal rights, but also in contrast with visions of the Croatian political elite about the Croatian constitutional position within the Monarchy; these had been emphasised during the revolution. From this point of view, in Croatia and Slavonia this period is marked as unconstitutional. On the other hand, on a conceptual level, the period from 1849 to 1861 brought important innovations. One such innovation was the regulation of constitutional matters by a formal constitution in the shape of a single act.

#### 4. The Constitution in Croatia and Slavonia from 1860 to 1868

In 1860, the king enacted the October Diploma (*Oktoberdiplom*) by which he envisioned the new constitution for the Monarchy with the Imperial Council as the central parliament and with representative institutions for each of the lands, including Croatia and Slavonia.<sup>29</sup> The October Diploma was further developed by the February Patent of 1861.<sup>30</sup> The first article of the February Patent defines it as constitutional law (*Staatsgrundgesetz*). Moreover, in the second article, the February Patent speaks about the re-establishment of the old constitutions of the kingdoms of Hungary, Croatia and Slavonia, and Transylvania but only within the limits set by the October Diploma. The king's vision of a constitution in these kingdoms was, thus, twofold, since

<sup>27</sup> The Austrian General Civil Code entered into force on 1 May 1853. On the introduction of the Austrian General Civil Code in other lands, see: M. Vuković, *Opći građanski zakonik s novelama i ostalim naknadnim propisima*, Zagreb 1955, p. V.

<sup>28</sup> W. Brauner, *The "First" European Codification of Private Law: The ABGB*, "Zbornik Pravnog fakulteta u Zagrebu" 2013, vol. 63, no. 5–6, pp. 1020–1023.

<sup>29</sup> Cf. *Kaiserliches Diplom vom 20. Oktober 1860, zur Regelung der inneren staatsrechtlichen Verhältnisse der Monarchie* [in:] *Die österreichischen Verfassungsgesetze...*, pp. 223–227. Cf. M. Smrekar, *Ustavno zakonoslovlje...*, pp. 7–8.

<sup>30</sup> Cf. *Kaiserliches Patent vom 26. Februar 1861* [in:] *Die österreichischen Verfassungsgesetze...*, pp. 255–259.

the constitution included new provisions (the October Diploma and the February Patent) and old ones. The new provisions stipulated affairs that would be decided at the Imperial Council in Vienna and the representation of Croatia and Slavonia in the Council.

In Croatia and Slavonia, the reconvening of the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia was seen as a critical moment in a return of constitutionality.<sup>31</sup> From that perspective, the constitutional order had yet to be determined.

During its work, the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia refused to send its representatives to the Imperial Council. Furthermore, it stated that the October Diploma and the February Patent were not in accordance with the old constitution.<sup>32</sup> In parallel to that, the Diet accepted numerous drafts, many of them of a constitutional nature, which were intended to build a new Croatian constitutional and legal system after eleven years of, from their point of view, unconstitutional rule.<sup>33</sup> In general, the drafts tried to reconcile municipal tradition and modern principles.<sup>34</sup>

However, the only draft that received the king's approval was a legal proposal on the relations of Croatia and Slavonia with the Kingdom of Hungary. This proposal defined the conditions under which Croatia and Slavonia would enter a real union with the Kingdom of Hungary. The article referred to 1848 and stated that from that year the constitutional relations between the Kingdoms of Dalmatia, Croatia, and Slavonia and the Kingdom of Hungary had ceased. It also proposed a new model of a constitutional bond between the kingdoms, but on equal footing. The law envisioned as autonomous Croatian affairs: internal affairs, education, worship, and the judiciary.<sup>35</sup>

However, the renewal of Croatian-Hungarian constitutional relations did not take place until 1868, and at the time the constitutional position of Croatia and Slavonia within the Habsburg Monarchy was provisional. The competent government for Croatia and Slavonia was the state government in Vienna. In parallel, the king in 1862 formed the Croatian court office in Vienna as a government office competent for Croatia and Slavonia in internal affairs, education, religion, and the judiciary. In Croatia and Slavonia the king formed the Royal Regent Council for the Kingdoms of Dalmatia, Croatia, and Slavonia headed by a *ban*. However, the Royal Regent Council was in its work dependent on orders from Vienna and the *ban* was only a state officer and not a political official.<sup>36</sup>

During this period, Croatian political and constitutional reality was marked by attempts to reach an agreement on the Croatian constitutional position within the

<sup>31</sup> Cf. F. Čulinović, *Sabor Hrvatske od 1861*, Zagreb 1967, p. 78.

<sup>32</sup> M. Smrekar, *Ustavno zakonodjelje...*, p. 10.

<sup>33</sup> For the work of the Diet and for an overview of the acts, see: F. Čulinović, *Sabor Hrvatske od 1861...*, pp. 77–210. See the acts in: A. Kolak Bošnjak, T. Markus, S. Matković, *Hrvatski sabor 1861.: zaključci i drugi važniji spisi*, Zagreb 2018, pp. 25–194.

<sup>34</sup> D. Čepulo, *Zakonodavna djelatnost Hrvatskog sabora 1861. – autonomija, modernizacija i municipalne institucije*, "Pravni vjesnik" 2002, vol. 18, no. 1–2, p. 154.

<sup>35</sup> Cf. B. Šulek, *Naše pravice...*, pp. 400–403; M. Smrekar, *Ustavno zakonodjelje...*, pp. 10–12.

<sup>36</sup> Cf. D. Čepulo, *Hrvatska pravna povijest...*, pp. 167–168.

Monarchy. In one such attempt, the head of the Croatian court office in Vienna, Ivan Mažuranić, aimed at the recognition of the February Patent by the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia through the concession of the unification of Dalmatia with Croatia and Slavonia, but this attempt failed.<sup>37</sup>

## 5. The Constitution in Croatia and Slavonia from 1868 to 1918

### 5.1. The Compromises and constitutionalism

In 1867 Franz Joseph I reached an agreement with the Hungarian political elite on a new constitutional arrangement within the Monarchy. The agreement, known as the Austro-Hungarian Compromise, presupposed a division of the Monarchy into two parts, Austrian and Hungarian, with the king and three ministries of military, foreign affairs, and joint finances for military and foreign affairs, as common institutions of the Monarchy. Military, foreign affairs, and joint finances were also called pragmatic affairs. In addition, the agreement defined common dual affairs as affairs of joint interest in which Austria and Hungary were supposed to agree, but in which both states kept full legislative and executive powers.<sup>38</sup> Other affairs, such as internal affairs, education, worship, the judiciary, the economy, finances, etc., were left to Austria and Hungary separately.

While the agreement was immediately accepted in the Hungarian Diet, the German liberal political elite on the Imperial Council initially opposed the agreement and asked for liberal reforms as a concession for approving the Compromise.<sup>39</sup> The liberal reforms consisted of accepting a set of fundamental laws. After the king's consent, the Imperial Council in December 1867 approved the Compromise and enacted a set of fundamental laws, known as the December Constitution (*Dezember-Verfassung*).<sup>40</sup>

The agreement between the king and the Hungarian political elite defined Croatia and Slavonia as a land within the Hungarian part of the Monarchy.<sup>41</sup> However, its status within the Hungarian part of the Monarchy still had to be defined. In this vein, it was necessary that the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia accept the Austro-Hungarian Compromise and make another agreement with the Hungarian Diet on the position of Croatia and Slavonia within the lands of the Hungarian Crown. In such circumstances, the king appointed the unionist Levin Rauch as the new *ban* governor (*banski namjesnik*) on 27 June 1867.<sup>42</sup> Further, the king on 20 October 1867

<sup>37</sup> Cf. *ibid.*, pp. 166–167.

<sup>38</sup> M. Gross, A. Szabo, *Prema hrvatskome građanskom društvu: društveni razvoj u civilnoj Hrvatskoj i Slavoniji šezdesetih i sedamdesetih godina 19. stoljeća*, Zagreb 1992, pp. 213–214.

<sup>39</sup> *Ibid.*, p. 213.

<sup>40</sup> *Die österreichischen Verfassungsgesetze...*, pp. 413–453.

<sup>41</sup> According to the Austro-Hungarian Compromise, Dalmatia was, as before, recognised as part of Austria.

<sup>42</sup> For more on the process of the appointment, see: I. Perić, *Hrvatski državni sabor 1848.–2000. Drugi svezak: 1868.–1918.*, Zagreb 2000, p. 13.

unilaterally enacted an electoral law for the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia. The law was in favour of the Unionist Party, which was the most willing to accept close constitutional relations with Hungary.<sup>43</sup> Elections were held in November and December 1867 under pressure from the *ban* governor Levin Rauch. As a result, the Unionist party won a majority.<sup>44</sup> After the Diet was convened, negotiations between the delegations of the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia and the Hungarian Diet were held. The result of the negotiations was an agreement called the Croatian-Hungarian Compromise.<sup>45</sup>

In the historical writing and in legal history much has been said about the agreement itself.<sup>46</sup> Here, I will only mention some of its basic premises. One of the premises was the recognition of Croatia and Slavonia as an autonomous land within the Hungarian part of the Monarchy. Its autonomy was recognised in matters of internal affairs, education, worship, the judiciary, and other affairs that were not explicitly mentioned as common Hungarian-Croatian affairs. The compromise recognised the *ban* as the head of the land government and the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia as a legislative body competent to enact laws in autonomous matters together with the king who had the right of legislative sanction. However, this autonomous structure faced considerable limitations. One such limitation was the obligation of the Croatian authorities to send all drafts accepted by the Diet to the king via the minister for Croatia and Slavonia in the Government in Budapest. The Government in Budapest could, therefore, object to some extent to the content of these autonomous drafts.<sup>47</sup> In addition, the specific dependency of Croatia and Slavonia *vis-à-vis* Budapest reflected the fact that the *ban* was appointed by the king but under the approval and with the counter signature of the prime minister of the Government in Budapest. All this indicates a imbalanced institutional arrangement in Hungary's favour.

What is more, the Croatian-Hungarian Compromise defined a wide sphere of joint affairs between Croatia and Slavonia and Hungary, specifically in matters of the economy, railways, finances, etc. In these matters, the competent authorities were the Government and the Diet in Budapest. In these institutions, Croats played only a minor

<sup>43</sup> On the electoral law of 1867, see: *ibid.*, pp. 21–25.

<sup>44</sup> *Ibid.*, pp. 27–30.

<sup>45</sup> Cf. Zakonski članak o nagodi, koju s jedne strane kraljevina Ugarska, sjedinjena s Erdeljem, s druge strane kraljevine Hrvatska i Slavonija sklopiše za izravnjanje postojavih između njih državnopravnih pitanja. Sbornik zakonah i naredabah valjanih za kraljevinu Hrvatsku i Slavoniju (further: Sbornik), Komad V, 1868. Cf. I. Perić, *Hrvatski državni sabor...*, pp. 35–41.

<sup>46</sup> M. Gross, A. Szabo, *Prema hrvatskome...*, pp. 221–238; D. Čepulo, *Hrvatska pravna povijest...*, pp. 172–181; I. Beuc, *Povijest institucija...*, pp. 275–282; L. Heka, *Osam stoljeća Hrvatsko-ugarske državne zajednice s posebnim osvrtom na Hrvatsko-ugarsku nagodbu*, Szeged–Subotica 2011, pp. 303–349; D. Šokčević, *Hrvatska od stoljeća 7...*, pp. 283–293; *The 1868 Croatian-Hungarian Settlement: Origin and Reality*, eds. V. Švoger, D. Soksevits, A. Cieger, B. Ostajmer, Zagreb–Budapest 2021.

<sup>47</sup> For the ability of the Government in Budapest to influence autonomous legal drafts and for some examples, see: D. Čepulo, M. Krešić, *Hrvatsko-ugarska nagodba: institucije i stvarnost* [in:] *"Mint nemzet a nemzettel..." Tudományos a magyar-horvat kiegyezés 140. évforduloja emlékeire/"Kao narod s narodom..." Konferencija u spomen 140. obljetnici Hrvatsko-ugarske nagodbe*, ed. D. Šokčević, Budapest 2011, pp. 149–153.

role. Part of the Government was one minister for Croatia and Slavonia, who was, as other ministers, responsible to the prime minister and to the Hungarian-Croatian Diet in which Croats were greatly outnumbered.<sup>48</sup>

The Croatian-Hungarian compromise represented a fundamental act that defined the position of Croatia and Slavonia within the Lands of the Hungarian Crown. However, it is evident that the compromise was not a constitution in the classic sense. It was not an act issued only by a king or by a constitutional assembly or by a king and a constitutional assembly together, but it was an act that was the result of negotiations between two diets. Later on, however, the act was accepted by the king, separately for Hungary and Croatia and Slavonia, and, thus, became law. Although the text of both laws was basically similar, there were also certain differences between them.<sup>49</sup>

The Compromise contains constitutional norms concerning the appointment of the *ban*,<sup>50</sup> on the competences of the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia,<sup>51</sup> on the responsibility of the *ban* to the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia,<sup>52</sup> and on the position of the Croatian minister in the Central Government, etc.<sup>53</sup> In addition, the Croatian-Hungarian Compromise contained norms that defined some citizens' rights. These are specifically political rights, for example, the right of Croatian representatives and virilists to participate in the work of the Hungarian-Croatian Diet,<sup>54</sup> the right of Croatian representatives to speak in Croatian in the Hungarian-Croatian Diet,<sup>55</sup> the rule (although not imperative) about employment of Croatian natives in common Hungarian-Croatian offices,<sup>56</sup> and the rule about Croatian language as the official language in Croatia and Slavonia.<sup>57</sup> The last rule implied the communication of the Croatian population with the authorities in Croatian.

The Compromise of 1868 was controversial from the very beginning for the members of the political elite who did not belong to the Unionist Party, including members of the People's Party, who emphasized its unconstitutional character. The People's Party, thus, asked for its revision, which was made in 1873 after the People's

<sup>48</sup> In the Hungarian-Croatian Diet, in the upper house there were only two and, from 1883, three Croatian representatives, while in the lower house there were only twenty-nine and, from 1883, forty members of the Croatian delegation. The entire lower house numbered 453 members. D. Čepulo, *Hrvatska pravna povijest...*, p. 175.

<sup>49</sup> On the differences between Croatian and Hungarian versions, see: M. Gross, A. Szabo, *Prema hrvatskome...*, pp. 234–235.

<sup>50</sup> Cf. art. 51 of the Croatian-Hungarian Compromise (further in footnotes: C-H Compromise).

<sup>51</sup> Cf. art. 47 and 48 of the C-H Compromise.

<sup>52</sup> Cf. art. 50 of the C-H Compromise.

<sup>53</sup> Cf. art. 44 of the C-H Compromise.

<sup>54</sup> Cf. art. 32–37 of the C-H Compromise.

<sup>55</sup> Cf. art. 59 of the C-H Compromise.

<sup>56</sup> Cf. art. 46 of the C-H Compromise. More on this rule see in: I. Kosnica, *Zapošljavanje u javnoj upravi u Hrvatskoj i Slavoniji (1868.–1918.) s obzirom na državljanstvo i hrvatsko – slavonsku pripadnost*, "Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave" 2018, no. 4, p. 622.

<sup>57</sup> Cf. art. 56–58 of the C-H Compromise.

Party won elections. Nevertheless, even after the revision, the basic premises of the Compromise remained the same.<sup>58</sup>

## 5.2. Constitutional matters in other acts

The constitutional system in Croatia and Slavonia was evidently only partially defined by the Compromises.<sup>59</sup> Parallel to that, we can identify other laws that defined the position of the Lands of the Hungarian Crown within the Monarchy. Here, the Pragmatic Sanction of 1723 is particularly important.<sup>60</sup> Furthermore, the following are also relevant: the Legal Article (I 1867) on the coronation of his Majesty Franz Joseph I as King of Hungary and its associated kingdoms,<sup>61</sup> the Legal Article (II 1867) on the royal guarantee and the royal oath,<sup>62</sup> and other laws on the crown and court.<sup>63</sup>

Another group of constitutional acts consists of laws that regulate the organisation of the government within the Hungarian part of the Monarchy. Relevant here are the laws on the Hungarian-Croatian Diet,<sup>64</sup> but also the laws that regulated Croatian institutions within the Croatian autonomous sphere. The last mentioned are, for example, the law on the organisation of the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia,<sup>65</sup> the law on the formation of the Croatian-Slavonian-Dalmatian land government,<sup>66</sup> and the law on the responsibilities of the *ban* and heads of departments of the land government of 1874.<sup>67</sup> In addition, of relevance are the laws on the regulation of the judiciary, specifically the law on the judiciary (*Zakon o sudačkoj vlasti*) of 1874, which contained basic rules on the organisation of the judiciary.<sup>68</sup> Another such fundamental law was the law on the presidency of the Table of Seven of 1874.<sup>69</sup>

<sup>58</sup> Cf. I. Perić, *Hrvatski državni sabor...*, pp. 104–115.

<sup>59</sup> The Compromises, later revisions of the Croatian-Hungarian Compromise, and the laws that defined financial agreements within the Monarchy see in: M. Smrekar, *Ustavno zakonoslovlje...*, pp. 17–103.

<sup>60</sup> Cf. the Pragmatic sanction in: M. Smrekar, *Priručnik za političku upravnu službu u kraljevinah Hrvatskoj i Slavoniji*, vol. 2, Zagreb 1900, pp. 893–898.

<sup>61</sup> Zakonski članak (I. 1867) O krunisanju Njegova Veličanstva Franje Josipa I. za kralja Ugarske i posestrimih joj kraljevina. Sbornik, Komad IV, 1869.

<sup>62</sup> Zakonski članak (II. 1867) O uzakonjenju kraljevske zavjernice, što ju je Njegovo kralj. Veličanstvo prije posvete i krunidbe izdalo, i kraljevske zakletve, koju je prigodom krunisanja položilo. Sbornik, Komad IV, 1869.

<sup>63</sup> Cf. M. Smrekar, *Priručnik...*, pp. 899–905.

<sup>64</sup> Cf. *ibid.*, pp. 948–963.

<sup>65</sup> The first of these laws was: Zakonski članak (II. 1870) Sabora kraljevina Dalmacije, Hrvatske i Slavonije, ob uređenju sabora istih kraljevina. Sbornik, Komad XV, 1870.

<sup>66</sup> Cf. Zakonski članak ob ustrojstvu autonomne hrvatsko-slavonsko-dalmatinske zemaljske vlade. Sbornik, Komad III, 1869.

<sup>67</sup> Zakon o odgovornosti bana kraljevina Dalmacije, Hrvatske i Slavonije i odjelnih predstojnika vlade zemaljske. Sbornik, Komad II, 1874.

<sup>68</sup> Zakon o vlasti sudačkoj. Sbornik, Komad VIII, 1874.

<sup>69</sup> The Table of Seven was the supreme court in Croatia and Slavonia. The relevant law terminated a previous rule on the Croatian *Ban* as a president of the court and prescribed the appointment of a special president as head of the court. Zakon o predsjedništvu kr. stola sedmorice za kraljevine Dalmaciju, Hrvatsku i Slavoniju. Sbornik, Komad VIII, 1874.

Another group of constitutional acts consists of laws that regulated the rights of citizens. Here, especially important are the Croatian electoral laws. The first of them was enacted as early as 1870, and later more electoral laws were passed.<sup>70</sup> These laws regulated voting rights for the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia. Other constitutionally relevant laws are the law on public assembly of 1875,<sup>71</sup> a set of laws on the freedom of the press,<sup>72</sup> and the Imperial Patent of 1852 which regulated the right of association.<sup>73</sup> Further important constitutional acts included those on the position of religious communities, for example, Jews and Muslims.<sup>74</sup> In principle, these laws gradually imposed the constitutional principle of freedom of religion within the Croatian constitutional and legal system.<sup>75</sup>

## Conclusions

On the eve of the revolutionary year of 1848, the constitution in Croatia and Slavonia consisted of rules relevant to the Lands of the Hungarian Crown, but also of specific rules relevant to the Kingdoms of Dalmatia, Croatia, and Slavonia. The situation radically changed during the revolution of 1848. At the time, as a reaction to events in Hungary, the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia made a decision to terminate constitutional relations with Hungary and proposed to the king a constitutional relation of the Kingdoms with Austria, assuming the retention of wide autonomous competences. Furthermore, the Diet accepted numerous drafts that regulated constitutional matters. Thus, the Diet followed a traditional pattern of regulation of constitutional matters with laws and not via one formal constitution.

The defeat of the 1848 revolution led to constitutional developments that were not in accordance with Croatian revolutionary aspirations. The March constitution envisioned the Monarchy as a central organised state with only limited autonomy for the crown lands, including Croatia and Slavonia. However, the model was not fully implemented in practice and was very soon replaced with a period of open absolutism. Nonetheless, conceptually speaking, the importance of the March constitution stems from the fact that it was the first formal constitution for the Monarchy, including Croatia and Slavonia.

<sup>70</sup> Zakonski članak o izbornom redu za sabor kraljevina Dalmacije, Hrvatske i Slavonije. Sbornik, Komad XV, 1870. For more on the electoral regulations in the period from 1848 to 1918, see: D. Čepulo, *Prava građana i moderne institucije. Europska i hrvatska pravna tradicija*, Zagreb 2003, pp. 91–110.

<sup>71</sup> Zakon o pravu sakupljati se. Sbornik, Komad III, 1875.

<sup>72</sup> For a detailed analysis of the press legislation, see: D. Čepulo, *Prava građana...*, pp. 141–159.

<sup>73</sup> Cf. the Imperial Patent in: M. Smrekar, *Ustavno zakonoslovlje...*, pp. 182–189.

<sup>74</sup> Cf. Zakonski članak sabora kraljevinah Dalmacije, Hrvatske i Slavonije kojim se ustanovljuje ravnopravnost izraeličanah sa sljedbenici ostalih u kraljevini Hrvatskoj i Slavoniji zakonom priznatih vjerozakonah. Sbornik, Komad XXI, 1873; Zakon o priznanju islamske vjeroispovijesti u kraljevinama Hrvatskoj i Slavoniji. Sbornik, Komad X, 1916.

<sup>75</sup> For details about the imposition of this principle in the Croatian-Slavonian legal order, see: D. Čepulo, *Prava građana...*, pp. 160–180.



In terms of constitutionality, the shift forward to open absolutism meant the abolition of the formal constitution and royal rule by decrees. In this period, neither Croatia and Slavonia nor the rest of the Monarchy enjoyed a formal constitution although the introduction of the Austrian General Civil Code in Croatia and Slavonia had a constitutional effect.

The new moment in constitutional regulation arrived with the collapse of absolutism in 1860. The shift was seen in Croatia and Slavonia as a chance to build new constitutional relations within the Monarchy, ones that would be more in line with the Croatian constitutional tradition. In such circumstances, the Diet of the Kingdoms of Dalmatia, Croatia, and Slavonia refused to send its representatives to the Imperial Council and accepted many drafts that aimed to build a new Croatian constitutional order after eleven years of unconstitutional rule. The acceptance of multiple drafts that regulated constitutional matters was in line with the earlier premodern tradition, when constitutional matters were regulated via numerous laws. However, this attempt failed and the constitutional relations of Croatia and Slavonia with the rest of the Monarchy were provisional for the next seven years and marked by attempts to reach some kind of adequate agreement.

A degree of stability in the constitutional order was achieved in 1868 after the acceptance of the Austro-Hungarian Compromise and the formulation of the Croatian-Hungarian Compromise. These acts represented fundamental acts that defined the position of Croatia and Slavonia within the Austro-Hungarian Monarchy and within the Lands of the Hungarian Crown. What is more, during that period, many systemic laws were passed that regulated the organisation of the government and the rights of citizens. Thus, constitutional matters in the period from 1868 to 1918 were regulated by the Compromises and systemic laws in the field of the organisation of the government and the rights of citizens. This again meant that there was no one formal constitution but only laws that regulated constitutional matters.

To sum up, one can say that an important feature of the concept of the constitution in Croatia and Slavonia in the period from 1848 to 1918 was the non-existence of one formal constitution. Instead, constitutional matters were regulated only by laws. An exception to this was the short-lived March constitution of 1849. Another important feature of the concept of the constitution was its change and an obvious tension between higher authorities and Croatian autonomous structures. One can say that most of the time, with the exception of the period of neo-absolutism from 1849 to 1860, the constitution was shaped by different levels of government and was therefore multi-layered. Finally, during this period the regulation of citizens' rights, specifically the right to vote, the right to public assembly, freedom of the press, and freedom of religion, etc., became part of the Croatian constitutional tradition.



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## Summary

*Ivan Kosnica*

### Reflections on the Croatian Constitutional Tradition from 1848 to 1918

This article discusses the Croatian constitutional tradition from 1848 to 1918. Its aim is to set out the main features of the concept of a constitution in Croatia in that period. In the first section, I make some basic remarks on the Croatian feudal constitution before 1848. This section represents the starting point for an analysis of subsequent constitutional development. In addition, I analyse the Croatian constitution between 1848 and 1849 and constitutional development from 1849 to 1860, 1860 to 1868, and 1868 to 1918.

**Keywords:** Austro-Hungarian Monarchy, constitution, Croatia, Habsburg Monarchy.

## Streszczenie

*Ivan Kosnica*

### Refleksje o chorwackiej tradycji konstytucyjnej w latach 1848–1918

Artykuł odnosi się do chorwackiej tradycji konstytucyjnej z okresu 1848–1918. Jego celem jest ustalenie zasadniczych cech konceptu konstytucyjnego w Chorwacji w tym czasie. Autor w pierwszej części zamieszcza podstawowe uwagi na temat chorwackiej konstytucji feudalnej sprzed 1848 r. Ta część stanowi punkt wyjścia do analizy późniejszego rozwoju konstytucyjnego. Ponadto przeanalizowano konstytucję okresu 1848/1849, rozwój konstytucyjny w latach 1849–1860, a następnie w latach 1860–1868 i 1868–1918.

**Słowa kluczowe:** monarchia austro-węgierska, konstytucja, Chorwacja, monarchia Habsburgów.

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## **Early Modern Ukrainian Constitutionalism: A Comparative View**

To be properly understood, a national tradition of constitutional law has to be considered in a European historical, philosophical, religious, and legal context. In this way, we encounter unusual and at first sight paradoxical early modern ideas and phenomena that cannot be explained in the legal language of our late modern and partly post-modern times. This article draws mainly on my previous work in the field. Some relevant texts by me are given in the list of literature.

**1.** The Protestant Reformation intellectually deconstructed the human world, and reshaped its unity, moving from a vertical hierarchy to primarily horizontal ties of human communities.

The first ideas of the Reformation as an intellectual movement were not religious. Two names are important here if we are to understand the genesis of the Reformation. In 1513, Niccolo Machiavelli wrote in Italian the book *Il principe* (The Prince), in which he insists that the social world is a sphere not of morality but of utility. He writes that politics is, to a great extent, full of vices and does not conform to Christian morality; therefore violations of morality in politics should be perceived as unavoidable. Politics is a sphere of the freedom of the human will and, as such, opposes the Christian ideal of reconciliation before the Divine will: 'God does not do all himself, otherwise he would deprive us of free will and part of the glory due to us'. Machiavelli proclaims that the human world is not static, but changeable (here the category of historical time is present), and that human beings will change it.<sup>1</sup> Political power ceases to be sacred; it is merely a rational phenomenon open to a people cognition. A people ceases to be the mystical church "body of Christ," but is rather an objective phenomenon.

In 1514, Nicolaus Copernicus for the first time put forward a heliocentric structure of the universe. According to this theory, the Earth is not central and is not unique, and this objectively shakes the idea of the universality and sacrality of the Roman Catholic Church, *inter alia*, as a social structure. From the standpoint of the twenty-first century, Copernicus's idea that the Earth revolves around the Sun, and not vice-versa, and also

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<sup>1</sup> N. Machiavelli, *The Prince*, trans. H. Thompson, Norwalk, Connecticut 1980, pp. 115–116.

that the Earth is merely one of several planets, and his supposition that not only the planets but also the stars are not simply white dots, but indications that beyond our solar system there exist many other universes, may seem completely irrelevant to socio-political and legal doctrines. In the sixteenth century, however, they cast doubt on the social doctrine of both the Roman Catholic and (later) Lutheran churches, as well as on the foundations of Europeans' social worldview. Theology insisted upon the uniqueness of the Earth as a creation of God. The Earth, consequently, should have been the centre of the universe and the sole planet. Copernicus's doctrine did not at all propose a denial of the idea of God and salvation, but objectively cast doubt on the possibility of a literal understanding of the text of the Bible and Christian theology which had been developed over many centuries, as well as Christian theology to be all-embracing and a universal key to any field of knowledge.

The social ideas of key church reformers were also filled with a deep social sense, which is important for this article. In *Disputatio pro declaratione virtutis indulgentiarum* (1517), Martin Luther proposes a new justification and meaning of the secular world (and this is reproduced in the Augsburg Confession of 1530 and in the Peace of Augsburg of 1555), and its main elements may be reduced to the following ideas: a) the individuality of salvation, the autonomy of the inner world of the human being, which debunked the power of church, discredited canon law, and provided for a horizontal instead of a hierocratic understanding of the social world; b) freedom of will and secular callings, which presuppose that governing is not dominance, but a profession and a limited function; c) the external world of human beings is secular and rational; it is an aggregate of communities of citizens with elected leaders in an ideal form and, in reality, is a developing State; and d) State should be based on its own laws and on rights, which includes the idea of the people's spirit and a vague variant of the people's sovereignty.<sup>2</sup> John Calvin in *Institutio Christianae Religionis* (1536) proposed some social ideas that could be summarised as follows: earthly rationality (including political rationality) is autonomous and morally neutral; it is a sphere of the freedom of the will, social integration, and self-regulation. Law can also be conceptually separated from morals.<sup>3</sup>

The base of the main social ideas of the Reformation relevant in this discussion was also the rediscovery of the Old Testament. The Samuel Book 1 clearly describe the replacement of the people's treaty with God with a social contract. One can see such a reading of the Old Testament, mostly without direct reference, in a number of early modern works, such as Baruch Spinoza's *Tractatus Theologico-Politicus* (1670).<sup>4</sup>

<sup>2</sup> M. Luther, *The 95 Theses: A Disputation to Clarify the Power of Indulgences* [in:] *idem, The Ninety-Five Theses and Other Writings*, trans. and ed. W.R. Russell, New York 2017; *idem, On Temporal Authority: To What Extent Should It Be Obeyed* [in:] *idem, Luther's Works*, vol. 45, ed. W.I. Brandt, Philadelphia, PA 1962, pp. 92, 101, 104–105; *idem, That a Christian Assembly or Congregation Has the Right and Power to Judge All Teaching and to Call, Appoint, and Dismiss Teachers, Established and Proven by Scripture* [in:] *idem, Luther's Works*, vol. 39, ed. W.I. Brandt, Philadelphia, PA 1970, pp. 306–308.

<sup>3</sup> J. Calvin, *Institutes of the Christian Religion*, trans. H. Beveridge, Grand Rapids, MI 1989.

<sup>4</sup> B. de Spinoza, *Tractatus theologico-politicus*, trans. S. Shirley, Indianapolis 1998.

**2.** Early modern meanings of important terms were quite different from ours: *res publica* with a monarch, a State without sovereignty, and civil law as national law. This offers some keys for an understanding of early constitutionalism.

One of the key definitions for a new State corresponding to a localised human community is provided by the Ukrainian-Polish thinker Stanisław Orzechowski Roxolan in *Dyalog albo Rozmowa około Exequucyey Polskiej Korony* in 1563: a *respublica* is an 'assembly of fellow citizens linked by a common law and common advantage'.<sup>5</sup>

The basic concepts and categories linking a human community, state, and law were elaborated by Jean Bodin in 1566 in *Methodus ad facilem historiarum cognitionem* (more precisely than in the French edition of the same work and much more clearly than in *Les Six Livres de la République*). Bodin's new ideas can be summarized thus:

- 1) a new understanding of people and community: a) a natural/savage and externally determined old people (*gens*), based on ethnic origin; b) a new rational civil people based on the free will (*populi*), which form an all-State community and the highest form of social integration, one that leads to the invention of 'society' (*societate*), the meaning of this word being principally transformed by Bodin; c) a political community, based on collective will and aware of collective interests, that is, a civil society (*civili societate*);
- 2) a new understanding of the State: a) natural personified State (*imperio*) with patriarchal power based on the instinct for domination and natural private law; b) a new societal and institutionalized State (*Rei publica* or *Res publica*) with societal authority based on rational trust and positive public law (and originating with such law), having the aim of benefitting society, although forms of rule may be various; c) indications of a societal State are citizens (instead of subjects), territory, and unified law; 3) a new concept of a social contract as a basic law, the essence of which is a people's control over the authorities and the 'legal administration of the State'; 4) a new understanding of sovereignty as 'final societal authority', the self-sufficiency of the State not subordinated to anybody and anything outside itself.<sup>6</sup>

**3.** The idea of the social contract was rediscovered and 'legalized' with the assistance of the doctrinal transformation of Roman private law.

A Second scholasticism led to the idea of universalization and interpolation of Roman private contractual principles on all obligations in the sixteenth and seventeenth centuries. In such a vision, the distributive justice of a State (in the *Summa Theologiae* of St. Thomas Aquinas) could no more be only an ethics of mercy, duty, and natural law, but also a promise, binding positive custom, and consensual contract. This gave rise to the understanding of the social contract as *offero*, and the dogmatics of public law developed from private law.<sup>7</sup>

<sup>5</sup> S. Orzechowski, *Dyalog albo Rozmowa około Exekucyi Polskiej Korony*, Kraków 1858, p. 11. The phrase is a somewhat modified citation from Cicero, *On the Republic*, Book 1, 39.

<sup>6</sup> I. Bodini, *Methodus, ad facilem historiarum cognitionem; ab ipso recognita, et multo quam antea locupletior: cum indice rerum memorabilium copiosissimo*, Paris 1572, p. 9 ff.

<sup>7</sup> D.Yu. Poldnikov, *Институт договора в правовой науке Западной Европы XI–XVIII веков*

The *mos gallicus* and *usus modernus* schools, as well as, for instance, the Polish and Ukrainian scholars of the *Akademia Zamojska*,<sup>8</sup> claimed that all law has to be positive, historical, and national. Thus, it was logical when François Hotman in *Franco-Gallia* (1573) points to special laws regulating the system of State power.<sup>9</sup> But the final important text here, in my opinion, is Hugo Grotius's *Inleydinge tot de Hollantsche rechtsgeleertheit* (Introduction to Dutch Jurisprudence), published in 1631, which argues that all law has a contractual character, and that the social contract is a historical *offer*, in relation to which contemporary citizens are a consensual third party.<sup>10</sup>

**4.** Two important keys to understand early modern European constitutionalism are: (1) the non-separability of international legal and public legal relations and (2) the collective subject-ness of social estates.

The first key was conditioned by the hierarchy of monarchical titles, the inequality of States within confessional spaces, and the non-sovereignty of rulers and States. All these were firmly embodied in the international religious, ethical, and legal orders, and this meant that the relation of localized human communities with monarchs in so-called composite States<sup>11</sup> had a twofold character, an international legal and a public legal one. The second key meant that State-building was legally embodied in the collective subject-ness of social estates.

The examples are the Peace of Augsburg of 1555–1556 and the 1648 Treaties of Westphalia, both international-legal and constitutional-legal acts of the Holy Roman Empire.

What was the nature of treaty between estates and a 'foreign' monarch? If the monarch figured in this treaty and for purposes of this treaty as a person (for a system of foreign institutions was not involved), and as an elected head of a State, and if the treaty regulates rights, duties, and the organization of authorities, then this is a constitutional treaty.

**5.** Ukraine has its own tradition of public-law relations and also has been deeply influenced by reformed Rzecz Pospolita constitutional formula.

Ukraine has been not just been a recipient, but an integral part of the rise of the intellectual Reformation and the development of a legal dimension of public relations in early modern times, including ideas of a self-sufficient society and the legal, contractual character of the State. These ideas and this practice provide the methodological keys

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[Institution of the Contract in the Legal Science of Western Europe XI–XVIII Centuries], Moscow 2013, pp. 277–280.

<sup>8</sup> V.O. Bondaruk, *Розвиток юридичної науки і освіти в Замойській академії (1594–1784 рр.): Дисертація [...] кандидата юридичних наук* [Development of Legal Science and Education in the Zamojska Academy (1594–1784): PhD dissertation], Kyiv 2016, pp. 146, 149–150.

<sup>9</sup> R. Launay, *Montesquieu: The Specter of Despotism and the Origins of Comparative Law* [in:] *Rethinking the Masters of Comparative Law*, ed. A. Riles, London 2001, p. 24.

<sup>10</sup> H. Grotius, *The Jurisprudence of Holland*, transl. R.W. Lee, Oxford 1926, pp. xiii, xv.

<sup>11</sup> *Entanglements in Legal History: Conceptual Approaches*, ed. T. Duve, Frankfurt am Main 2014, p. 11.

to distinguish and understand the evolution of Ukrainian constitutionalism during the period in question.

Ukraine had long and coherent tradition of public-law relations, which began in the (Kyiv) Rus' period (the *riad*, known as early as 862).<sup>12</sup> They matured in a composite State, the Grand Duchy of Lithuania, Rus, and Samogitia (the statute charters, the 'Lithuanian Statutes', etc.). Ukrainian estates took an equal part in the creation and functioning of the constitutional formula of the *Rzecz Pospolita*.

The very idea of *Rzecz Pospolita* creation lies in the framework of Bodin's concept of a new societal State. The essence of the Lublin *Unia* of 1569 can be summarized as follows:

- a) the representatives of the social estates of the historical Ukrainian lands – the Kyiv Land, Pidliashshia, Volyn, and Bratslavshchyna – voluntarily joined the Kingdom of Poland in this process;
- b) the Ukrainian estates together with others from the Kingdom of Poland and the Grand Duchy of Lithuania, Rus, and Samogitia decided to create a single unified State – the *Rzecz Pospolita* (a literal equivalent of *res publica*). The main ideas underlying these acts were: the non-validity of any determination by the monarch of the fate of States without a decision of peoples represented by the social estates; the indestructibility and mutual binding nature of treaties between the estates and monarchs; and the individual State status of the constituent parts of the union, the *Rzecz Pospolita*, and the distinctiveness of corresponding peoples.<sup>13</sup>

The *Artykuły henrykowskie* of 1573 and later *pacta conventa* laid a foundation for two centuries of an uninterrupted Polish, Lithuanian, Ukrainian, and Belarusian constitutional tradition.<sup>14</sup> But massive suppression of the rights of the Ukrainian population including violation of basic constitutional acts led to the legitimate relief from loyalty to king and State and the right to resistance. This legitimacy might be disputable, but only within the framework of written law, public-law customs, and concepts of that time. The resistance started in 1648 and shortly acquired the form of massive war of liberation in Eastern and Central Ukraine with later searches for a new constitutional bases for Ukrainian Statehood.

**6. Active attempts to reform the *Rzecz Pospolita* constitutional formula to include the Ukrainian State in the second half of the seventeenth century were not successful.**

<sup>12</sup> See for example: V.I. Sergeevich, *Вече и князь. Русское государственное устройство и управление во времена князей Рюриковичей* [Veche and Prince: Russian State Order and Administration in the Time of Riurikovichi Princes], Moscow 1867, pp. 67–75.

<sup>13</sup> *Volumina Legum*, vol. 2, 2<sup>nd</sup> ed., St. Petersburg 1859; M. Koialovich, *Люблинская уния или последнее соединение Литовского княжества с королевством Польским на Люблинском сейме 1569 г.* [Lublin Unia or the Last Union of Lithuanian Duchy with Polish Kingdom on Lublin Sejm of 1569], St. Petersburg 1863; *Дневник Люблинского сейма 1569* [The Diary of Lublin Sejm 1569], St. Petersburg 1869; O. Halecki, *Przyłączenie Podlasia, Wołynia i Kijowszczyzny do Korony*, Kraków 1915; *idem, Dzieje unii jagiellońskiej*, vol. 2, Kraków 1920; *Akta unji Polski z Litwą, 1385–1791*, Kraków 1932; *Volumina Constitutionum*, vol. 2, Warsaw 2005.

<sup>14</sup> *Volumina Legum*, vol. 2...



The preconditions for both a new State and a new constitutionalism in Ukraine were created by commissions to consider the complaints of the Cossacks in the first half of the seventeenth century. The results were embodied in treaties ratified by the Sejm and by royal privileges which transformed the Cossacks into a semi-privileged social estate on a certain territory.

Starting with the Treaty of Zboriv<sup>15</sup> in 1649, these acts acquired a new essence. The Ukrainian political entity, *Viysko Zaporozke*, acted as a representative of the interests of an entire sum of personally free social estates of the Dnipro basin region. Ukrainian demands evolved and were directed mainly towards the emancipation of the Eastern Orthodox population, full recognition of the Cossack estate, and wider constitutional reform, including the creation of a Grand Duchy of Rus. These demands were never essentially satisfied; some concessions were temporary, being rather a military or political compromise than a legal one. The treaties of Zboriv (1649), Bila Tserkva (1651), Hadiach (1658–1659), Chudniv (1660), Pidgaytsi (1667), and Ostroh (1670) were of a constitutional character, but in essence were imposed on *Viysko Zaporozke*. There were also some projects to revitalize the Hadiach treaty in 1700–1708.<sup>16</sup>

The Zboriv and subsequent treaties could not, in principle, change the legal relations on the lands of the Dnieper basin region and abolish the pre-war power structures and relations of ownership, for not a single branch of power in the *Rzecz Pospolita* had the competence or the will to do this; this was equivalent to the utter breakdown of the entire legal system of the State. Without such change, the *Hetman* government and other central and local agencies of power could not perform any functions except military mobilization, estate-representative functions, and estate-judicial ones. This model did not create substantial legal foundations for the Ukrainian State.

**7.** In 1654, the Ukrainian State, *Viysko Zaporozke*, entered into constitutional relations with the tsar as monarch and in international-legal relations with Muscovy as a State.

The recognition in the 1649 Treaty of Zboriv of *Viysko Zaporozke* as a negotiating party had profound significance, and with some legal stretch, it was seen as the legitimate representative of the Ukrainian estates. Both Ukrainians and foreign States claimed that essential violations of constitutional provisions gave a people the right to free itself from tyranny.<sup>17</sup> From 1651, *Viysko Zaporozke* proposed that a treaty be concluded with the tsar. Muscovite diplomacy used the argument of constitutional

<sup>15</sup> *Volumina Legum*, vol. 4, St. Petersburg 1859; L. Pritsak, *Основні міжнародні договори Богдана Хмельницького 1648–1657 pp.* [Main International Treaties of Bohdan Khmelnytsky, 1648–1657], Kharkiv 2003; *Diariusz ekspedycji zborowskiej*, ed. M. Nagielski "Przegląd Wschodni" 1991, vol. 1, issue 4.

<sup>16</sup> O.V. Kresin, *Ukrainian Statehood in the Mid-Seventeenth to Early Eighteenth Centuries in Treaties with Foreign States: Principal Legal Models*, "Jus Gentium" 2019, vol. 5, no. 1; 2020, vol. 5, no. 2.

<sup>17</sup> See, among others: L.V. Zaborovski, *Католики, православные, униаты. Проблемы религии в русско-польско-украинских отношениях конца 40-х – 80-х гг. XVII в. Документы. Исследования* [Catholics, Orthodox, Uniates. Problems of Religion in Russian-Polish-Ukrainian Relations at the End of 40s – 80s of the 17<sup>th</sup> Century: Documents. Studies], vol. 1, Moscow 1998.



obligations in an attempt to reconcile *Viysko Zaporozke* with the *Rzecz Pospolita* and later, in 1653, for justifying the freedom of Ukrainians.

No incorporation of *Viysko Zaporozke* into Muscovy was planned or occurred in 1654, but instead, there was a legitimisation of the Ukrainian State as an all-estate political-territorial formation and not as just a system of Cossack estate self-government (as it was considered in the *Rzecz Pospolita*).

The Pereiaslav-Moscow treaty of 1654 was a complex of foundational uncoded constitutional acts: conditions of *Viysko Zaporozke* (approved by the tsar's government without principal changes, but later falsified), and the particular charters to the Cossacks, *szlachta*, and cities. But no treaty was concluded with the Ukrainian Orthodox church (as the structure representing special social estates and the population of church lands). Later additional treaties of temporary validity and the same constitutional character were concluded: the treaties of Pereiaslav (1659), Baturyn (1663), Moscow (1665), Hlukhiv (1669), Konotop (1672), Pereiaslav (1674), and Kolomak (1687).<sup>18</sup>

The procedure of their conclusion provided for: the Ukrainian parties formed and mutually agreed their conditions, the tsar approved them or insisted on changes. The essential fields regulated with these treaties were: the rights and freedoms of social estates, the powers of the authorities, administration and court systems, finances, the tsar's credentials and obligations, etc. Constitutional treaties between Ukraine and the tsars in the second half of the seventeenth century mostly had structured content with coherent and logical sense, in spite of harsh conflicts between the parties.

From 1700, a tendency to ignore and violate the treaties on the part of the tsars became clear. This provoked an unsuccessful massive revolt and war against the tsar between 1708 and 1714. There were later acts of resistance and political emigration. Ukrainian opposition to violations of the treaties was constant and strong for several generations. With limitations and violations, this model survived until 1764 (liquidation of *Hetman* rule), 1783 (liquidation of other central authorities), and the 1830s (liquidation of the Ukrainian legal system).

**8.** The idea of the social contract idea and its practice in *Viysko Zaporozke* in the seventeenth and eighteenth centuries developed constantly in mutual dialogue.

Some principal concepts and their elements that can be distinguished here are as follows:

- 1) the concept of a free and unconquered people as territorially limited, politically institutionalized inter-estate corporation with inviolable rights; self-determination of the people; the contractual origin of the State; the separateness and indestructibility of the Ukrainian State;

<sup>18</sup> A. Iakovliv, *Українсько-московські договори в XVII–XVIII віках* [Ukrainian-Muscovite Treaties in the 17<sup>th</sup>–18<sup>th</sup> Centuries], Warsaw 1934; O.V. Kresin, *Політико-правова спадщина української політичної еміграції першої половини XVIII століття* [Political and Legal Heritage of the Ukrainian Political Emigration of the First Half of the 18<sup>th</sup> Century], Kyiv 2002.

- 2) the concept of binding constitutional treaties within the people (between social estates and agencies of power) and between the people and the monarch; the contractual character of political power; the right to resistance in cases of the violation of treaties and of tyranny;
- 3) the concept of the consistency and mutual complementarity of natural law, constitutional treaties (the basic social contract with amendments), and constitutional customs;
- 4) however, issues of the division of public and private law were not consistently resolved.<sup>19</sup>

**9.** The Ukrainian Constitution of 1710 arose from the earlier national tradition and was not principally influenced by other traditions.

In 1709, the death of *Hetman* Mazepa, who achieved the unsuccessful war against the tsar, raised the issue of the costs he left behind him. Were they public or private? A special arbitrage (by the Bendery Commission) on the costs revealed serious imprecision and *lacunae* in constitutional treaties and ambiguity in constitutional customs. And, of course, previous treaties of *Viysko Zaporozke* with the tsar lost their legitimacy. All this led to rectification of positions and views.

**10.** The Ukrainian Constitution of 1710 contained some major innovations caused by a reconsideration of the political and legal crisis.

The original draft of the Constitution was written in Ukrainian, but it also had an official translation into Latin: *Pacta et Constitutiones Legum Libertatumque Exercitus Zaporoviensis inter illustrissimum dominum dominum Philippum Orlik, neoelectum ducem Exercitus Zaporoviensis, et inter generales, colonellos, nec non eundem Exercitum Zaporoviensem, publico utriusque partis laudo conventa ac in libera electione formali iuramento ab eodem illustrissimo duce corroborata, anno domini 1710, Aprilis 5, ad Benderam*.<sup>20</sup>

It was drafted and adopted by the General Council of *Viysko Zaporozke* on 5 April 1710 together with the election of a new *Hetman*, Pylyp Orlyk. It consists of a Preamble and sixteen articles. The character of the act is defined in the text as the treaty of *Viysko Zaporozke* with the *Hetman*. It had no time limit set on its validity. It was formally intended to define new legal provisions in addition to natural law and constitutional customs, but, in fact, it is codified and quite systematic. The act existed in a set with Orlyk's oath of office and a confirmation diploma from Charles XII of Sweden. He confirmed the Constitution *a posteriori*. *Pacta et Constitutiones* functioned in the Right-Bank region of Ukraine between 1711 and 1714.

<sup>19</sup> O.V. Kresin, *Ukrainian Statehood in the Mid-Seventeenth to Early Eighteenth Centuries...*

<sup>20</sup> The Ukrainian original, the 1710 Latin translation, and a modern English translation are published in: "Пакти і Конституції" Української козацької держави [Pacts and Constitutions of the Ukrainian Cossack State], ed. V.A. Smolij, Lviv 2011.

Some of the main provisions of the *Pacta et Constitutiones* of 1710 could be generalized are:

- 1) The *Hetman's* actions were monitored and could be cancelled by a General Council or by a General Court decision. The *Hetman* had to be elected by the General Council with the formal sanction of the king. He might be removed from office by a General Court decision.
- 2) The *Hetman's* credentials were essentially limited: representing the State in relations with the king; presiding over foreign policy according to decisions of the General Council and under the control of the Cabinet of Ministers (*Heneralna Starshyna*); coordinating elections to the General Council and elections of regional authorities; chairing the Cabinet of Ministers; and supervising all administration.
- 3) Parliament – the General Council – had to be elected in its entirety; its composition was defined. Three sessions a year with fixed dates were stipulated. It had legislative and control powers, elected the *Hetman*, and appointed the Cabinet of Ministers as recommended by the *Hetman*.

Some key ideas implemented in the *Pacta et Constitutiones* of 1710 are:

- 1) the idea of an elected constitutional monarchy. The monarch as the guarantor of statehood, of the inviolability of rights, and of defense against foreign enemies. He is above the political system and no more part of it; he has no real internal credentials not a party to the social contract, but only its guarantor;
- 2) autocracy on the part of the monarch and of the *Hetman* is inappropriate. Public and private law should be clearly delimited;
- 3) two possible statuses of territories and peoples in relations with monarchs were defined: a) conquered territory and people—such relations are characterized as subjection and slavery and are unlawful; b) protection—such relations are contractual and constitutional;
- 4) the idea of a free people was refined. It was understood as a population of a certain territory that, realizing its self-determination, is self-governed and has mutually-binding contractual (constitutional) relations with the monarch. The rights of a free people were seen as inalienable.<sup>21</sup>

## Conclusions

The idea of a localized self-governed society gradually emerged in Europe with the intellectual movement partly embodied in the Protestant Reformation. The idea of the social contract was rediscovered with the interpretation of the Old Testament, reformulated by European thinkers, and 'legalized' with the generalization and

<sup>21</sup> O.V. Kresin, *Політико-правова спадщина української політичної еміграції...*; *idem*, "Пакти й конституції законів і вольностей Запорізького війська..." 1710 р. ['Pacts and Constitutions of Laws and Freedoms of Viysko Zaporozke' of 1710], "Український історичний журнал" [Ukrainian Historical Journal] 2005, no. 2.

interpolation of Roman private law doctrine. Two important keys to understand early modern European constitutionalism are the inseparability of international legal and public legal relations, and the collective subject-ness of estates. Ukrainians had a long and quite coherent tradition of public law relations that began in the (Kyiv) Rus' period. They took part in the creation of the *Rzecz Pospolita* constitutional formula as a new type of societal State, but finally found no special place for themselves within this formula as a people equal with Poles and Lithuanians. The Ukrainian State, *Viysko Zaporozke*, from 1654 to 1764 formed its own constitutional tradition internally and in relations with the tsars. However, this constitutional development was repeatedly violated, limited, and then wiped out by Russian imperialism. Features of Ukrainian constitutionalism between 1654 and 1764 were: its uncoded character (a basic fragmented social contract with massive amendments) with codifying trend; the substantive role of ideas of natural law and constitutional customs; and unresolved issues of public and private law separation. The Ukrainian Constitution of 1710 arose primarily from the earlier national tradition and contained major innovations: a more codified character, more institutionalized public relations, and a reduction of monarchical powers, etc.

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## Summary

*Oleksiy V. Kresin*

### Early Modern Ukrainian Constitutionalism: A Comparative View

The author trying to consider the Ukrainian constitutional tradition in the wider European context of ideas, concepts, categories, acts, and practices of the sixteenth and seventeenth centuries. He analyses the genesis of the idea of social contract, its main elements, and their realization in international legal and public legal relations. He traces the genesis of Ukrainian constitutional acts of seventeenth and early eighteen centuries from both national, trans-national, and all-European conditions. One of them were shortcomings of the *Rzecz Pospolita* constitutional formula the provided no equal place for Ukrainian people within it. The author shows

that Ukrainian State *Viysko Zaporozke* from 1654 to 1764 formed own constitutional tradition, and discloses its main features. Special attention is devoted to the Ukrainian Constitution of 1710 and its principal innovations features.

**Keywords:** legal history, history of constitutional law, constitutionalism, Ukrainian law, the Early Modern period.

## Streszczenie

*Oleksiy V. Kresin*

### Wczesnonowoczesny ukraiński konstytucjonalizm – perspektywy porównawcze

Autor podjął próbę analizy ukraińskiej tradycji konstytucyjnej w szerszym europejskim kontekście idei, pojęć, kategorii, aktów i praktyk XVI i XVII w. W opracowaniu przedstawiono genezę idei umowy społecznej, jej główne elementy i ich realizację w stosunkach prawnomiędzynarodowych i publiczno-prawnych. Ponadto prześledzono genezę ukraińskich aktów konstytucyjnych XVII i XVIII w. w kontekście zarówno narodowych, transnarodowych, jak i ogólnoeuropejskich uwarunkowań. Jednym z nich były niedociągnięcia formuły konstytucyjnej Rzeczypospolitej, która nie zapewniała równego miejsca dla narodu ukraińskiego. Autor pokazuje, że ukraińskie państwo Wojsko Zaporoskie (Hetmanat) od 1654 do 1764 r. ukształtowało własną tradycję konstytucyjną i ujawnia jej główne cechy. Szczególną uwagę w artykule poświęcono ukraińskiej konstytucji z 1710 r. i jej głównym innowacjom.

**Słowa kluczowe:** historia prawa, historia prawa konstytucyjnego, konstytucjonalizm, prawo ukraińskie, wczesnonowoczesny.

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# **The Importance of the Sources of Law Used in Drafting the Constitution of the Republic of Latvia with the Purpose of Strengthening Constitutionalism**

## **Introduction**

The Republic of Latvia was established as a national state on 18 November 1918.<sup>1</sup> This was a natural and, in fact, inevitable consequence of the collapse of imperial systems throughout Europe, which resulted in the peoples of many of the former empires achieving the right to self-determination.<sup>2</sup> As has been argued by scholars of post-imperial transitions, the idea of the nation-state became the principal 'structural principle' of the European legal and political landscape during the interwar period.<sup>3</sup>

The transition from an imperial system to republican statehood based on the values of democracy and the rule of law posed several challenges to the founders of the new states. One of the foremost tasks in Latvia was the creation of a constitution, which would not merely reflect general ideological aspirations, but rather establish enforceable institutional guarantees of the values of parliamentarism, popular sovereignty, and a democratic republic, ones that public administration would be inclined to put into practice.

The essence of Latvia's national, legal, and social emancipation was embodied in the idea of constitutionalism in its political and legal dimensions.<sup>4</sup> At the centre of this idea is the written or formal constitution, understood as a normative legal act characterised by a specific drafting and adoption procedure.<sup>5</sup> Thus, because of the understanding

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<sup>1</sup> *The call 'To the citizens of Latvia!'*, "Pagaidu Valdības Vēstnesis", 14.12.1918.

<sup>2</sup> *The Impact of the First World War and Its Implications for Europe Today*, [https://eu.boell.org/sites/default/files/uploads/2014/06/the\\_impact\\_of\\_the\\_first\\_world\\_war\\_and\\_implications\\_for\\_europe\\_today.pdf](https://eu.boell.org/sites/default/files/uploads/2014/06/the_impact_of_the_first_world_war_and_implications_for_europe_today.pdf) [accessed: 2024.01.25]. See also: Judgment of the Constitutional Court of 30 November 2007 in Case No 2007-10-0102, Conclusions, paragraphs 18–18.3.

<sup>3</sup> I. Feldmanis, *Par Latvijas valsts vēstures sākumslokiem*, "Latvijas Vēstnesis", 30.12.2008, no. 202.

<sup>4</sup> R. Balodis, E. Levits, *Satversmes ievada interpretēšanas (komentēšanas) pamatjautājumi* [in:] *Latvijas Republikas Satversmes komentāri: ievads; I nodaļa: vispārējie noteikumi*, sagatavojis autoru kolektīvs prof. R. Baloža zinātniskā vadībā, Rīga 2014, p. 36.

<sup>5</sup> *Ibid.*, p. 35.

of the idea of a nation state and the concept of constitutionalism current at that time, it was only natural that the Act of Proclamation of 18 June 1918 had already decided that a fundamental law, the Constitution of the Republic of Latvia (hereinafter, the *Satversme*/the Constitution/the Basic Law), would be drawn up in accordance with Latvia's unique circumstances.<sup>6</sup>

Given the historical background and specific geopolitical circumstances of Latvia's declaration of independence, the procedure and methods chosen by politicians to establish such a fundamental law were essential to the fulfilment of this political promise.

This article examines the legal sources and comparative frameworks that influenced the drafting of the *Satversme* adopted in 1922. In particular, it shows how these sources, especially through the analysis of foreign constitutional models, contributed to the conceptualization and institutionalization of Latvian constitutionalism. To this end, the article applies historical, analytical-anthropological, comparative, and deductive methods.

By tracing how doctrinal borrowing and pragmatic adaptation shaped the constitutional design of Latvia in the early twentieth century, the article situates the *Satversme* not merely as a national legal instrument, but as part of the broader intellectual and political currents of post-war European constitutionalism. The thesis advanced is that the *Satversme* emerged not as a copy of foreign constitutions, but as a sophisticated synthesis of global constitutional ideas, adapted to Latvian historical and political specificities, thus strengthening of the idea of constitutionalism in Latvia.

## 1. The nature of constitutionalism before the Constituent Assembly

The imperative to draft a fundamental law that would correspond to Latvia's legal and factual circumstances was not only determined by the act of proclamation, but also by the political platform adopted the day before, on 17 November 1918, by the so-called Pre-parliament or the People's Council of Latvia.<sup>7</sup> This platform emphasised the need to establish a system of governance rooted in democratic representation and the rule of law. However, the realisation of this constitutional objective was delayed by geopolitical turbulence. The geopolitical situation temporarily made it difficult and, in fact, impossible to carry out this task,<sup>8</sup> as the newly established Latvian state after the declaration of independence had to be protected from the tyranny of the Great Powers. Thus, from 18 November 1918 until 11 August 1920, the territory of Latvia was essentially a war zone, with the Latvian Provisional Government and its armed forces

<sup>6</sup> The call 'To the citizens of Latvia!'. . .

<sup>7</sup> The political platform of the People's Council, [http://home.lu.lv/~rbalodis/Konst%20tiesibas/KT\\_lvadas/Tautas%20Pad+Council%20platforma.pdf](http://home.lu.lv/~rbalodis/Konst%20tiesibas/KT_lvadas/Tautas%20Pad+Council%20platforma.pdf) [accessed: 2024.05.19].

<sup>8</sup> Marģera Skujenieka uzruna. *Satversmes komisijas referentu ziņojumi par Satversmes I daļu IV. sesijas 1. sēde 1921. gada 20. septembrī* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922). Latvijas Republikas Satversmes projekta apspriešana un apstiprināšana*, Rīga 2006, p. 2.



fighting battles against troops commanded by Pavel Bermond-Avalov (1877–1973), the Bolshevik Red Army, and German forces.<sup>9</sup>

The outcome of the Latvian War of Independence in 1920 finally made it possible to start practical work on the realisation of the political and state goals defined above. This had both domestic and foreign political significance, because, as it was explained at the time, 'the only sure means of struggle against communism is the creation of a national democracy'.<sup>10</sup> Nonetheless, the ongoing military conflict did not paralyse constitutional developments entirely. Thus, as in other parts of Europe after the First World War, so-called provisional or temporary constitutions were adopted in Latvia.<sup>11</sup> The political platform of the People's Council of Latvia, already mentioned, functioned until 1 June 1920, laconically but imperfectly laying down the basic principles of the functioning of the Latvian state system,<sup>12</sup> that is, the need for the people to elect their representatives, the principles of elections, and the guarantee of the freedoms of the press, speech, assembly, association, and other freedoms.<sup>13</sup>

After its expiry, the Declaration on the State of Latvia of 27 May 1920 and the Provisional Regulations on the State Structure of Latvia of 1 June 1920 entered into force and were regarded as a second provisional constitution.<sup>14</sup> The Provisional Regulations on the State System of Latvia functioned until 7 November 1922, when the new Constitution entered into force.

These early constitutional instruments not only laid the foundations for institutional continuity amid uncertainty but also carried the symbolic function of affirming statehood in the eyes of both the Latvian population and the international community. They demonstrate that constitutionalism in Latvia began not with a single founding document, but through an evolving sequence of provisional norms aimed at consolidating republican governance.

In the broader context of regional transitions from empire to constitutional republics, one must also acknowledge the relevance of historical research in neighbouring states. For instance, Polish historiography, particularly the works of Piotr Łossowski<sup>15</sup> and Tomasz Paluszyński,<sup>16</sup> provides valuable insight into the post-First World War

<sup>9</sup> Ē. Jēkabsons, *Latvian War of Independence*, <https://enciklopedija.lv/skirklis/22216-Latvijas-Neatkar%C4%ABas-kar%C5%A1> [accessed: 2024.01.25].

<sup>10</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 1.

<sup>11</sup> *Latvijas Republika desmit pastāvēšanas gados*, Rīga 1928, p. 73; K. Dišlers, *Ievads Latvijas valststiesību zinātnē*, Rīga 1930, p. 69.

<sup>12</sup> *Marģera Skujenieka uzruna...* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 2.

<sup>13</sup> L. von Witte, *La Costituzione Della Repubblica Lettone*, Roma 1930, pp. 3–17.

<sup>14</sup> I. Bērziņa, G. Krūmiņš, J. Pleps et al., *Latvijas valsts ideja un aizsardzība: no dibināšanas līdz mūsdienām*, Valmiera 2022, pp. 60–61; K. Dišlers, *Ievads Latvijas valststiesību zinātnē...*, p. 74; *Latvijas tiesību vēsture (1914–2000)*, Rīga 2000, p. 162.

<sup>15</sup> P. Łossowski, *Kraje bałtyckie na drodze od demokracji parlamentarnej do dyktatury, 1918–1934*, Wrocław–Warszawa–Kraków 1972; *idem*, *Łotwa – nasz sąsiad. Stosunki polsko-łotewskie w latach 1918–1939*, Warszawa 1990, p. 63.

<sup>16</sup> T. Paluszyński, *Walka o niepodległość Łotwy 1914–1921*, Warszawa 1999, p. 447; *idem*, *Walka o niepodległość Estonii 1914–1920*, Poznań 2007, p. 494.

transformation of the Baltic region, including Latvia's struggle for sovereignty and the emergence of parliamentary systems. Although Latvian constitutional thought developed largely autonomously, it did so in parallel with broader Central and Eastern European patterns of institution and legal reorientation.<sup>17</sup>

## 2. The process of drafting the Constitution and the sources used in the context of strengthening Latvian constitutionalism

The Provisional Constitution, or the Provisional Rules of the State System of Latvia, was adopted by the first parliament elected by the people, the Constituent Assembly. Elections to it, with a record turnout,<sup>18</sup> were held on 17–18 April 1920.<sup>19</sup> It is important to note that the elections were held in accordance with the basic principles of electoral practice recognised in Western European constitutionalism, including the requirement of gender equality,<sup>20</sup> which was a progressive practice and one not even universally recognised in Europe at that time.

The Constituent Assembly began its work on 1 May 1920 and remained in office until 7 November 1922, when the *Saeima* (parliament) began to perform the functions of Parliament.<sup>21</sup> The majority of the political forces in the Constituent Assembly were Social Democrats, followed by the Latvian Farmers' Union, politicians representing the interests of the Latgale region, and other parties.<sup>22</sup>

<sup>17</sup> Latvia's constitutional experience shared structural similarities with those of other newly independent or reconstituted European states emerging from the collapse of empires after the First World War. Like Czechoslovakia, Poland, and Finland, Latvia faced the dual challenge of constructing a new legal order while simultaneously affirming national sovereignty and social legitimacy. In Czechoslovakia, the 1920 Constitution emphasised national unity and parliamentary governance, drawing heavily from both Austrian and French republican models. In Poland, the March Constitution of 1921 similarly adopted a parliamentary structure while reflecting elements of French and Swiss constitutionalism, though later developments shifted toward presidentialism. Finland's 1919 Constitution established a republican form of government with strong parliamentary control, despite early monarchist proposals. What unites these experiences is the conscious use of comparative constitutionalism as a method of state-building, combined with a rejection of the autocratic or imperial legal legacies from which these nations emerged. See also: J. Hoetzel, *The Definitive Constitution of Czechoslovak Republic* [in:] *The Constitution of the Czechoslovak Republic*, Prague 1920, pp. 12–18; F. Zoll, *Rights and Duties in the Polish March Constitution 1921 – An Illusion of the Liberal Constitution?*, "Saggi DPCE online" 2021, vol. 48, no. 3, pp. 3030–3031; *Independence and Democracy: Finland's Journey to Constitutional Democracy*, Parliament of Finland, [https://www.parliament.fi/FI/naineduskuntatoimii/esitemateriaalit/Documents/NETTI\\_ITSENAISYYS\\_JA\\_DEMOKRATIA\\_ENGLANTI.pdf](https://www.parliament.fi/FI/naineduskuntatoimii/esitemateriaalit/Documents/NETTI_ITSENAISYYS_JA_DEMOKRATIA_ENGLANTI.pdf) [accessed: 2025.05.22].

<sup>18</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 2.

<sup>19</sup> M. Skujenieks, *Latvijas parlamenti* [in:] *Latvijas Republika desmit pastāvēšanas gados*..., p. 62.

<sup>20</sup> Ā. Ģērsons (pseudonyme A. Ventmalnieks), *Latvijas vēsture*, Valmiera–Cēsis 1923, p. 287.

<sup>21</sup> O. Gerts, *Par Latvijas Republikas Satversmes tēviem, pamatu licējiem*, "Latvijas Vēstnesis", 14.06.2012, no. 93.

<sup>22</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 2.

It is important to note that the first and main task of the Constituent Assembly was the drafting of the Basic Law of the State,<sup>23</sup> with the view that it should be 'normally suited to the character of its people, its living conditions, its style of life, and which would show what kind of country we are and what kind of country we are building. All 152 members of the Constituent Assembly take part in this great work, because the final versions of the articles of the law must be voted on by standing up'.<sup>24</sup>

In addition to drafting the Basic Law, the Constituent Assembly also performed the tasks of a national parliament. This meant that the Parliament also adopted a number of important laws that were to regulate the most important areas of state life, including agrarian reform, the conduct of elections to the *Saeima*, and others.<sup>25</sup>

On 5 May 1920, the Constitutional Assembly elected a commission to draft the Constitution. The well-known Social Democrat Mārgers Skujenieks (1886–1941) became its chairman. The work of the Commission was distributed between two sub-commissions. One of them was responsible for drafting the first part of the Basic Law, that is, the foundations of the state system (Part I of the Constitution), while the other was to draft the catalogue of citizens' rights and freedoms (Part II of the Constitution). The methodology adopted, which included three readings in each sub-commission and joint plenary discussions, reflected a commitment to procedural legitimacy and legal deliberation.<sup>26</sup> In addition to these two commissions, commissions worked for a short period on the arrangements for the next parliamentary elections and on heraldry.<sup>27</sup>

Initially, work started on the drafting of the rules of the state system. This process was led by the Social Democrat deputy Fēlikss Cielēns (1888–1964), who drafted most of the theses to be included in the project.

The Constituent Assembly's action in drafting the content of the Basic Law was in line with the theoretical concept of the constituent power (*pouvoir constituant*) developed by the French statesman and leading figure of the French Revolution Emmanuel Sieyès (1748–1836).<sup>28</sup> According to this, given the practical consideration that the people cannot come together to adopt a constitution, they delegate or empower special representatives to draft and adopt a Basic Law on their behalf.<sup>29</sup> This point was also made by the member of parliament Jānis Purgalis (1869–1934) during the debate on the first part of the Constitution.<sup>30</sup> Since the people themselves could not physically assemble to write the Constitution, they delegated this responsibility to their elected representatives.

<sup>23</sup> *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 3.

<sup>24</sup> O. Gerts, *Par Latvijas Republikas Satversmes tēviem...*

<sup>25</sup> *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 3.

<sup>26</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 3.

<sup>27</sup> J. Pleps, D. Plepa, *Latvijas Republikas Satversme*, <https://enciklopedija.lv/skirklis/100866-Latvijas-Republikas-Satversme> [accessed: 2025.05.22].

<sup>28</sup> K. Dišlers, *Demokrātiskas valsts iekārtas pamati*, Rīga 1931, p. 30.

<sup>29</sup> J. Pleps, E. Pastars, I. Plakane, *Konstitucionālās tiesības*, Rīga 2021, pp. 43–44.

<sup>30</sup> *Jāņa Purgaļa uzruna. Satversmes komisijas referentu ziņojumi par Satversmes I daļu IV. sesijas 1. sēde 1921. gada 20. Septembrī* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 11.

On the basis of this special mandate given by the people, the question of Latvia's legal basis, which must also be enshrined in the *Satversme*, became of primary practical importance. In this respect, the members of the Constituent Assembly were almost unanimous that the concept that Latvia is an independent, democratic republic, as set out in the provisional Constitutions, should also be enshrined in the Basic Law, stressing that these words should be regarded as the 'spirit of the Constitution'.<sup>31</sup> The choice of a republic was based on a consideration of Latvia's historical and geographical situation,<sup>32</sup> explaining that the Latvian people were against the reactionary power in the East, meaning Soviet Russia, as well as against the aristocracy that had developed under the nobility and when Latvia was part of the Russian Empire.<sup>33</sup>

The eminent scholar of state law Kārlis Dišlers (1878–1954) also stressed that a democratic republic was the most appropriate model of state governance for Latvia, rejecting a separate privileged social order such as the nobility.<sup>34</sup> Thus, the Constitutional Assembly stated that the sustainability of the Latvian state was linked exclusively to the recognition of a democratic republic and the establishment of rules for its functioning that would allow this recognition to be implemented in practice.<sup>35</sup>

Although various concepts included in the draft Constitution provoked discussions during the drafting of the first part of the Constitution, the most important and acute discussions were about the institution of the President of Latvia and which country's example Latvia should follow in regulating the work of the Head of State. Cielēns considered that the duties of the Head of State would be performed, as during the Constitutional Assembly, by the President of the *Saeima*, whose powers would be mainly nominal.<sup>36</sup> By contrast, the member of parliament Arveds Bergs (1875–1941) insisted that the President of the State should be endowed with broader powers, including the provision that the President of the State should be elected by direct suffrage, giving him independent political functions.<sup>37</sup> This legal framework was in fact modelled on the Constitution of the German Empire of 11 August 1919, the so-called Weimar Constitution.<sup>38</sup>

The debates revealed a deep engagement with both European and transatlantic models. The United States was cited as an example of a presidential system with a strong executive branch, but its unique system of checks and balances was seen

<sup>31</sup> *Marģera Skujenieka uzruna...* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 8.

<sup>32</sup> *Tautas vai saeimas vēlētu valsts prezidentu? – lielā cīņā Satversmes Sapulcē, "Latvju Ziņa", 7.05.1953, no. 9, p. 6.*

<sup>33</sup> *Marģera Skujenieka uzruna...* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 9.

<sup>34</sup> K. Dišlers, *Latvijas valsts varas orgāni un viņu funkcijas*, Rīga 1925, p. 33.

<sup>35</sup> I. Bērziņa, G. Krūmiņš, J. Pleps et al., *Latvijas valsts ideja un aizsardzība...*, p. 64.

<sup>36</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, pp. 3–4.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Die Verfassung des Deutschen Reiches*, <https://www.verfassungen.de/de19-33/verf19-i.htm> [accessed: 2024.03.11].

as unsuitable for a small European republic like Latvia. France, Switzerland, Estonia, and Poland also featured in these discussions, each providing specific institutional templates that were considered, adapted, or rejected.

Cielēns criticised the so-called Weimar Constitution proposal, referring to the French Constitution of 1848, arguing that too broad presidential powers could lead to a constitutional crisis and a concentration of power in the hands of one person.<sup>39</sup> He also referred to practice in the United States, pointing out that the system in place there was, however, very different from the European tradition of constitutionalism and the framework of checks and balances established between Parliament, the executive, and the President.<sup>40</sup> The Social Democrat representative also pointed out that the separate institution of the President of the Republic entailed additional costs, as demonstrated, for example, by the practical implementation of the Polish constitution, which maintains a very expensive presidential apparatus.<sup>41</sup>

Some members of parliament expressed the view that the institution of the President was a legacy of the old monarchies,<sup>42</sup> and that even a popularly elected President could not mitigate the potential risks of revolution and usurpation of power.<sup>43</sup> The Swiss constitution was highlighted as an example of a state without a President,<sup>44</sup> as was Estonia, where the Prime Minister acted as head of state.<sup>45</sup> Those in favour of the institution of the presidency also referred to the theory of the separation of powers proposed by the Enlightenment philosopher Montesquieu (1689–1755), noting that a popularly elected president would promote a balance between the executive and the legislature.<sup>46</sup>

Legal scholars have noted that a popularly elected president or a head of state endowed with broad and functional powers can compensate for the political vacuum that arises in countries with weak party systems (such as Russia and France at the time).<sup>47</sup> Given the fragmentation of political parties, such a solution could have strengthened parliamentarism in Latvia, but despite the concerns expressed in the debate, the institution of the President of Latvia was created in a way that was mainly in line with the representative model of the presidency, without a very broad competence and operational framework. This, scholarship has pointed out,

<sup>39</sup> Fēliksa Cielēna uzruna. *Satversmes komisijas referentu ziņojumi par Satversmes I daļu IV. sesijas 1. sēde 1921. gada 20. septembrī* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., pp. 25–26.

<sup>40</sup> *Ibid.*, p. 25.

<sup>41</sup> *Ibid.*, p. 27.

<sup>42</sup> *Satversmes komisijas referentu ziņojumi par Satversmes I daļu IV. sesijas 1. sēde 1921. gada 20. septembrī* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 42.

<sup>43</sup> Fēliksa Cielēna uzruna... [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 26.

<sup>44</sup> *Satversmes komisijas referentu ziņojumi par Satversmes I daļu*... [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., pp. 40, 61.

<sup>45</sup> *Ibid.*, p. 46.

<sup>46</sup> *Ibid.*, p. 45.

<sup>47</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 5.

nevertheless allows the Latvian constitution to be considered more akin to the French theory of constitutionalism than to the Weimar constitution.<sup>48</sup>

Moreover, by limiting the powers of the President, the Constitution established the so-called institution of countersignature, which required the co-signature of a member of the Cabinet for the issuance of certain, indeed, most, acts of the President.<sup>49</sup> This institution was also enshrined in the Weimar Constitution, but its origins are primarily linked to monarchies, as a means of limiting the power of the monarch.<sup>50</sup> This arrangement implied the predominance of the executive and its political responsibility within the Latvian state system.<sup>51</sup>

In addition to the elaboration of the constitutional framework for the activities of the executive, the President of the Republic, and the legislature, the work of the Constituent Assembly during the discussion of the first part of the Basic Law considered the possibilities of direct involvement of the people (direct democracy)<sup>52</sup> in matters of public administration, mainly in the form of referenda and initiatives.<sup>53</sup>

The development of twentieth-century constitutionalism after the First World War contributed to the consolidation of direct democracy. A striking example of this was the Weimar constitution, which was modelled, to one degree or another, on elements of popular participation in the basic laws of other countries.<sup>54</sup> At that time, direct democracy was understood as the right of citizens to oppose a decision taken by parliament, thus providing mainly for two types of referendums: compulsory referendums to amend the constitution and optional referendums. These limited the power of parliament.<sup>55</sup> The institution of referendums in the Latvian Constitution,<sup>56</sup> including the regulation of the procedure for amending the Basic Law,<sup>57</sup> was also essentially modelled on the Weimar Constitution.<sup>58</sup>

The Constitutional Assembly members criticised the threshold set in the Basic Law for the actual implementation of direct participation of the people, pointing out that in Latvia it was virtually impossible to collect the votes of one fifth of the electorate for a legislative initiative.<sup>59</sup> However, suggestions that the practice of referendums developed in the Swiss cantons be adopted, which required a much smaller quorum,

<sup>48</sup> L. von Witte, *La Costituzione Della Repubblica Lettone...*, pp. 3–17.

<sup>49</sup> *Ibid.*

<sup>50</sup> L. Valtere, *Kontrasignācijas institūta ģenēze un izpausmes Latvijas Republikā*, Rīga 2011, p. 9.

<sup>51</sup> K. Dišlers, *Latvijas valsts varas orgāni un viņu funkcijas...*, p. 38.

<sup>52</sup> *Satversmes komisijas referentu ziņojumi par Satversmes I daļu...* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 60.

<sup>53</sup> *Ibid.*, pp. 65–66.

<sup>54</sup> E. Kolbs, *Veimāras Republika*, Rīga 1997, p. 22.

<sup>55</sup> I. Nikuļceva, *Tautas nobalsošana un vēlēšanu likumdošanas iniciatīva*, Rīga 2012, p. 12.

<sup>56</sup> *20. gadsimta Latvijas vēsture*, Rīga 2003, pp. 161–164.

<sup>57</sup> R. Balodis, *Par tautas tiesībām un faktiskām iespējām grozīt Latvijas Republikas Satversmi* [in:] *Tiesības un tiesiskā vide mainīgos apstākļos. Latvijas Universitātes 79. starptautiskās zinātniskās konferences rakstu krājums*, Rīga 2021, pp. 412–413.

<sup>58</sup> I. Nikuļceva, *Tautas nobalsošana un vēlēšanu likumdošanas iniciatīva...*, p. 14.

<sup>59</sup> *Fēliksa Cielēna uzruna...* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 28.

did not find general support.<sup>60</sup> However, despite the strict requirements, Kārlis Dišlers also considered the principles established in the Constitution to be sufficient to classify Latvia as a direct democracy.<sup>61</sup>

On 15 February 1922, the Constituent Assembly adopted the first part of the Constitution by an overwhelming majority.<sup>62</sup> It consisted of eighty-eight articles, divided into seven chapters, regulating general provisions (Articles 1–4), the nature of the *Saeima* (Parliament) (Articles 5–34), the institution of the President (Articles 35–54); the functions of the Cabinet (executive) (Articles 55–63), the legislative process (Articles 64–81), the general principles of the courts (Articles 82–86), and the institution of the State Audit Office (Articles 87–88). As legal scholars of the time explained, this type of structure was akin to the Weimar Constitution.<sup>63</sup>

The similarities, which make it possible to consider the 1922 Constitution of Latvia as a fundamental law of its time, are also demonstrated by the fact that the Latvian Constitution, like the fundamental laws of Estonia, Lithuania, Finland, Germany, and other countries, began with a short preamble: ‘The people of Latvia, in freely elected Constitutional Assembly, have adopted the following Constitution of the State.’<sup>64</sup> It is true, however, that this approach to the preamble had led to its being formulated in a laconic way so that it did not reflect some of the values of the people.<sup>65</sup> In the spring of 2014, the *Saeima* decided to amend the Constitution and supplement it with an extended preamble, an initiative of Egils Levits, then a judge of the Court of Justice of the European Union, aimed at strengthening the values and culture of the Latvian people, which became the subject of fierce debate after the 2012 referendum on strengthening the status of Russian as the second state language.<sup>66</sup> The referendum had a turnout of 71.13% of the electorate. Overwhelmingly, they decided that Latvian should be the only state language.<sup>67</sup>

The wording of Article 2 of the *Satversme*, stating that ‘the sovereign power of the Latvian State belongs to the people of Latvia’,<sup>68</sup> also bears certain similarities to the

<sup>60</sup> *Ibid.*

<sup>61</sup> K. Dišlers, *Latvijas valsts varas orgāni un viņu funkcijas...*, p. 35.

<sup>62</sup> *20. gadsimta Latvijas vēsture...*, pp. 161–164.

<sup>63</sup> L. von Witte, *La Costituzione Della Repubblica Lettone...*, pp. 3–17.

<sup>64</sup> *Ibid.* Original preamble goes as follows ‘Latvijas tauta savā brīvi vēlēta Satversmes sapulcē ir nolēmusi sev šādu valsts Satversmi’ [English – ‘The people of Latvia, in freely elected Constitutional Assembly, have adopted the following State Constitution’]. The Constitution of the Republic of Latvia, <https://www.saeima.lv/en/legislative-process/constitution> [accessed: 2025.07.05.]

<sup>65</sup> R. Balodis, *Latvijas Republikas Satversmes ievads* [in:] *Latvijas Republikas Satversmes komentāri. Ievads. I nodaļa. Vispārējie noteikumi*, Rīga 2014, p. 92.

<sup>66</sup> R. Balodis, *Konstitūcijas sastāvdaļa: preambula – tās loma un nozīme mūsdienu konstitucionālismā* [in:] *Tiesību efektīvas piemērošanas problemātika: Latvijas Universitātes 72. zinātniskās konferences rakstu krājums*, Rīga 2014, p. 298.

<sup>67</sup> *On Amendments to the Constitution of the Republic of Latvia (2012)*, [https://www.cvk.lv/lv/pargrozijumiem-latvijas-republikas-satversme-2012?utm\\_source=https%3A%2F%2Fwww.google.com%2F](https://www.cvk.lv/lv/pargrozijumiem-latvijas-republikas-satversme-2012?utm_source=https%3A%2F%2Fwww.google.com%2F) [accessed: 2024.05.28].

<sup>68</sup> Current translation: ‘The sovereign power of the State of Latvia is vested in the people of Latvia.’ Article 2 of the *Satversme*, <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia> [accessed: 2025.07.05].



Weimar Constitution. As the authors of the Weimar Constitution explained at the time, this met a need to enshrine the sovereignty of the people in an act of constitutional rank, confirming the people's desire for freedom.<sup>69</sup> The belief in the sovereignty of the people and the contempt for political systems imposed by foreign powers<sup>70</sup> was, thus, one of the three central principles which permeated the Constitution and characterised its 'spirit'. Alongside popular sovereignty, the idea of the republic and the principle of parliamentarianism permeate the concepts underlying the Constitution.<sup>71</sup>

The enshrinement of the right to vote in the Constitution was aimed at putting democratic principles into practice. Taking into account the historical peculiarities of Latvia and the size of the country, the Constitutional Assembly decided, after extensive debate, that a bicameral system should not be introduced in Latvia, but rather a unicameral parliament. The procedure under which the parliament was given powers for only three years was criticised; it was pointed out that only countries such as England, which had a long tradition of parliamentarianism, could afford short terms of office.<sup>72</sup> However, as in other Western European constitutions, the stability of parliament was ensured, for example, by a ban on the recall of individual members.<sup>73</sup> Nevertheless, a consolidation of the parliamentary tradition in Latvia encountered various problems, which both fragmented the political forces represented in Parliament and laid the foundations for the crisis of parliamentarism and its consequences,<sup>74</sup> which culminated in the loss of independence in 1940.<sup>75</sup>

Moreover, Article 81 of the Constitution, which gave the Cabinet of Ministers the right to issue regulations with the force of law between parliamentary sessions, was also seen as detrimental to strengthening the role of Parliament. Leo Witte (1887–1948) pointed out at the time that this practice was taken over from the Basic Laws of the Russian Empire adopted in 1906, which would undermine the people's confidence in the stability of Parliament.<sup>76</sup>

One of the issues, in the legal formulation of which the members of the Constitutional Assembly looked extensively at the practice of foreign constitutionalism, was related to the immunity of members of the *Saeima*. In this respect, the prohibition in Article 28 of the Constitution against prosecuting members of the *Saeima* in connection with their voting or their views as expressed during the execution of their duties was similar to the principles of the Estonian Constitution, as well as, at least in part, to those of

<sup>69</sup> L. von Witte, *La Costituzione Della Repubblica Lettone...*, pp. 3–17.

<sup>70</sup> *Latvijas Republikas Satversmes tapšana un ciņas ap to*, "Latvju Ziņas", 16.04.1953, no. 8, p. 6.

<sup>71</sup> U. Ģērmanis, *Latvijas Satversmes tēvi*, [http://zagarins.net/jg/jg7/JG7\\_Germanis.html](http://zagarins.net/jg/jg7/JG7_Germanis.html) [accessed: 2024.05.19]; K. Dišlers, *Latvijas valsts varas orgāni un viņu funkcijas...*, p. 38; *idem*, *Dažas piezīmes pie Latvijas Republikas Satversmes projekta*, "Tieslietu Ministrijas Vēstnesis" 1921, no. 4–6, p. 139.

<sup>72</sup> L. von Witte, *La Costituzione Della Repubblica Lettone...*, pp. 3–17.

<sup>73</sup> *20. gadsimta Latvijas vēsture...*, pp. 161–164.

<sup>74</sup> Judgment of the Constitutional Court of 23 September 2002, 'On Compliance of the Second Sentence of Section 38(1) of *Saeima* Election Law with Articles 6, 8, 91 and 116 of the *Satversme*'. *Latvijas Vēstnesis*, 24.09.2002, No. 136, Conclusions.

<sup>75</sup> R. Miķelsons, *Latvijas vēsture*, [s.l.] 1948, p. 105.

<sup>76</sup> L. von Witte, *La Costituzione Della Repubblica Lettone...*, pp. 3–17.



French<sup>77</sup> and English constitutionalism,<sup>78</sup> but with certain differences and national peculiarities of application.<sup>79</sup> A liberal element of this right was the fact that immunity of deputies was also applicable during the inter-sessional period, which was not provided for in the constitutions of other European countries such as France, Belgium, or Greece.<sup>80</sup>

On 17 January 1922, the Constituent Assembly began discussing the draft second part of the Constitution, which was to lay down the fundamental rights of citizens.<sup>81</sup> The proposed draft, with thirty-one articles, contained a wide range of rights, from the principle of equality to the inviolability of the home and correspondence, and the prohibition of the death penalty.<sup>82</sup>

The members of the Constituent Assembly drew inspiration for the catalogue of fundamental rights from a very wide range of historical sources, including constitutions adopted after the French Revolution<sup>83</sup> that contained the basic principles of human and civil rights.<sup>84</sup> These civil rights values were later enshrined in the Weimar Constitution, as well as in the fundamental laws of Spain, Italy, and other countries. At the same time, they permitted the most appropriate formulation of legal guarantees for the Latvian context.<sup>85</sup>

The draft of the second part of the Constitution, in terms of the wording and structure of the articles, essentially corresponded to the Weimar Constitution,<sup>86</sup> however, as legal scholarship indicates, many civil guarantees were not included in the draft by the deputies of the Constituent Assembly, nor was there a classification of rights according to categories.<sup>87</sup> Objectively, the draft of the second part was incomplete: it lacked a logical structure and a systematic presentation of the articles.<sup>88</sup>

Some members of the Constitutional Assembly, however, were sceptical about the need to enshrine this catalogue of rights directly in the Basic Law, suggesting instead that these guarantees should be included in other laws. However, recognising that Latvia was a parliamentary republic<sup>89</sup> in the early stages of its development, with a weak democratic tradition in contrast to, for example, France or England, it was

<sup>77</sup> *Satversmes I daļas lasīšana pa pantiem. IV. sesijas 14. sēde* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922)*..., p. 300.

<sup>78</sup> L. von Witte, *La Costituzione Della Repubblica Lettone*..., pp. 3–17.

<sup>79</sup> F. Cielēns, *Latvijas Republikas Satversmes noteikumi par deputātu imunitāti*, "Tieslietu Ministrijas Vēstnesis", 1.03.1929, no. 3–4, p. 104.

<sup>80</sup> R. Akmentiņš, *Latvijas Satversmes reforma*, "Jurists", 1.04.1934, no. 4, pp. 106–118.

<sup>81</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922)*..., p. 5.

<sup>82</sup> *Draft Constitution, Part 2*, <https://docs.google.com/document/d/1WXDRjxBnntkvu9zBNsALmhBUMeNf2SqIAFLZTRO47To/edit#bookmark=id.gjdgxs> [accessed: 2024.01.25].

<sup>83</sup> J. Čakste, *Par valsts satversmi* [in:] *eadem, Taisnība vienmēr uzvarēs*, Rīga 1999, p. 166.

<sup>84</sup> *Satversmes komisijas referentu ziņojumi par Satversmes II daļu. V. sesijas 1. sēde* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922)*..., pp. 418–419.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> J. Fillere, *Advokāts kā maksātnešpējas administrators. Ētikas problēmjaūtājumi*, Rīga 2016, pp. 12–13.

<sup>88</sup> *20. gadsimta Latvijas vēsture*..., pp. 161–164.

<sup>89</sup> A. Pommers, *Latvijas vēsture*, Rīga 1930, p. 349.

stressed that civil and political rights and freedoms should be enshrined in the Basic Law in order to strengthen their protection and practical enforceability.<sup>90</sup>

There were extensive discussions on the fundamental rights of citizens, but the search for compromise on the preferred wording of the articles, which could be observed during the work on the first part of the draft Constitution, was absent.<sup>91</sup> Thus, on 5 April 1922, the vote on the adoption of the second part was rejected by a majority of six votes. According to scholars of constitutionalism, this was, in fact, the result of a misunderstanding about the scope and wording of the rights to be included, rather than of principled opposition to the idea of introducing fundamental rights for citizens.<sup>92</sup> Thus, in the decisive vote the Social Democrats abstained; they had hoped to correct the previously unaddressed shortcomings in the wording of the second part of the Constitution in a third reading.<sup>93</sup>

Thus, in the inter-war period, the Constitution functioned without a separate catalogue of fundamental rights. There is a debate as to whether the failure to adopt the second part of the Constitution created a situation in which the fundamental rights of the individual did not exist, or at least were not properly recognised, in inter-war Latvia. In my opinion, there is no basis for such a view, since, and here one must also agree with many legal scholars, the popularly elected parliament, the *Saeima*, using the powers granted to it in the Constitution, filled this gap at least partially by adopting laws which provided for, *inter alia*, the freedoms of the press, association, and assembly, as well as other guarantees.<sup>94</sup> Dišlers also considered that the protection of these legal values, in circumstances where the fundamental rights of citizens were not enshrined in the Constitution, was, thus, left in the hands of the people themselves.<sup>95</sup>

Also, it may be concluded that the comparative method was used explicitly and systematically by Latvian lawmakers. The drafting process involved the analysis of constitutional documents from Switzerland, Germany (especially Weimar), Finland, France, England, the USA, Poland, Estonia, Czechoslovakia, and even Japan. However, Soviet constitutional models were consciously excluded. The aversion to the centralized, one-party system and to the symbolic use of constitutional language devoid of enforceable rights underscored Latvia's deliberate distancing from the Soviet model of legal formalism and normativism.

A deeper look into the Weimar Constitution reveals several structural and normative elements that found resonance in the Latvian constitutional project. Among them were the principles of popular sovereignty, parliamentary supremacy, and mechanisms of direct democracy (for example, referenda and popular initiatives),

<sup>90</sup> *Satversmes komisijas referentu ziņojumi un vispārējās debates par Satversmes II daļu. V. sesijas 1. sēde* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 507.

<sup>91</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 6.

<sup>92</sup> *Latvijas tiesību vēsture (1914–2000)*..., p. 165.

<sup>93</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)*..., p. 6.

<sup>94</sup> *Ibid.*, p. 7; see also: *Cilvēktiesības pasaulē un Latvijā*, Rīga 2021, pp. 339–341; A. Kučs, *Pamattiesības* [in:] *Latvijas valsts tiesību avoti. Valsts dibināšana – neatkarības atjaunošana*, Rīga 2015, p. 121.

<sup>95</sup> K. Dišlers, *Ievads Latvijas valststiesību zinātnē*..., p. 75.

which were conceptually adopted and adjusted to Latvia's smaller, more homogeneous parliamentary context. Notably, the Weimar model's separation of powers, clear institutional demarcations, and regulated presidential functions appealed to Latvian lawmakers who sought to establish a system resistant to executive overreach while maintaining democratic accountability.

In contrast, Soviet legal theory, emerging from the 1918 Russian Soviet Federative Socialist Republic Constitution and further developed in the 1924 and 1936 Soviet constitutions, was seen as both normatively and structurally opposite to Latvian constitutional ideals.<sup>96</sup> The concept of 'democratic centralism', the subordination of judicial independence to political authority, and the absence of enforceable individual rights made Soviet constitutionalism incompatible with the Latvian vision of the rule of law. Therefore, emphasis in the *Satversme* on institutional pluralism, civil liberties, and legislative primacy can be interpreted not only as an affirmative act of nation-building but also as a principled rejection of Soviet constitutional symbolism and its use as an ideological instrument of state power.<sup>97</sup>

Moreover, while the Constitution included the institution of countersignature, a tool to constrain presidential power by requiring ministerial co-approval of executive acts, this device, derived from monarchical constitutions such as those of Germany and France, was transformed into a mechanism of republican accountability. In this way, the Latvian Constitution incorporated European tools of constitutional design while adapting them to the logic of parliamentary sovereignty.

In sum, the drafting of the *Satversme* was a product of doctrinal learning and practical synthesis. The Latvian approach to constitutionalism was neither imitative nor dogmatic; it was rather eclectic, although rational, and ideologically attuned to the aspirations of a democratic nation-state. The constitutional text was concise, structured, and rooted in the legal and political thought of its time, with clear traces of German public law, French republicanism, and comparative lessons from neighbouring states. Despite the rejection of the second part of the Constitution, the overall framework established the institutional and normative foundations for a functioning parliamentary democracy.

## Summary and conclusions

Long before the declaration of Latvia's independence, shortly after the events of 1905, the former member of the Constituent Assembly, Social Democrat and prominent poet

<sup>96</sup> T. Foglesong, *The Reform of Criminal Justice and Evolution of Judicial Dependence in Late Soviet Russia* [in:] *Reforming Justice in Russia, 1864–1996: Power, Culture, and the Limits of Legal Order*, ed. P.H. Solomon, Jr., New York 2015, p. 207. See also: В.А. Лазарева, *Судебная власть и ее реализация в уголовном процессе*, Самара 1999, pp. 38–43.

<sup>97</sup> See also: С.Ф. Кечежян, *Правоотношения в социалистическом обществе*, Москва 1958, p. 170.

Jānis Pliekšāns (1865–1929) had written that the fundamental law of the state was first a question of uniting the values of the nation, and only after that it was a question of law.<sup>98</sup> Thus, the Constitution of the Republic of Latvia adopted on 15 February 1922, which entered into force on 7 November 1922 at 12.00,<sup>99</sup> can be regarded as a synthesis of theoretical concepts of constitutional law of its time, political compromises, and considerations of varying degrees of abstraction.

The Constitution emerged from a Constituent Assembly composed of 152 deputies of diverse ideological and ethnic backgrounds, including Latvians, Jews, Russians, Germans, and Poles. Thus, it can be argued that the Basic Law drafted by the Constituent Assembly was a peculiar amalgamation of extensive comparative legal studies and progressive ideas aimed at allowing Latvia to flourish in an era when despotism and other negative vestiges of imperialism had no place.

The historical background influenced the sources chosen for the content of Parts I and II of the Constitution. Although statesmen primarily looked towards the so-called 'old democracies' in order to adopt practices and principles that had been approved and recognised as good there, at the same time it was clear that what was suitable for other countries would not yet be suitable for Latvian conditions. Thus, some of the institutions included in the Constitution are characterised by a certain degree of eclecticism, in terms of combining the principles of different constitutional theories, such as Weimar and US constitutionalism.<sup>100</sup> The Latvian *Satversme* exhibited clear affinities with the Weimar Constitution in matters such as the structure of parliament, the limits on presidential authority, and mechanisms of direct democracy.

The Constitutional Assembly members, working for almost two years on the text of the Basic Law, tried to create a basis for the continued existence of the Latvian nation in accordance with principles that were unknown or inadequately implemented under the Russian Empire, highlighting the legal, historical, political, national, cultural, and other elements specific to Latvia that were outside the legal dimension.<sup>101</sup> Thus, the need to establish the foundations of parliamentary culture and democratic principles, which were unknown to most Latvians at that time, became paramount.

From a general point of view, there is, of course, no doubt that the Constitution of the Republic of Latvia was in line with the ideas and values of its time and of the nation state, and also embodied the idea of constitutionalism in the sense that it was found in many parts of Europe after the First World War. Its content and the concepts embodied in the Constitution were, if not directly, at least ideologically influenced by the constitutions of many other countries, notably the Weimar Constitution,<sup>102</sup> as

<sup>98</sup> A. Birkerts, *J. Raiņa dzīve*, Rīga 1938, pp. 146–147.

<sup>99</sup> *Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922)*..., p. 1.

<sup>100</sup> V. Cielava, *Priekšvārds* [in:] *Latvijas Satversmes Sapulces stenogrammu izvilkums (1920–1922)*..., p. 5.

<sup>101</sup> J. Pleps, E. Pastars, I. Plakane, *Konstitucionālās tiesības*..., p. 22.

<sup>102</sup> *Die Verfassung des Deutschen Reichs ('Weimarer Reichsverfassung')*, <https://www.verfassungen.de/de19-33/verf19-i.htm> [accessed: 2024.01.25]; L. von Witte, *La Costituzione Della Repubblica Lettone*..., pp. 3–17.

well as those of Switzerland, Baden,<sup>103</sup> Tsarist Russia,<sup>104</sup> Finland, France, England, the USA, Poland, Czechoslovakia, Estonia, and even Japan.<sup>105</sup> The fact that the Weimar Constitution played an important role in the development of the content and concepts of the Constitution was due to the peculiarities of the period,<sup>106</sup> as not only the Latvian legislature, but also other Western European countries made extensive use of the progressive and liberal ideas of German constitutionalism in the process of constitutional innovation.<sup>107</sup>

Thus, it is no coincidence that the Constitution was described as a contemporary constitution at the time of its adoption.<sup>108</sup> Perhaps it was precisely the contemporaneity and the concise formulation of the values enshrined in the Basic Law<sup>109</sup> that allowed the Constitution to be fully restored after the restoration of Latvia's independence.<sup>110</sup>

What distinguished the Latvian case was the balance between modern institutional design and the cultural-political mission of consolidating a democratic republic in a region with limited prior experience of democratic governance. The members of the Constituent Assembly understood that the Constitution was not only a legal text but a cultural instrument of transformation. There is no doubt that the *Satversme* of 1922 conformed to the dominant ideas of constitutionalism in interwar Europe: it was brief, normatively coherent, procedurally legitimate, and ideologically grounded in the values of republicanism, sovereignty of the people, and the rule of law. The influence of the Weimar Constitution and other European models was not merely textual; it was conceptual. Indeed, the contemporaneity and conciseness of the *Satversme* may explain its remarkable resilience. After the collapse of Latvian independence in 1940, the *Satversme* lay dormant under Soviet rule, but it was symbolically and legally revived during the restoration of independence in 1990–1993. Its enduring normative potential was rooted in its ability to express both timeless principles and historically situated compromises.

<sup>103</sup> K. Dišlers, *Dažas piezīmes pie Latvijas Republikas Satversmes projekta...*, pp. 142–145.

<sup>104</sup> J. Pleps, *Satversmes iztulkošanas konstitucionāli tiesiskie un metodoloģiskie problēmjautājumi*, Rīga 2010, pp. 171–172; J. Jūgs, *Latvijas Republikas Satversmes pieņemšana un tās juridisko institūtu tapšanas vēsturiskais apskats*, Rīga 2007, p. 3.

<sup>105</sup> O. Gerts, *Par Latvijas Republikas Satversmes tēviem...*; D. Apine, A. Bāliņš, J. Krūmiņš et al., *Veimāras konstitūcija – Latvijas Republikas Satversmes pamatakmens*, [http://home.lu.lv/~rbalodis/Konst%20tiesibas/Doktor\\_semin\\_LR%20Satversmi/JF\\_doktoranti\\_Veimara\\_Satversme\\_07.pdf](http://home.lu.lv/~rbalodis/Konst%20tiesibas/Doktor_semin_LR%20Satversmi/JF_doktoranti_Veimara_Satversme_07.pdf) [accessed: 2024.04.05].

<sup>106</sup> D. Apine, A. Bāliņš, J. Krūmiņš et al., *Veimāras konstitūcija...*; Judgment of the Constitutional Court of 23 September 2002, 'On Compliance of the Second Sentence of Section 38(1) of Saeima Election Law with Articles 6, 8, 91 and 116 of the *Satversme*.' Published in the official gazette "Latvijas Vēstnesis", 24.09.2002, no. 136, Conclusion.

<sup>107</sup> J. Pleps, *Veimāras relativisms vai mūžības klauzula* [in:] *Tiesību interpretācija un tiesību jaunrade – kā rast pareizo līdzsvaru: Latvijas Universitātes 71. zinātniskās konferences rakstu krājums*, Rīga 2013, p. 358; *Opinion of the Constitutional Law Commission 'On the Constitutional Foundations of the Latvian State and the Untouchable Core of the Constitution'*, p. 39, [https://blogi.lu.lv/tzpi/files/2017/03/17092012\\_Viedoklis\\_2.pdf](https://blogi.lu.lv/tzpi/files/2017/03/17092012_Viedoklis_2.pdf) [accessed: 2024.05.11].

<sup>108</sup> *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 3.

<sup>109</sup> J. Pleps, E. Pastars, I. Plakane, *Konstitucionālās tiesības...*, pp. 67–68.

<sup>110</sup> *Latvijas Satversmes Sapulces stenogrammu izvilks (1920–1922)...*, p. 2.

In light of more recent scholarship on post-Soviet constitutionalism, the Latvian experience of 1920–1922 acquires renewed relevance. Comparative studies have shown that many post-Soviet states have struggled to achieve a similar level of normative coherence and institutional restraint in their foundational documents.<sup>111</sup> By contrast, Latvia's *Satversme*, drafted in the early twentieth century and restored after independence, has demonstrated a rare continuity and legal resilience.

To conclude the outline of the history of Latvian constitutionalism and the sources of law used in the process of drafting the *Satversme*, it can be said that:

- 1) The transition from an imperial system to a republic based on the values of democracy and the rule of law necessitated the drafting of a fundamental state law that would not only correspond to the individual historical and geographic conditions of the Latvian people, but also adopt the principles of democracy, sovereignty, republicanism, and parliamentarism that had been adopted in the constitutions of other Western European countries.
- 2) In drafting the Constitution of the Republic of Latvia, deputies to the Constitutional Assembly extensively applied the methods of comparative law, analysing foreign constitutions and the findings of constitutional scholars, using the Weimar Constitution, as well as the concepts of the fundamental laws of Switzerland, Baden, Tsarist Russia, Finland, France, England, the USA, Poland, Czechoslovakia, Estonia, and Japan.
- 3) The adoption of foreign constitutional practices strengthened the establishment and consolidation of Latvia as a parliamentary republic, not only in its legal dimension, but also in the practical implementation of these concepts. However, the Latvian Constitution cannot be considered identical to any European or foreign constitution.
- 4) The Constitution was designed to institutionalize parliamentary supremacy, safeguard fundamental values, and create legal mechanisms capable of withstanding executive excess or ideological distortion. Despite the failure to adopt Part II of the Constitution on fundamental rights, parliamentary legislation served as a compensatory measure, enshrining civil liberties such as freedom of expression, assembly, and association.

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<sup>111</sup> W. Partlett, H. Küpper, *The Post-Soviet As Post-Colonial: A New Paradigm for Understanding Constitutional Dynamics in the Former Soviet Empire*, Cheltenham 2022, pp. 111–116; A. Kazharski, *Central Europe Thirty Years after the Fall of Communism: A Return to the Margin?*, London 2022, pp. 182–184.

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## Summary

*Linda Lielbriede*

### **The Importance of the Sources of Law Used in Drafting the Constitution of the Republic of Latvia with the Purpose of Strengthening Constitutionalism**

The Constitution of the Republic of Latvia took two years to draft and entered into force on 7 November 1922. The process was influenced by historical events and the political situation in which the Latvian people found themselves, thus necessitating the drafting of a constitution that would meet the current needs of the people and the country, strengthening the ideas of parliamentarism, democracy and republic. Influenced by diverse parliamentary representation, the Constitution combined elements from various legal traditions, including the Weimar Constitution, the U.S., and others, while adapting them to Latvian circumstances. It marked a transition from imperial rule to a democratic republic, rooted in parliamentary and republican principles. The study examines the choices made by the Constituent Assembly, the sources of law used and the diverse considerations in the drafting process of the various concepts enshrined in the Constitution.

**Keywords:** constitutionalism, Constituent Assembly, Constitution of the Republic of Latvia, comparative constitutional law.

## Streszczenie

*Linda Lielbriede*

### **Znaczenie źródeł prawa wykorzystanych przy opracowywaniu Konstytucji Republiki Łotewskiej dla wzmocnienia konstytucjonalizmu**

Opracowywanie Konstytucji Republiki Łotewskiej, która weszła w życie 7 listopada 1922 r., zajęło dwa lata. Na proces ten miały wpływ wydarzenia historyczne i sytuacja polityczna, w jakiej znalazł się naród łotewski. Wymusiły one zredagowanie Konstytucji, która spełniałaby bieżące potrzeby narodu i państwa, wzmacniając idee parlamentarne, demokratyczne i republikańskie. Pod wpływem zróżnicowanej reprezentacji parlamentarnej Konstytucja łączyła elementy zaczerpnięte z różnych tradycji prawnych, w tym Konstytucji Weimarskiej, Stanów Zjednoczonych i innych, jednocześnie dostosowując je do łotewskich uwarunkowań. Jej przyjęcie stanowiło o przejściu od rządów cesarskich do republiki demokratycznej, zakorzenionej w zasadach parlamentarnych i republikańskich. W artykule przeanalizowano wybory dokonywane przez Zgro-

madzenie Konstytucyjne, wykorzystane przez nie źródła prawa oraz różnorodne rozważania prowadzone w procesie opracowywania rozmaitych konceptów zawartych w Konstytucji.

**Słowa kluczowe:** konstytucjonalizm, Zgromadzenie Konstytucyjne, Konstytucja Republiki Łotewskiej, porównawcze prawo konstytucyjne.

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## **National Tradition or Foreign Patterns? Sources of Inspiration for Finnish Constitutionalism at the Beginning of the Twentieth Century – A Comparative Approach**

### **1. The Constitutional Heritage of Finland<sup>1</sup>**

Maintaining some degree of independence (*Itsenäinen Suomi*), Finland existed from 1809 to 1917 as the Grand Duchy of Finland (*Suomen suuriruhtinaskunta*). This was an autonomous territory located within the Russian Empire and it was connected with the Russian Empire by a personal union. Earlier, Finland was under Swedish rule. However, on 6 December 1917, the Finnish Declaration of Independence (*Suomen itsenäisyysjulistus*) was published. The independent Kingdom of Finland (*Suomen kuningaskunta*) was proclaimed. Thus, the new Finnish state was organized in the form of a monarchy, although constitutional discussions at the time drew on the experience of both Scandinavian monarchist states, such as Sweden and Norway, and republican states, such as France and the United States.<sup>2</sup>

After the end of the civil war of 1918, constitutional legislation on the form of the new state intensified.<sup>3</sup> Until then, the basic constitutional act still in force in the

<sup>1</sup> This section in part presents material from the author's doctoral dissertation. See: D. Michalski, *Ustrój polityczno-prawny Finlandii i jego funkcjonowanie w latach 1917–2000. Studium prawnno-historyczno-porównawcze*, Warszawa 2021. It also draws on material from D. Michalski, *Constitutional Norms in the Polish and Finnish Constitutions of the Interwar Period*, "Studia Iuridica" 2019, vol. 80, pp. 235–249.

<sup>2</sup> Compare them in: *Monarkia waiko tasavalta?*, "Turun Sanomat" 1918, issue 4034, p. 4; K. Wainio, *Monarkia waiko tasavalta?*, "Uusi Aika" 1918, issue 62, pp. 4, 6.

<sup>3</sup> The civil war, which was fought to determine the form of the new state. The combatants were supporters of independence and complete independence from Soviet influence (the Whites) and leftist revolutionaries supported by the Bolsheviks (the Reds). The war lasted 108 days and resulted in over 30,000 casualties. For more on this topic, see, among others: D. Michalski, *Fińska droga do niepodległości – rewolucja 1917–1918* [in:] *O wolność i sprawiedliwość: chrześcijańska Europa między wiarą i rewolucją*, eds. U. Cierniak, N. Morawiec, A. Bańczyk, series: Człowiek, Wiara, Kultura, no. 4, Częstochowa 2018, pp. 503–514; B. Szordykowska, *Historia Finlandii*, Warszawa 2011, pp. 231–237; S. Hentilä, *Od uzyskania niepodległości do zakończenia wojny kontynuacyjnej 1917–1944* [in:] *Historia polityczna Finlandii 1809–1999*, eds. O. Jussila, S. Mentilä, J. Nevakivi, Kraków 2001, pp. 118–128.

country was the Instrument of Government from 1772. In that year, the Swedish king Gustav III Vasa, after a year of rule, led a coup resulting in limiting the competences of the *Riksdag* (Swedish parliament) in favour of the monarch. Thus, on 21 August 1772, the Instrument of Government was adopted in Sweden, a fundamental law the provisions of which granted the king full executive power. Finland, then under Swedish rule, was forced to accept the provisions of this new Swedish constitutional act.<sup>4</sup> The Finnish Parliament (*Eduskunta*) confirmed it on 15 May 1918.<sup>5</sup> Although in Sweden a new Instrument of Government was adopted in 1809, Finland decided to maintain the previous one because the new one came into force when Finland had already become part of the Russian Empire.

After the civil war, elections to the *Eduskunta* took place in 1919, the outcome of which ultimately determined the failure of any monarchist model. The vast majority (three quarters) of seats were won by groups supporting a republican form of government. The consequence of this was a departure from a monarchist model for a republican one.<sup>6</sup> The task of enacting the constitution was set before the new Parliament. A constitutional commission presented relevant projects to the Parliament.<sup>7</sup> Two of them that were monarchist were rejected, which is understandable in the political situation of that time. The new project selected included points of contention regarding the political position of the President of the Republic and the procedure for his election. Right-wing groups supported strong presidential power, while left-wing groups supported the strong rule of the Parliament.<sup>8</sup>

The *Eduskunta* approved the republican Instrument of Government (*Suomen Hallitusmuoto*)<sup>9</sup> on 21 June 1919, adopting the draft of a new Constitution. Thus, there was a change in the form of government from a monarchist one to a democratic and republican one. The regent Carl Gustav Emil Mannerheim approved the new Instrument of Government on 17 July 1919.<sup>10</sup> The name of the basic law, Instrument of Government, was historically conditioned and referred to the normative act of 1772, valid in Finland from the time of the Swedish dependence.<sup>11</sup>

<sup>4</sup> On this topic, see, among other: B. Szordykowska, *Historia Finlandii...*, pp. 64–66; T. Cieślak, *Historia Finlandii*, Wrocław–Warszawa–Kraków 1983, pp. 111–112.

<sup>5</sup> J. Paasivirta, *Finland and Europe. The Early Years of Independence 1917–1939*, Helsinki 1988, p. 148.

<sup>6</sup> B. Szordykowska, *Historia Finlandii...*, p. 239; T. Cieślak, *Historia Finlandii...*, p. 228; S. Hentilä, *From the Power of the Estates to the Power of the People* [in:] *The Parliament of Finland*, Helsinki 2000, p. 37; *idem*, *Od uzyskania niepodległości...*, p. 141.

<sup>7</sup> J. Nousiainen, *The Finnish Political System*, Cambridge, MA 1971, p. 145; T. Cieślak, *Historia Finlandii...*, p. 228.

<sup>8</sup> L.A. Puntila, *The Political History of Finland 1809–1966*, Helsinki 1974, pp. 121–122; S. Hentilä, *Od uzyskania niepodległości...*, p. 142.

<sup>9</sup> *Suomen Hallitusmuoto*, Suomen Asetuskokoelma 94/1919, pp. 1–23.

<sup>10</sup> Y. Blomstedt, *A Historical Background of the Finnish Legal System* [in:] *The Finnish Legal System*, ed. J. Uotila, Helsinki 1966, p. 21; J. Osiński, *Prezydent Republiki Finlandii* [in:] *Prezydent w państwach współczesnych*, ed. *idem*, Warszawa 2009, p. 196. On the beginning of the republic and its authorities, see also: P. Rajala, *Suomen historia*, Porvoo 1989, pp. 52–53; L.J. Hendell, P. Katara, G.F. Schmidt, *Finnland im Anfang des XX. Jahrhunderts*, Helsingfors 1919, pp. 546–588.

<sup>11</sup> T. Cieślak, *Historia Finlandii...*, p. 228.

The adoption of the constitutional act ended disputes about the form of the state and completely ruled out the possibility of building a system of government other than a republican one. It also indicated where to look for the basic constitutional principles of the Republic of Finland, which became a democratic state based on the rule of law, in which the principle of the separation of powers applied. However, because of strong monarchist traditions, the division into legislative, executive, and judiciary was not clear. While the judiciary was clearly separated from the other powers, the legislature and the executive were not clearly or transparently separated. The competences of the president were distinguished, for example, by the extraordinary right of legislative initiative.<sup>12</sup> The adoption of the new constitution resulted in the creation of a strong power centre, granted to the office of the president. As a result of the experience of the political system and a historical tradition stemming from the periods of Swedish and Russian rule, the constitutional domination of a strong and independent head of state appeared in Finnish republicanism. That is why the elected President was granted an almost unchanged scope of state power from that of the constitutional king.<sup>13</sup>

A characteristic element of Finnish constitutionalism at the time was the exclusion of the powers and functioning of the Parliament (that is, legislative authority) from the scope of the basic law. This was regulated in a separate normative act. In Finland, the Parliament Act of 1906 was still in force from the period of the Russian Empire.<sup>14</sup> In 1928 it was replaced by the Parliament Act<sup>15</sup>, a normative act of an already independent Finland.

The Parliament Act of 1928 was one of a series of constitutional acts issued from the beginnings of the independence of the Republic of Finland until the adoption of a new unified constitution in 1999. It repealed the previously binding law of a similar name, which was traditional for Finnish constitutionalism, the Act on the Parliament of the Grand Duchy of Finland.<sup>16</sup> This was mainly a justification for the separate regulation of matters concerning the functioning of the parliament. The previous, separate regulation of matters concerning legislative power was appropriate primarily for the period of autonomy, when parliament functioned as the legislative body of the Grand Duchy of Finland. At that time, the remaining matters were not subject to constitutional regulation, because the appropriate norms had to be sought in the acts

<sup>12</sup> V. Merikoski, *The System of Government* [in:] *The Finnish Legal System...*, pp. 25–26, 31.

<sup>13</sup> For more on this topic, see: D. Michalski, *Akt o formie rządów z 1919 roku – pierwsza konstytucja niepodległej Finlandii*, "Studia z Dziejów Państwa i Prawa Polskiego" 2016, vol. 19, pp. 252–253; J. Karp, *Prawo wyborcze na urząd prezydenta w Finlandii* [in:] *Prawo wyborcze na urząd prezydenta w państwach europejskich*, eds. S. Grabowska, R. Grabowski, Warszawa 2007, pp. 84–85; T. Cieślak, *Historia Finlandii...*, pp. 228–229; B. Szordykowska, *Historia Finlandii...*, pp. 240–241; M. Klinge, *Krótką historią Finlandii*, Helsinki 1997, p. 122; K. Ciemniewski, *Zasady ustroju politycznego Finlandii*, Bydgoszcz 1971, pp. 125–126.

<sup>14</sup> For more on this topic, see: D. Michalski, *Akt o formie rządów z 1919 roku...*, p. 253; M. Grzybowski, *Systemy konstytucyjne państw skandynawskich*, Warszawa 1998, p. 17.

<sup>15</sup> *Valtiopäiväjärjestys*, Suomen Asetuskokoelma 7/1928, pp. 101–116.

<sup>16</sup> *Suomen Suuriruhtinaanmaan Valtioapäiväjärjestys*, Suomen Suuriruhtinaanmaan Asetuskokoelma 26/1906, pp. 1–24.

of the Russian Empire, which were also binding in the autonomous territory. Therefore, a characteristic element of Finnish constitutionalism at that time was the exclusion of regulations concerning the competences and principles of the functioning of the parliament. Legislative power, outside the scope of the fundamental law, was regulated in a separate normative act of a constitutional nature.<sup>17</sup>

## 2. Constitutional Influences in Finland: A Comparative Approach to Contemporary Finland

For centuries, the Nordic countries, and in a narrower sense, the Scandinavian countries (Denmark, Norway, and Sweden), were considered a politically homogeneous area. Despite differences, these societies established cooperation, which developed an awareness of the bonds that connected them. At the same time, until the end of the Middle Ages, the historical development of the Nordic areas was based on the strategic dominance of political powers. On the one hand, there was the Kalmar Union in which Denmark had a dominant position, and on the other, Sweden (from 1523) upon which Finland was dependent. However, the development of these areas led to their political disintegration. The most important moments here were: the collapse of the Kalmar Union in 1523; Finland's separation from Sweden in 1809 and its full independence in 1917; Norway's transition to Swedish rule in 1814 and its gaining full independence from 1905; and finally, the severance of Iceland's last ties with Denmark in 1944.<sup>18</sup>

The history of Nordic constitutionalism is historically based on two states, Denmark and Sweden, which were hegemons in the region and influenced other states. For this reason, two varieties of Nordic constitutionalism can be distinguished: eastern (Sweden and Finland) and western (Denmark, Norway, and Iceland).<sup>19</sup> However, the factor that integrated Nordic constitutionalism was the spread of Swedish institutional models to other countries—Norway, Finland and, to a lesser extent, Denmark.<sup>20</sup> In sum, the Scandinavian political model is characterised by the existence of the following institutions: social democracy functioning within a monarchy, legalism with often anachronistic constitutions, the frequent lack of an explicit principle of popular sovereignty, and the original institution of the *ombudsman*.<sup>21</sup>

Finnish constitutionalism and its constitutional institutions were strongly influenced by Nordic constitutionalism, especially Swedish constitutionalism, from the very beginning of its development. This was because Finland was an integral part of the Swedish Empire until 1809 and later of the Russian Empire from 1809 to 1917.

<sup>17</sup> M. Grzybowski, *Systemy konstytucyjne państw skandynawskich...*, p. 17.

<sup>18</sup> N. Andrén, *Government and Politics in the Nordic Countries: Denmark, Finland, Iceland, Norway, Sweden*, Stockholm 1964, pp. 13–14.

<sup>19</sup> N. Herlitz, *Elements of Nordic Public Law*, Stockholm 1969, p. 155.

<sup>20</sup> R.F. Thomasson, *Sweden. Prototype of Modern Society*, New York 1970, p. 13.

<sup>21</sup> A. Grochulski, *Państwa skandynawskie [in:] Systemy ustrojowe państw kapitalistycznych*, ed. E. Zieliński, Warszawa 1975, p. 285.

Importantly, despite over a hundred years of Russian domination, the Finns resisted Russification and retained the traditions and constitutional institutions with which they had been associated for centuries. In this situation, Finnish constitutionalism evolved in its own direction, creating original solutions, institutions, and constitutional mechanisms, which were, however, very similar to Swedish ones.<sup>22</sup> Geographic proximity to Scandinavia was not the only reason for adopting and continuing Nordic constitutional traditions. There were political, social, and economic reasons for this.<sup>23</sup> A system of several constitutional acts was created during the period of Swedish domination and for political reasons the constitution of Finland was initially based on four sources. These are primarily two fundamental laws, which, because of the subject matter they regulate, can be referred to generally as the 'form of government' and the 'parliamentary act'.<sup>24</sup>

The principles of the political system of Finland, as defined in its 1919 Constitution, differed from most forms of government in force in various European countries after the First World War. These European constitutions, while emphasizing the clear supremacy of parliaments, granted heads of state a limited representative role in principle. The president was a symbol of national unity, stood outside or above political parties, did not make his own key political decisions, but relied on the decisions of the prime minister or the cabinet. The head of state in a parliamentary system was actually an advisor to the cabinet and performed more representative functions, in contrast to other political forms, in which ministers were his advisors and executors of decisions.<sup>25</sup> In authoritarian or even totalitarian states, the head of state had far-reaching powers. However, the situation was different in Finland, where the indirectly-elected President was granted a scope of state power that was almost unchanged from that of the constitutional king.

Today, the constitutions of the Nordic states do, indeed, define their forms of government. Denmark, Norway, and Sweden are parliamentary, hereditary constitutional monarchies, while Iceland and Finland are parliamentary republics. Apart from Iceland, the other countries have complex constitutions, which consist of several legal acts regulating the functioning of representative bodies (Finland, Sweden), the responsibility of public officials (Finland), the succession to the throne (Denmark, Sweden), and even freedom of speech and the press (Sweden). The basic

<sup>22</sup> V. Serzhanova, D. Wapińska, *Ewolucja konstytucjonalizmu w Finlandii* [in:] *Aktualne problemy reform konstytucyjnych*, ed. S. Bożyk, Białystok 2013, pp. 417–418. See also: P. Kastari, *The Historical Background of Finnish Constitutional Ideas*, "Scandinavian Studies in Law" 1963, no. 7. The influence of Nordic legal and constitutional institutions can be observed in the case of Sweden, but also in Norway and Denmark: M. Grzybowski, *Geneza i współczesne tendencje rozwojowe skandynawskich instytucji parlamentarnych*, "Gdańskie Studia Prawnicze" 2014, vol. 31, pp. 281–304.

<sup>23</sup> This position is taken, among others, by M.A. Mogunowa in *Skandinavskije gosudarstwa. Centralnyje organy vlasti*, Moskwa 1975.

<sup>24</sup> P. Kastari, *The Finnish Constitutional System and Its Development* [in:] *Constitution Act and Parliament Act of Finland*, Helsinki 1967, p. 5.

<sup>25</sup> D. Michalski, *Ustrój polityczno-prawny Finlandii...*, pp. 234–235; K. Cierniewski, *Zasady ustroju politycznego Finlandii...*, p. 129.

principles of the states' constitutions are included in the Forms of Government that apply in them. The original constitutions have many similarities, but, generally, because of the different socio-political conditions in which they were created, they affect the political life of individual countries in different ways.<sup>26</sup>

The Swedish Constitution of 1809 was adopted at a time of great internal tensions, and although it was intended to separate powers effectively to prevent royal absolutism, it maintained the monarch's quite extensive prerogatives. However, the new Constitution of 1974 adopted the principle that all public authority comes from the people. This increased the role of the unicameral parliament and the head of government, while the monarch remained the sole head of state. The Finnish Constitution of 1919 was created after independence and the end of the civil war and adapted many previously functioning Swedish institutions and, to a much lesser extent, Russian ones. As a result, a strong constitutional position was granted to the republican head of state while preserving a fairly significant position for the Parliament operating on the basis of a modern act from 1906. However, in the currently applicable fundamental law, more emphasis is placed on parliamentary government.<sup>27</sup>

In terms of structure and substantive content, original Nordic constitutions did not contain solemn preambles, and their normative part consisted primarily of the principles of the system, the division of powers, although often allocating primacy to the executive, to the judiciary, and sometimes to the principles of the supremacy of the people. They also offer guarantees of fundamental rights (usually in contemporary acts). For this reason, old constitutions often did not correspond to the changing socio-political situation of the nineteenth and twentieth centuries, which made it necessary to amend them through a special procedure. Thus, in Sweden, to amend the Constitution, it was necessary to vote on it twice, while maintaining the principle that the second vote should take place after the elections to the *Riksdag*. In Norway, the parliamentary-qualified majority entitled to adopt constitutional amendments became two-thirds of representatives. On the other hand, in Finland, which adapted Swedish and Norwegian institutional solutions, any amendment had to be adopted first by a majority vote, and then, after parliamentary elections, by another resolution requiring a qualified majority of two-thirds of the votes. The exception was the recognition of an amendment as urgent, which resulted in its being considered by a difficult-to-obtain five-sixths majority and its adoption by a two-thirds majority, without the need to postpone it until the next elections. The Finnish Constitution was made more flexible by the possibility of adopting extraordinary acts, which made exceptions to the validity of constitutional norms. Indeed, this is a heritage of the period of Russian rule and the lack of any possibility of changing the basic rules in the state without the consent of the Empire.<sup>28</sup>

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<sup>26</sup> D. Michalski, *Ustrój polityczno-prawny Finlandii...*, p. 250.

<sup>27</sup> *Ibid.*, pp. 250–251.

<sup>28</sup> *Ibid.*, pp. 251–252.



Differences are also notable in the matter of the executive. Currently, in Iceland and Finland, the president is elected by universal suffrage, while in Denmark, Sweden, and Norway, a hereditary king holds power for life. Nevertheless, in practice, the constitutional position of the executive in relation to the legislature is similar, as they exercise their power through ministers who are responsible to parliaments. In Scandinavian political and constitutional terminology, the term government is usually understood as comprising the head of state together with a cabinet of ministers. In contrast to the British constitutional tradition, ministers do not necessarily have to be members of parliament, and in Norway, combining these functions is even unacceptable. Generally, in Denmark, Iceland and, with some restrictions, in Norway, there is no duality of executive power, because ministers at the head of large departments centrally manage the administration.<sup>29</sup>

Common elements can be seen in the matter of legislative power. Unicameralism and four-year terms of office are in force everywhere in the Nordic states. Unicameralism existed first in Norway, and in 1919 it was introduced in Finland, and in 1953 in Denmark,<sup>30</sup> and in Sweden it has existed since 1971.<sup>31</sup> However, these are not uniform bodies in terms of institutional structure; for example the Norwegian *Storting* meets in two chambers, while the Finnish *Eduskunta* is a typical unicameral body.

Another similarity is the appointment of a Parliamentary Ombudsman to monitor the legality of the application of the law by the courts and administration. The office of Ombudsman was established originally in Sweden in 1809 and spread to other countries in the region. A common feature almost everywhere is the parliamentary method of appointing the Ombudsman from among people of high social prestige and with legal training. The Ombudsmen's task is to ensure that the law is analyzed by state bodies and that legislation is in accordance with the constitution. Annually, reporting to the parliament, they publish their opinions, demand changes to resolutions passed incorrectly, and, exceptionally, they can even refer the matter to the appropriate judicial body. They are a body that supervises and admonishes, and, above all, they are independent of other state bodies.<sup>32</sup> They can act on citizens' complaints and, thus, protect their rights against abuses.<sup>33</sup> In Sweden and Finland, a Chancellor of Justice is also appointed, who has similar competences, but is also a legal advisor to the government. Both bodies cooperate to avoid conflicts of competences and conflicts of duties.<sup>34</sup>

<sup>29</sup> A. Grochulski, *Państwa skandynawskie...*, pp. 297, 301.

<sup>30</sup> M. Sczaniecki, *Powszechna historia państwa i prawa*, Warszawa 1994, p. 504.

<sup>31</sup> L. Kowalska-Postén, *Zarys rozwoju parlamentaryzmu w Szwecji*, "Komunikaty Instytutu Bałtyckiego" 1982, issue 34, p. 43.

<sup>32</sup> W. Szyszkowski, *Instytucja ombudsmána w nowoczesnym państwie*, "Zeszyty Naukowe Uniwersytetu Mikołaja Kopernika w Toruniu" 1969, issue 37, pp. 37–45.

<sup>33</sup> E. Hansen, *Ombudsman w państwach skandynawskich i podstawowe przejawy jego działalności*, "Studia Prawnicze" 1972, issue 32; *idem*, *O nadzorze ogólnym w Szwecji*, "Nowe Prawo" 1960, no. 3, pp. 367–368; *idem*, *Instytucja ombudsmána w Norwegii*, "Nowe Prawo" 1968, no. 3.

<sup>34</sup> A. Grochulski, *Państwa skandynawskie...*, p. 310. See also: P. Kastari, *Delegat parlamentu i kanclerz sprawiedliwości Finlandii*, "Państwo i Prawo" 1963, no. 3; K. Cierniewski, *Zasady ustroju politycznego*

The interpretation of the constitution and the conformity of the adopted legal acts with it is mostly the responsibility of parliaments. Nordic constitutional law scholars even claim that despite their penchant for legalism, the great authority of the constitution does not mean that it is strictly respected.<sup>35</sup> As a result, little importance is attached to examining the constitutionality of laws. Perhaps because of the high sense of legalism, it would be difficult to pass a law that contradicts the primary principles. In connection with this, the courts have been called upon to a small extent for this purpose in Denmark, Norway, and Iceland, while judicial review is practically not used in Finland or Sweden.<sup>36</sup>

### 3. The Specificity of Finnish Constitutional Arrangements<sup>37</sup>

The political and legal system of Finland in the period 1917–2000 was marked by its own characteristic solutions. Apart from traditional, modern constitutional principles, known in European and world constitutionalism, Finnish constitutionalism was influenced by institutions developed primarily during the period of Swedish rule and, to a lesser extent, Russian domination (including the strong constitutional position of the head of state, a unique legislative body, a special procedure for amending the fundamental law, exceptional laws, and the lack of constitutional courts).

During the period of political stabilization after the First World War, Finnish principles and basic constitutional rules did not change. After gaining independence in 1917, work began on repealing the fundamental laws adopted during the period of Swedish dependency (including the Instrument of Government of 1772) and Russian dependency (including the Parliament Act of 1906), which were still in force. Until the adoption of a new, unified constitution<sup>38</sup> in 1999, Finland's constitutional system was regulated by a constitution composed of several acts. The Instrument of Government of 1919, the Parliament Act of 1928,<sup>39</sup> the Ministerial Responsibility Act of 1922,<sup>40</sup> and the Act on the High Court of Impeachment of 1922<sup>41</sup> were considered as fundamental constitutional acts, which repealed the previously binding acts regulating the principles of the political system in the state. A much desired period of political stabilization was introduced after the turbulent period of the First World War by the first of these acts

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*Finlandii...*, pp. 203–206; M. Grzybowski, *Szwecja* [in:] *Systemy ustrojowe państw współczesnych*, eds. S. Bożyk, M. Grzybowski, Białystok 2012, p. 209.

<sup>35</sup> N. Herlitz, *Elements of Nordic Public Law...*, p. 44.

<sup>36</sup> A. Grochulski, *Państwa skandynawskie...*, p. 285.

<sup>37</sup> This section draws on my research presented in my doctoral dissertation: D. Michalski, *Ustrój polityczno-prawny Finlandii...*, pp. 269–271.

<sup>38</sup> *Suomen perustuslaki*, Suomen Asetuskokoelma 731/1999.

<sup>39</sup> *Valtiopäiväjärjestys*, Suomen Asetuskokoelma 7/1928, pp. 101–116.

<sup>40</sup> *Laki eduskunnan oikeudesta tarkastaa valtioneuvoston jäsenten ja oikeuskanslerin virkatointen lainmukaisuutta*, Suomen Asetuskokoelma 274/1922, pp. 1099–1100.

<sup>41</sup> *Laki valtakunnanoikeudesta*, Suomen Asetuskokoelma 273/1922, p. 1098.

(the Instrument of Government). Moreover, for the Finnish people the balance struck here had even greater significance after the end of the civil war in 1918.

My research indicates that by introducing a republican political system, with a specific role of the head of state and its dominant influence on the political situation in the state, a kind of compromise was developed between two extremely different political concepts (a republic as opposed to a monarchy). Thus, the parliamentary-cabinet system typical of the republican form of government was not introduced, as was generally the case in other European countries, but rather a strong (almost actually a monarchical) position was allotted to the president. Through such a specific hybridization of the political system, it was possible to gain the greatest possible social support for the idea of the political development of the new state.

What distinguished constitutionalism in Finland from European solutions, apart from the fact that the subject of constitutional regulation was regulated in several acts and from the specific type of republican system adopted, was the special procedure for adopting and amending fundamental laws. The procedure by which the implementation of an adopted amendment was suspended until the first ordinary session after new elections and its re-adoption by a qualified majority was specific and derived from Swedish legal culture.

In addition to traditional constitutional laws, Finland's legal system had a number of exceptional laws, deriving from the period of dependence on Russian legislation. Systemic reforms during the period of autonomy, and especially its limitation, were practically impossible, and yet were necessary because of the political needs of that time. Their provisions were able indirectly to affect the constitutional system, as they could be temporary or permanent laws. Naturally, the legal basis for issuing exceptional laws was rooted in both the Instrument of Government and the Parliament Act. At that time, unable to change the fundamental laws, and wanting to ensure the protection of fundamental rights and property, it was decided to adopt laws in the manner provided for changing the fundamental law, without permanently affecting the functioning of the system. This led to the flexibility of the Finnish constitution, while maintaining the principles of the system.

Another important aspect that distinguished the Finnish system was the lack of an appropriate constitutional court. No judicial body was established that was authorized to examine the compliance of an adopted law with the fundamental laws. Respecting the principle of separation of powers, ordinary courts also lacked the authority to assess the quality of adopted law. However, specific Nordic bodies were established, such as the Chancellor of Justice and the Parliamentary Ombudsman, the authority of whom, despite seemingly similar competences, permitted reaching agreements beyond party divisions; their opinion on adopted laws was accepted without dispute.

The main effect of the systemic evolution of eighty years of the so-called 'first constitutional period' (1919–2000) was the strengthening of parliamentarism by shifting the centre of gravity of power from the head of state, which weakened the position of the head of state in favour of the legislative body. Such a rich legacy of stable constitutional achievements was established without systemic revolution while

incorporating them in uniform fundamental law, the one that is currently applicable that, in 2000, began the so-called second constitutional period in Finland.

Finally, the specifics of Finland's political and legal system are confirmed by comparing its system with those of other European countries. This specificity means that Finnish institutions, although closest to the Nordic system, are characterized by their own distinctiveness. These include: the special systemic position of the head of state; constitutional exceptional laws; the suspension of the execution of a draft constitutional law that has been voted on until the first ordinary session after elections; the lack of constitutional courts, and the unicameral nature of the representative body. This does not permit an unambiguous positioning of Finland's system in the traditional theoretical division into democratic-liberal, authoritarian, socialist, or even totalitarian states. Because of the form of government and the systemic position of the head of state, Finland was closest to authoritarian states in the so-called first constitutional period (1919–2000). However, through the influence of the legislature and the judiciary and via a wide catalogue of fundamental rights that were actually applied, Finland is not far from democratic-liberal states. Thus, the specific hybridization of power translates into an ambiguous definition of the entire political and legal system, which makes this country extremely interesting.

## Conclusions

There is some debate as to whether contemporary constitutional solutions in Finland emerged from a national tradition or from foreign patterns. One can state that the origins of Finnish constitutional solutions are based both on Swedish patterns and on Russian influences. As soon as Finland gained its independence for the first time, the priority was to define the constitutional legal basis.

The current political and legal system of Finland is characterised by its own properties in terms of solutions but is not completely self-determined in its origins. As a result of breaking free from Russian dependence, the idea has been to emphasise the continuity of the legacy of the Swedish legal tradition with Finnish national separateness. Apart from traditional, modern constitutional principles, known from global and European constitutionalism, the Finnish constitutional situation was influenced by institutions developed primarily during the period of Swedish dependence and, to a lesser extent, during the period of Russian dependence. In consequence, the Constitution in the first constitutional period (1917–2000) consisted of several legal acts and the strong constitutional position of the head of state. However, the second constitutional period (from 2000) is still characterised by a unicameral legislative body (*Eduskunta*), a special procedure for amending the fundamental law, exceptional laws, and a lack of constitutional courts.

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## Summary

*Dawid Michalski*

### **National Tradition or Foreign Patterns? Sources of Inspiration for Finnish Constitutionalism at the Beginning of the Twentieth Century – A Comparative Approach**

Finland became a sovereign subject of international law on 6 December 1917. One of the manifestations of state-building is the adoption of a Fundamental Law, which is generally given the form of a constitution. In the political history of Finland, there is a normative act that is referred to as that constituting the foundations of the system of the independent Finnish state. Indeed, this was not the only act comprehensively regulating constitutional matters in the state. Thus, the constitution of the newly established state was not unitary in nature, but complex. Moreover, it was initially based partly on foreign normative acts, taken over from the period of dependence, that is, Swedish and Russian acts. This article discusses the historical inspirations for Finnish constitutionalism. The following research questions were asked in the course of the research that preceded the article: 1) What was the constitutional heritage of Finland's initial period of independence?; 2) Whose constitutional experiences were the inspiration for the sources of Finnish constitutional law?; 3) What is the specific nature of Finnish constitutional arrangements?

**Keywords:** comparative approach, constitutional heritage, constitutional influences, Finland.

## Streszczenie

*Dawid Michalski*

### **Tradycja narodowa czy obce wzorce? Źródła inspiracji dla fińskiego konstytucjonalizmu na początku XX wieku – Finlandia w ujęciu porównawczym**

Finlandia stała się suwerennym podmiotem prawa międzynarodowego 6 grudnia 1917 r. Jednym z przejawów występowania czynników państwowotwórczych jest przyjęcie praw fundamentalnych, którym na ogół nadawano formę konstytucji. W historii politycznej Finlandii istnieje akt normatywny, który jest określany jako akt stanowiący podwaliny ustroju niepodległego państwa fińskiego. Jak się jednak okazało, nie był to jedyny akt kompleksowo regulujący materię konstytucyjną w państwie. Konstytucja nowo powstałego państwa nie była zatem pojedynczym aktem, lecz miała złożony charakter. Co więcej, początkowo opierała się częściowo na obcych aktach normatywnych, przejętych z okresu zależności, odpowiednio – od Szwecji i od Rosji. Celem niniejszego artykułu jest przeprowadzenie badań nad historycznymi inspiracjami fińskiego konstytucjonalizmu. Dla prowadzonych analiz zadano następujące pytania badawcze: 1) Jakie było dziedzictwo konstytucyjne początkowego okresu niepodległości Finlandii?; 2) Czyje doświadczenia konstytucyjne były inspiracją dla źródeł fińskiego prawa konstytucyjnego?; 3) Jakie są szczególne cechy fińskich urządzeń konstytucyjnych?

**Słowa kluczowe:** podejście komparatystyczne, dziedzictwo konstytucyjne, wpływy konstytucyjne, Finlandia.

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# Emerging Parliaments between Corporative Representation and Interaction with the Royal Courts: Parliamentary History in Late Medieval and Early Modern Central Eastern Europe

## I. Introduction: Rethinking Proto-Parliamentarian Representation in Interrelation with the Consolidation of Royal Rule

In late medieval Europe from the twelfth to the fifteenth centuries, the expansion of court advisory bodies (*curiae extraordinariae, plenae, generales*) into representative bodies of the estates accompanied the consolidation of royal rule. This innovative focus of parliamentary history onto a 'royal counterpart' godfathers the essay's approach to a 'mirrored choreography', and it starts from the following considerations: there are common patterns of the consolidation of monarchical rule typically manifested as the institutionalised differentiation of the princely ruling organisation (*curia regis*) from the court as royal household: the formation of a royal chancellery, the struggle for supreme jurisdiction, and the establishment of a financial administration.

All these lordly traces onto the 'foundation of the modern state' ('*De vestiging van de moderne Staat*'),<sup>1</sup> to borrow a phrase from Raoul C. van Caenegem, are characterised by a rationalisation of rule in the Weberian sense;<sup>2</sup> this necessitated the expansion of the royal circle of advisors for political matters through the appointment of a specialised chancery, legal and financial experts, whose legal (or clerical) expertise often carried on learned legal thought; the less the rulers' decisions were based on traditional customary law, the more they required the approving consent of professional subjects, in order to act in accordance with the customs and 'old laws' of the land. Such advisory bodies (*curiae extraordinariae, plenae, generales*), if amplified as court or lords' assemblies (*Hof-* or *Herrentage*), seem to be the nucleus, the seed for the emergence

<sup>1</sup> R.C. van Caenegem, *Over Koningen en Bureaucraten, Oorsprong en ontwikkeling van de hedendaagse staatsinstellingen*, Amsterdam–Brussels 1957, pp. 7, 53 ff.

<sup>2</sup> J. Winckelmann, M. Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, 5. Auf., Tübingen 1972, pp. 124 ff., 815 ff., 822; W. Reinhard, *Geschichte der Staatsgewalt: Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*, München 1999, pp. 125, 141 ff. The country reports on Poland and Hungary are also inspired by his account (p. 142 ff.).



of the estates' representative bodies. From the innermost circle of the closest advisors a Privy Council could emerge as the central governing body, which in the context of an elective kingship (such as in Scandinavia or East-Central Europe) could become an independent centre of power in the hands of the high nobility. Such a court-related genesis sheds new light on the advisory bodies' often misleadingly abbreviated description as prototypes of today's parliaments.<sup>3</sup> It is the aim of this article to discuss them as a *forum*, a communicative arena to negotiate the nobility's claim to political leadership throughout Europe, to their customary right to co-decision, and to their rights to be consulted in certain national matters.

Their origin in the *curia* not only marks the ambivalence of aristocratic rule through political predominance due to royal reference, on the one hand, and competition with the crown for rule, on the other,<sup>4</sup> but, above all, the consensus-based nature of pre-modern rule.<sup>5</sup> 'What concerns all must be approved by all' (Codex 5.59.5.2: *Quod omnes tangit ab omnibus comprobetur*).<sup>6</sup> This came close to Aristotelian thinking about the mixed constitution, the favourable interaction of monarchical majesty (*maiestas*), aristocratic authority (*auctoritas*), and democratic freedom (*libertas*).<sup>7</sup> Kingdoms thus amounted to entities (*universitates*), and estates were legitimised within them, as is still expressed today in the English triad of the 'King-in-Parliament' (denominating the King in both Houses of Parliament).

<sup>3</sup> Early German constitutionalism (Art. 13 DBA, Art. 20 WSA) is eager to avoid the 'revolutionary' term parliament and uses estates instead (*landständische Verfassungen*). The pre-modern assemblies of the estates, however, represented the sum of individual interests (Rousseau's *volonté de tous*), never the overall interests of the people (Rousseau's *volonté générale*). This often seems to have been the reason for the failure of the formation of the estates as representative bodies.

<sup>4</sup> R. Scheyhing, *Recht* [in:] *Handwörterbuch zur deutschen Rechtsgeschichte* (hereinafter: HRG), eds. A. Erler et al., 1<sup>st</sup> ed., Berlin 1995, col. 46 ff.; W. Reinhard (*Geschichte der Staatsgewalt...*, Fn. 2, p. 218) cites the right of convocation as an example of the ambivalence between competition and closeness: even if the self-organisation of the estates (town federations, Aragonese conjurations) laid at the core the estates' assemblies, their coming together remained depended on the monarchical initiative. Thus, for Reinhard, 'the estates system was a monarchical organisation'.

<sup>5</sup> I. Reiter, *Repräsentation* [in:] HRG, vol. 4, col. 906.

<sup>6</sup> VI 5.12.29, Liber sextus Lib. 5, Tit. XII *De Regulis Iuris*, Regula XXIX: *Quod omnes tangit debet ad omnibus approbari*, cited Friedberg, p. 1122. Cf. B. Tierney, *Religion, Law, and the Growth of Constitutional thought 1150–1650*, Cambridge 1982, pp. 59, 80, 84; *idem*, *Foundations of the Conciliar Theory, the Contribution of the Medieval Canonists from Gratian to the Great Schism*, Leiden 1998, p. 43; W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 217; Y. Shang, *A Historical and Legal Comparison between Tianxia Wei Gong and Quod Omnes Tangit*, series: *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 10, Cham 2023. For basic principles of representation, see H. Hofmann, *Repräsentation. Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, 4. Aufl. mit einer neuen Einleitung, Berlin 2003.

<sup>7</sup> This aligns with the classification introduced by G. Barudio (*Das Zeitalter des Absolutismus und der Aufklärung*, Frankfurt am Main 1981, p. 14 ff.) according to the Scandinavian tripartite model of King/Privy Council/Diet, which seeks to overcome the dualistic constitutional thinking of King/Estates (e.g., D. Willoweit, S. Schlinker, *Deutsche Verfassungsgeschichte. Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, 8<sup>th</sup> ed., München 2019, § 11 II, Rn. 7, p. 83). For this argumentation in analysis of Barudio, see W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 223 ff.

Thereby, the thinking and organising of a nation-wide corporative representation has a decisive constitutionalising effect, irrespective of structural differences between two-chamber or three-curia systems.<sup>8</sup> The latter resulted from different social conditions or varying influences of the clergy, nobility, and cities,<sup>9</sup> or of a kind of 'political geography' (Kazimierz Orzechowski).<sup>10</sup> The approach to negotiating spheres of influence corresponds with the ReConFort-focus on the communicative dependency of rule: conflicts have a constitution-building power.<sup>11</sup> Recent historiography has underlined this formative impact of the dynamic communicative effects of bargaining for power.<sup>12</sup> From this, the essay's second point of interest is drawn: it was the emergence of the estates' assembly that had a formative impact on constituting the kingdom.<sup>13</sup> This will be explained on the basis of parliamentary formation processes

<sup>8</sup> T. Ertmann, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe*, Cambridge 1997, pp. 19–25; O. Hintze, *Typologie der ständischen Verfassungen des Abendlandes* (1930) [in:] *Staat und Verfassung. Gesammelte Abhandlungen zur Allgemeinen Verfassungsgeschichte*, eds. *idem*, G. Oestreich, 3., durchges. u. erw. Aufl., Göttingen 1970, pp. 120–139, 124 ff. No typological alternative (bicameral type/parliamentary monarchy of the English type or tricursal type/absolute monarchy) can be proven. See fundamentally, W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 223 ff. Cf. also G. Günter, *Das Zeitalter...*, pp. 14, 37, 83, 90, 365, 385.

<sup>9</sup> Cf. the argumentation of U. Seif (= Müßig), *Der mißverstandene Montesquieu: Gewaltenbalance, nicht Gewaltentrennung*, "Zeitschrift für Neuere Rechtsgeschichte" 2000, no. 22, pp. 149–166.

<sup>10</sup> K. Orzechowski, *Les systèmes des assemblées d'états. Origines, évolution, typologie*, „Parliaments, Estates and Representation" 1986, vol. 6, no. 2, pp. 105–111, 107.

<sup>11</sup> U. Müßig, *Konflikt und Verfassung* [in:] *Konstitutionalismus und Verfassungskonflikt*, ed. *eadem*, Tübingen 2006, p. 1, ReConFort I (<https://link.springer.com/book/10.1007/978-3-319-42405-7> [accessed: 2024.06.11]) and ReConFort II (<https://link.springer.com/book/10.1007/978-3-319-73037-0> [accessed: 2024.06.11]).

<sup>12</sup> See instead of many other reference cf. H. Carl, *Herrschaft* [in:] *Enzyklopädie der Neuzeit*, vol. 5, ed. F. Jaeger, Stuttgart 2007, col. 399–416, 401; W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 18 ff.; D. Freist, *Absolutismus*, Darmstadt 2008 (Kontroversen um die Geschichte), p. 20 ff.; *eadem*, *Einleitung: Staatsbildung, lokale Herrschaftsprozesse und kultureller Wandel in der Frühen Neuzeit* [in:] *Staatsbildung als kultureller Prozess. Strukturwandel und Legitimation von Herrschaft in der Frühen Neuzeit*, eds. R.G. Asch, D. Freist, Köln–Weimar–Wien 2005, pp. 1–47, esp. p. 40 for the meaning of 'bargaining, negotiating'; W. Braddick, *State formation and political culture in Elizabethan and Stuart England. Micro-histories and macro-historical change* [in:] *Staatsbildung als kultureller Prozess...*, pp. 69–90, 74, 77, 81 ff., 88. Cf. also in regard to cultural history of politics L. Schorn-Schütte, *Historische Politikforschung: Eine Einführung*, München 2006, p. 84 ff.; *eadem*, *Einleitung* [in:] *Aspekte der politischen Kommunikation im Europa des 16. und 17. Jahrhunderts: Politische Theologie – Res Publica-Verständnis – konsensgestützte Herrschaft*, ed. *eadem*, Historische Zeitschrift, Beiheft 39, München–Oldenburg 2004, pp. 1–4, 7 ff., 9 ff. Cf. also the publications by B. Stollberg-Rilinger (e.g. *The Impact of Communication Theory on the Analysis of the Early Modern Statebuilding Processes* [in:] *Empowering Interactions. Political Cultures and the Emergence of the State in Europe, 1300–1900*, eds. W. Blockmans et al., Farnham, UK–Burlington, VT 2009, pp. 313–318).

<sup>13</sup> If one follows the pointed differentiation of C. Sarti, *Deposing Monarchs, Domestic Conflict and State Formation, 1500–1700*, New York 2021, p. 28, Fn. 109, it becomes clear that contrary to J. Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Frankfurt am Main repr. of the 1962 – edition 2013, p. 61 there is no 'bourgeois public sphere' in its dialectic to public violence (*idem*, *Strukturwandel der Öffentlichkeit...*, pp. 55, 72–76), but rather a 'political public sphere as in principle accessible to all [...], even if partly only in a receiving manner' [paraphrasing translations by the author], if one expands the concept of the (constitutional) public

in Central and Eastern Europe (II–V). The formative impact of estates' assemblies on constituting kingdoms coincides in two common aspects: the legal idea of identity representation and the practical interaction with the crown's financial needs. These are to be explained in the subsequent introductory sections of this article, before a comparative sketch of the Crown and Estates' interrelatedness in medieval Poland, Hungary, and Bohemia is offered (II). There follow some remarks on Polish-Lithuanian aristocratic republicanism (III), considerations of the specific Hungarian Balance of Power between Crown and Nobility (IV), and discussion of the Bohemian estates' specific striving for representation, in the face of the Duke of Bohemia's special position as an Imperial Prince (V). A short conclusion provides more stimuli for further research (VI).

To establish the basis for the mirrored choreography approach and for investigating estates' assemblies' formative impact on constituting kingdoms, it is necessary to understand how the councillors' votes counted for the whole kingdom and how voluntary corporative self-organization was bolstered in the emerging monetary economy.<sup>14</sup>

## 1. Basics of Identity Representation

Based on the aristocratic *viritim* self-awareness that each individual represents himself, estates assemblies developed the common curiatic vote of sub-sections as well as the majority principle, in order to legally identify single votes with the whole. These legal constructions, the collegial character constituted by the majority principle as well as the associated notion of a singled-out part, both characterize the emergence of collective bodies at European courts.<sup>15</sup> In addition, they laid the ground for thinking about identity representation,<sup>16</sup> without which no parliamentary representation would have been possible later. First of all, a kingdom as a whole (*universitas*) is not in itself capable of acting (*per se agere*). According to the medieval canonical *tempus repraesentationis*-formula (still valid by Bartolus in the fourteenth century),<sup>17</sup> action

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sphere with C. Sarti and ReConFort to an understanding 'as the sum of communications with the aim of enabling the rulers and the ruled to communicate about political processes', the public sphere is also decisively involved in the negotiation process of rule (Cf. also J. Arndt, *Herrschaftskontrolle durch Öffentlichkeit. Die publizistische Darstellung politischer Konflikte im Heiligen Römischen Reich 1648–1750*, Göttingen 2013, p. 505. Concerning the development of a 'political public' D. Freist, *Einleitung: Staatsbildung...*, pp. 1–47, 34, Fn. 15).

<sup>14</sup> This is why assemblies of estates rarely appear in Central, Northern, and Eastern Europe before the fifteenth century, whereas in Western and Southern Europe they have been documented since the thirteenth/fourteenth centuries. On this, see W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 218, in particular *León 1188* as oldest documented representation.

<sup>15</sup> H. Hofmann, *Repräsentation...*, Fn. 6, § 14 V, p. 215.

<sup>16</sup> *Ibid.*, Fn. 6, § 14 V, p. 216: 'this question of all legal questions'.

<sup>17</sup> Bartolus de Saxoferrato, *Tractatus de ordine iudiciorum*, ed. G.A. Martin, Jena 1826, p. 16: 'Tertium est tempus repraesentationis'. Cf. the *ordines iudicarii* and their significance for court constitution, U. Müßig, *Reason and Fairness Constituting Justice in Europe, from Medieval Canon Law to ECHR*, series: Legal History Library, vol. 27, Leiden 2019, p. 45 ff.

could be attributed to others only as a legal fiction. Such a reasoning could not explain representation in the decision-making process.<sup>18</sup>

Therefore, the institutional consolidation of estates' councils as decision-making bodies<sup>19</sup> in charge of a kingdom, increasingly understood as a polity, triggered a will-based *pars pro toto*-way of thinking.<sup>20</sup> From there, it took only one step in argumentation to establish the corporation's ability to act and make decisions through its legally competent members, provided that they all had come together for the whole (*omnes ut universi*); then, their act of will had to be visibly binding on the entire kingdom. This was especially true for the election of a king. The electoral right to choose the (next) king has never been an aristocratic prerogative of individual electors. On the contrary, it was only attributable to the corporate union of an electoral council. Therefore, constituting the Prince-electors' majority vote in the Imperial Law *Licet iuris* of 1338<sup>21</sup> or the corporative overall vote of the Polish *szlachta* in the Confederation of Warsaw in 1573 marked breakthroughs in corporate identity representation.

In fact, the impact of late medieval and early modern estate assemblies on later parliamentary history depended less on a democratic mandate than on the collegial character constituted by the majority principle and the associated idea of being able to make decisions for the entire community as a prominent part of it. '*Esse maiorem partem et representare universitatem*'<sup>22</sup> can be read in the *consilia* of Laurentius Calcanes, and Johannes Bertachinus specified only sixty years later: '*due partes representant totam universitatem*.'<sup>23</sup> These prominent voices lead back to the late medieval Marsilius of Padua and his work *Defensor pacis* (Defender of Peace) (1324), in which the majority of citizens is considered to be the whole (even though the Marsilian argumentative line more likely traces back to the Aristotelian notion of primacy of the whole over the parts).<sup>24</sup>

<sup>18</sup> Especially since classical Roman law did not recognise substitution in the will (M. Kaser, R. Knütel, S. Lohsse, *Römisches Privatrecht*, 22. Aufl., München 2021, p. 261, § 45, Rn. 6). Cf. also Dig. 50, 17, 73, 4 (*Corpus iuris civilis. Volumen primum*, eds. T. Mommsen, P. Krueger, Dublin–Zürich 1973, p. 922, col. 961) und Dig. 45, 1, 38, 17, Ulp. 49 (*Corpus iuris civilis...*, p. 774, col. 659).

<sup>19</sup> H. Hofmann, *Repräsentation...*, Fn. 6, § 14 VII, p. 224.

<sup>20</sup> Cf. A. Esmein, *L'Unanimité et la Majorité dans les Élections Canoniques* [in:] *Mélanges Hermann Fitting*, vol. 1, eds. H. Fitting, E. Meynial, Montpellier 1907, repr. Aalen–Frankfurt am Main 1969, pp. 355–382, 372, 376 with reference to Panormitanus' explanation of the *senior pars* as the *communis opinio*.

<sup>21</sup> Based on the Weistum von Rhense, Weinrich II No. 89, D. Willoweit, S. Schlinker, *Deutsche Verfassungsgeschichte...*, Fn. 7, § 11 II, p. 83.

<sup>22</sup> Laurentius Calcanes (Philosopher, jurist in Brescia, Italy, died 1479), *consilium* 75, p. 309<sup>r</sup>, Brixen – Edition 1504, <https://www.digitale-sammlungen.de/en/view/bsb11200607?page=308,309> [accessed: 2024.08.23].

<sup>23</sup> Joannes Bertachinus Firmanus, *Repertorium Utriusque Iuris*, Quarta Pars, Lugduni 1562, fol. 220<sup>v</sup>.

<sup>24</sup> *Der Verteidiger des Friedens*, Part I, Chapter XIII, § 2, transl. W. Kunzmann, ed. H. Kusch, Stuttgart 1971, p. 60; Aristototele, Pol. 1253a (18–29).

## 2. Interacting with the Crown on its Financial Needs

With the rise of cash flows (instead of trading products tied to land and soil), royal financial needs could no longer be met solely through the income from the crown domain, especially during military crises; this resulted in the estates' involvement in authorising taxes. Centuries earlier than the 'No taxation without representation' slogan of the American colonists, fiefs materialised into property titles were the cornerstone of the 'dual power [of prince and estates] in the European world of states'.<sup>25</sup>

It was the estates' right to grant taxes that solidified the consensual nature of pre-modern rule. In 1267, for example, a papal letter from Clement IV to King Charles I d'Anjou of Naples<sup>26</sup> made the estates' consensus mandatory for the levying of taxes and for any defence measures.<sup>27</sup> Similarly, in the Patriarchate of Aquileia, the estates' participation in the creation of new statutes was described as 'customary' as early as 1282.<sup>28</sup>

The right to approve taxes led to a joint responsibility for legislation: 'In return for the approval of taxes, the estates used to submit complaints, so-called *gravamina*, from which legislation could emerge, either on co-operation of the estates, as in Poland and Hungary, or initiated by the crown, as in sixteenth-century France'.<sup>29</sup> As this integration of sovereignty progressed, the nobility and especially the wealthy knighthood insisted that no new laws or rights be created without their consent. The ecclesiastical lords of the manor and the towns were also able to claim a say through their financial power. In ecclesiastical principalities, cathedral chapters gained significant influence through

<sup>25</sup> H. Schulze, *Staat und Nation in der europäischen Geschichte*, 2<sup>nd</sup> ed., München 2004, p. 38: The weaker the crown ties of the nobility became due to the materialisation of fiefs into territorial possessions, the more the financial power of the crown domain was weakened. The ruler was all the more dependent on the support of the most powerful and solvent landowners (paraphrase translation).

<sup>26</sup> Letter, dated 6 February 1267 from Clemens IV to König Karl I of Sicily against the taxation of the clergy in Naples and Sicily, even in cases of necessity for defense (*Die Briefe Papst Clemens IV. (1265–1268)*, ed. M. Thumser, MGH-Edition, Nr. 305, 2015, p. 209, [http://webserver1.mgh.de/fileadmin/Downloads/pdf/clemens\\_2015.pdf](http://webserver1.mgh.de/fileadmin/Downloads/pdf/clemens_2015.pdf) [accessed: 2023.12.19]): 'Numquam enim consensimus nec prestitimus conniventiam, sed tunc diximus, quod et nunc scribimus, te videlicet prelati et baronibus et locorum communitatibus convocatis tue necessitatis instantiam et utilitatem defensionis eorum debere patenter exponere et de ipsorum ordinare consensu, quale tibi a tuis impenderetur auxilium, quo contentus et aliis tuis iuribus eos in sua dimitteres libertate'.

<sup>27</sup> P.-S. Leicht, *La posizione giuridica dei parlamenti medievali italiani* [in:] *L'organisation corporative du Moyen Age à la fin de l'Ancien Régime (études présentées à la Commission internationale pour l'histoire des assemblées d'États II)*, Louvain 1937, pp. 91–109, 98 ff., 99. Cf. letter, also dated 1267, from Clemens IV to König Karl I of Sicily giving advice concerning the organisation of his court and the governance of his kingdom (*Die Briefe Papst Clemens IV. (1265–1268)*..., p. 244): 'Collectas ab ecclesiis vel monasteriis vel domibus aliis religiosis aut a quibuscumque personis ecclesiasticis secularibus aut regularibus aut de bonis aut rebus earum numquam exigas, an vero ab ecclesiarum hominibus seu vassallis, in quibus habent irredictionem ordinariam et tu merum imperium, mediante iustitia vel interveniente concordia decidetur'.

<sup>28</sup> P.-S. Leicht, *La posizione giuridica*..., supra n. 27, p. 99.

<sup>29</sup> W. Reinhard, *Geschichte der Staatsgewalt*..., Fn. 2, p. 222 (paraphrase translation).

their right to elect bishops (as established by the Fourth Lateran Council in 1215). This seems to have correlated with a property-like understanding of princely rule.<sup>30</sup>

The increasing institutionalisation of estates assemblies is reflected in an emerging regularity of their meetings.<sup>31</sup> In the beginning, the convening of estates assemblies was fundamentally dependent on the financial needs of princes and, thus, on their sole initiative to convene. If no one raised an objection, a tax could be recognised under 'customary law' (the so-called concealment of the estates).<sup>32</sup> The estates' right to authorise taxes could only be circumvented by virtue of princely prerogative in the case of necessity (*necessitas*), often at the cost of fierce conflict with the estates. Thus, the English constitutional struggles of the seventeenth century stemmed from the Stuarts' fiscal 'ingenuity' in labelling customs, duties and forced loans as 'ship money', lying within royal prerogative in foreign affairs and to levy them bypassing Parliament (Bate's Case, Darnel's Case, and Hampden's Case).<sup>33</sup>

These introductory observations on the councillors' votes counting for the whole kingdom and on their will-based corporative self-organisation interacting with the crown's financial needs also apply to medieval Central Eastern Europe (Poland, Hungary, and Bohemia). Their first processes of consolidating royal power show both notable similarities and significant differences: they all corresponded in the institutionalisation of court structures, though the ways in which the establishment of central authorities unfolded varied greatly.

## II. Constitutional Relations between Crown and Estates in Medieval Poland, Hungary, and Bohemia

While in Poland the Piast kings managed to establish a common royal administration, thereby consolidating its unifying force, the Hungarian magnates' power and the symbolic significance of a Christian crown provided the crucial factors in shaping proto-national coherence along the Pannonian Basin. In Bohemia, royal power could only be solidified by tackling vast allodial areas of power. Given these differences, a mirrored

<sup>30</sup> D. Willoweit, *Rechtsgrundlagen der Territorialgewalt, Landesobrigkeit, Herrschaftsrechte und Territorium in der Rechtswissenschaft der Neuzeit*, Köln–Wien 1975, pp. 11 ff., 34 ff., 216 ff.

<sup>31</sup> For the establishment of a regularly meeting committee of estates, see E. Schubert, *Steuer, Streit und Stände, Die Ausbildung ständischer Repräsentation in niedersächsischen Territorien des 16. Jahrhunderts*, "Niedersächsisches Jahrbuch für Landesgeschichte" 1991, vol. 63, pp. 1–58, 51 ff. In the monarchical system, the estates assembly could only be convened by the prince. A right of self-assembly was rather unusual in the European context. Annual meetings were considered to be quite a lot. For this, see W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 218. For institutional tendencies by means of summons (for representing the common people), see E. Schubert, *Die Landstände des Hochstifts Würzburg*, Veröffentlichungen der Gesellschaft für fränkische Geschichte, Reihe IX, Darstellungen aus der fränkischen Geschichte 23. Band, Würzburg 1967, p. 104.

<sup>32</sup> This meant that the tax was recognised under customary law.

<sup>33</sup> U. Müßig, *Constitutional conflicts in seventeenth-century England*, "Tijdschrift voor Rechtsgeschiedenis/The Legal History Review" 2008, no. 76, pp. 27–47.



choreography focus on the constitutionalization of the crown-estates relationship might be an apt *tertium comparationis* to come closer to the article's goal of setting out the emergence of the estates' assemblies' formative impact on 'constituting' the kingdom.

## 1. The Consolidated Polish Crown of the Piast Dynasty

The fragmentation of the Polish dominion<sup>34</sup> among the Margraviate of Brandenburg,<sup>35</sup> the Teutonic Order,<sup>36</sup> and the Bohemian Přemysls<sup>37</sup> was overcome with the coronation of Duke Władysław I Ellenlang (*Łokietek*)<sup>38</sup> as King of Poland (*rex Poloniae*)

<sup>34</sup> From 1138 to the formation of the Piast duchies (N. Davies, *Im Herzen Europas. Geschichte Polens*, 2<sup>nd</sup> ed., München 2001, p. 259 ff.; A. Gieysztor, *Polen* [in:] *Lexikon des Mittelalters*, vol. 7, 2<sup>nd</sup> ed., München 2003, col. 53). The name Polonia only stood for Greater Poland. The Polish Church and the family connections of the Piast ruling houses were the unifying factor. This was also the reason for their weakness against the Mongols (defeat at Wahlstatt near Liegnitz in 1241). The fragmentation was also due to the inheritance system based on the seniority principle: new principalities, which were fundamentally divided, were not permanently granted to the sons of the deceased ruler, but only for a limited period. If a holder of a princely title died, the other heirs succeeded to the title. As a rule, there was a particularly prominent and powerful principality, which usually fell to the eldest son. This son then also held at least *pro forma* sovereignty over the territories of his brothers, so that the imperial union was preserved.

<sup>35</sup> As the nucleus of the later Prussian state, the Margraviate of Brandenburg was created during German eastward expansion in the twelfth and thirteenth centuries as an imperial territory along the middle Elbe to the areas bordering the Oder. The Lebus Land fell to Brandenburg. Pomerania became an independent duchy.

<sup>36</sup> After the failure of the Polish crusades against the Prussians in 1221–22, the subjugation of the Prussian lands by the Teutonic Knights marked the birth of the Teutonic Order. The enfeoffment of the Teutonic Order with the Kulmer Land (1226 Golden Bull of Rimini; the establishment in 1309 of the Marienburg headquarters of the Order instead of Venice under Grand Master Hermann von Salza) by the Kuyavian-Mazovian Duke Konrad I (from the House of Piast) in 1230, together with a guarantee of ownership of all future conquered heathland for the Knights of the Order. In the same year, the first Knights of the Order arrived on the Vistula and built Thorn Castle, named after the crusader castle of Toron in the Holy Land. The Order's occupation of Pomerelia and Gdańsk in violation of the treaty remained a constant source of struggle for the Polish crown against the Knights of the Order until 1525.

<sup>37</sup> Firstly, the reintegration of Poland occurred as Przemysł II of Poznań succeeded in uniting several partial principalities in his hands (Poznań, Gniezno-Kalisz, and Kraków) and at the insistence of the nobility and the high clergy was crowned King of Poland in Gniezno in 1295. However, his attempt to restore his kingship ultimately led to his assassination. Between 1300 and 1305, Poland entered a personal union with Bohemia under King Wenceslas (Wacław). Subsequently, a process of disintegration began. The Bohemian kings John and his son, the German Emperor Charles IV, separated Silesia from the Polish state union in 1339–53. Finally, Silesia became an indirect part of the Empire as part of Bohemia in 1348.

<sup>38</sup> Since 1306: *dux Regni Poloniae* (for this title, see A. Świeżawski, *Dux regni Poloniae i haeres regni Poloniae. Ze studiów nad tytulaturą władców polskich na przełomie XIII i XIV wieku*, "Przegląd Historyczny" 1989, vol. 80, no. 3, pp. 429–438, 435). For the reunification of the Polish Kingdom by Władysław I Łokietek from the Kuyavian line of the Piasts, relying on the cultural community, the tradition of Piast rule, and the Church, see M. Biskup, G. Labuda, *Die Geschichte des Deutschen Ordens in Preußen*, Osnabrück 2000, p. 373; J. Strzelczyk, *Piasten* [in:] *Lexikon des Mittelalters*, vol. 6, München 2003, col. 2125–2126. During the division of the lands into small Piast principalities, the mechanisms

in 1320. The name '*Corona Regni Poloniae*' appeared for the first time,<sup>39</sup> and a *curia Regis* was established. The Piast king assembled the dignitaries (initially only from Lesser Poland, but by the beginning of the fifteenth century also from Greater Poland) at court (*in curia*) to discuss decisions and to have important legal acts approved. Gradually, the Kraków (Lesser Poland) court established itself as an 'all-Polish' royal court (*Curia Regni Poloniae*).<sup>40</sup> In addition to ecclesiastical and secular dignitaries, gatherings of royal advisors were regularly convened (*curia generalia*) to participate in the royal jurisdiction, to issue documents, or to help the administration 'with advice and consent';<sup>41</sup> without any evidence of their own competences restricting the crown. The institutionalisation of the extended circle of advisors drawn from the clerical, political, and financial elite into a powerful *consilium supremum* (Polish: *rada*)<sup>42</sup> alongside a narrower court council (*consilium secretum*), travelling with the monarch,<sup>43</sup> coincided with the consolidation of the crown under Łokietek and Casimir the Great<sup>44</sup>

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to ensure unity, such as the principles of primogeniture and seniority, had not proven to be effective. Additionally, during the period of fragmentation, the Polish lands were threatened by foreign powers – especially by the Teutonic Order, Brandenburg, and the Kingdom of Bohemia (S. Gawlas, *Władysław I. Łokietek* [in:] *Lexikon des Mittelalters*, vol. 9, München 2003, col. 286; F. Seibt, § 17 *Polen von der Jahrtausendwende bis 1444* [in:] *Handbuch der Europäischen Geschichte*, vol. 2, ed. T. Schieder, Stuttgart 1987, pp. 1046–1079, 1068 ff.).

<sup>39</sup> And documents the overarching unity of the Polish lands and feudal principalities.

<sup>40</sup> The word 'court' seems to be the correct term for the royal council. But one must be careful with the terminology, a council of unspecified composition and character as part of the court, is an advisory and judicial body. It was Władysław I Ellenlang who, after fierce battles, supported by the clergy and several lesser princes, succeeded in uniting Lesser Poland, Central Poland with the main castles of Sieradz and Łęczyca, Kujawy and Dobrin and annexing Greater Poland, and in 1320 in permanently elevating Poland to a kingdom. With Ellenlang's coronation in 1320, Kraków became the capital and also the 'heartland' of Poland. (G. Labuda, *Klempolen* [in:] *Lexikon des Mittelalters*, vol. 5 (*Hiera-Mittel bis Lukanien*), München 2003, col. 1204). The most important principalities for Ellenlang were Kraków, Kuyavia, and Greater Poland (W. Drelicharz, *Dux Cracoviae oder künftiger rex Poloniae? Die Legitimation von monarchischer Herrschaft in der Krauer Geschichtsschreibung des 13.–14. Jahrhunderts* [in:] *Legitimation von Fürstendynastien, Identitätsbildung im Spiegel schriftlicher Quellen (12.–15. Jahrhundert)*, eds. G. Vercamer, E. Wólkiewicz, Wiesbaden 2016, pp. 277–304, 295).

<sup>41</sup> In the Slavic dominions of Central and Eastern Europe, too, written sources provide evidence of tendencies towards centralisation (C. Ehlers, *Um 1012. Wie sich ambulante zu residenter Herrschaft entwickelt hat* [in:] *Die Macht des Königs. Herrschaft in Europa vom Frühmittelalter bis in die Neuzeit*, ed. B. von Jussen, München 2005, pp. 106–124, 124).

<sup>42</sup> It included the highest dignitaries of the land, who were also magnates belonging to the leading noble families, as well as the highest local officials (*palatini, castellani*). The court was solely composed of its main officials (i.e. free noblemen); marshalls etc. were not formally part of the royal ct., except for the ones sitting as judges over the members of the court. In this regard, the Polish *curia regis* differed from similar European institutions.

<sup>43</sup> There is such a thing as a secret or clandestine council, but only exceptionally, during times of war. Note that this secret council is not a permanent but rather a rare solution when important decisions have to be made in a close circle and in confidential matters, such as the presence of spies.

<sup>44</sup> Under Kazimierz, the classic council – bishops, ministers and dignitaries, voivodes and castellans, was called the *consilium domini regis*. In the middle of the fifteenth century the appointment of so-called *Iuniores* to the Council is witnessed, that is, noble lower officials, chamberlains and others, thus creating the *council supremum* as a counterweight to the magnates in favour of the latter group.



in the fourteenth century. In the form of the General Assembly (*Consilium totius regni in conventioni*), the Council asserted the rights of aristocratic co-government and was the nucleus of the later upper house of the Sejm (Senate).

The Polish crown was not truly consolidated before the reign of Kazimierz III Wielki (Casimir the Great, 1333–70).<sup>45</sup> He achieved this strengthening through the expansion of direct royal administration,<sup>46</sup> the centralisation of the chancellery, the recourse to Roman law, the recording of customary law (*ius terrestre*)<sup>47</sup> as well as through the effectiveness of financial administration in the hands of his royal treasurer (including an increase in royal income from salt and mines, customs duties and new levies).<sup>48</sup> This expansion of the *dominium* occurred to a large extent by means of newly founded villages and towns, be it with the help of Flemish or German immigrants,<sup>49</sup> be it through the 'rededication' of settlements that had customarily been established under Polish law as places under German law. However, the German legal patterns of the Saxon-Magdeburg and Lübeck law for the economic organisation of rural and urban settlements should not obscure the fact that the Polish population was the driving force behind internal migration: the impetus for the eastward migration of tens of thousands of peasants and craftsmen did not come from the Empire or its constituent territories, but from the Polish princes themselves. In 1364, the royal capital Kraków became the seat of the first Polish university, the second university in Central Europe after Prague in 1348. In need of trained lawyers, Casimir the Great modelled Kraków university largely on that of Bologna. As a result, an intellectual and cultural upswing reached one of its high points under this last Piast king. Accordingly, the transpersonal concept of an abstract Polish crown, the *Corona Regni Poloniae*, was established.

<sup>45</sup> Kazimierz Wielki (the Great, 1333–1370), son of King Władysław I Ellenlang. Louis the Great of Anjou then ruled in personal union with Hungary, followed by the Jagiellons from 1386–1572 until the elective kingdom from 1576 onwards. Despite his policy of alliance with the Hungarian Angevins, the Luxembourgs, the Wittelsbachs, and the Knights, which was aimed at achieving a balance, Kasimierz failed to regain Pomerelia, and Silesia was finally given to Bohemia in 1348.

<sup>46</sup> He, therefore, endeavoured to give the Kraków officials nationwide powers and gradually took away the powers of the former local district authorities, which were based on the *starosty* (elders) with their administrative and judicial powers. The *starosty* were officials who represented the king. The office of Starost was created at the end of the thirteenth century with the unification of Poland. The general *starosty* were *brachium regale* ('arms of the king') in the main provinces, lacking only the authority to grant privileges. In the fourteenth and fifteenth centuries, the *starosty* exercised administrative and judicial powers; in the latter case they were responsible for prosecution and judicial investigation without estates and for the execution of judgements and for prosecution of the most serious crimes, the so-called four articles, regardless of the status of the offender (arson, rape, robbery in the street and attack on a nobleman's house) (S. Russocki, *Starosta* [in:] *Lexikon des Mittelalters*, vol. 8, 2<sup>nd</sup> ed., München 2003).

<sup>47</sup> Separate for Lesser and Greater Poland.

<sup>48</sup> Kazimierz Wielki introduced the penny as the national currency.

<sup>49</sup> In addition, generosity towards the Jews also encouraged immigration; in contrast, Jews were subjected to numerous pogroms in Western Europe.

## 2. Princely Consolidation under the influence of the Hungarian Magnates and the Holy St Stephen's Crown

In Hungary, the magnates held the most important offices and were part of the royal court as advisors and judges from the eleventh century onwards. The Golden Bull of 1222 issued by Andrew II (1205–1235) already mentions the Council of the Kingdom.<sup>50</sup> The annual assembly of the nobility in Stuhlweißenburg ordered by this letter of freedom amounted to the Hungarian Imperial Diet, at which the magnates and prelates formed their own prominent group.<sup>51</sup> The institutionalisation of the chancellery only began with the admission of petitions to the royal court at the end of the twelfth century,<sup>52</sup> at the same time as the introduction of Gregorian chant in the Hungarian church.<sup>53</sup> Initially, the typically Hungarian legal institution of the so-called credible places (*loca credibilia*) prevented the emergence of scholarly writing. The jurisdiction of the court judge (*curialis comes*, *iudex curiae regiae*), which had been documented since the twelfth century, extended to the entire kingdom from the thirteenth century onwards (hence the translation *Landesrichter* as *iudex curiae*). Just like chancellor and court judge, the other highest offices in Royal Hungary (palatine,<sup>54</sup> governor, provincial governor, and *banus*<sup>55</sup> of Croatia) were in the hands of the nobility.<sup>56</sup> The Hungarian narrative of the Holy Crown of St Stephen appears to be a special instrument of the

<sup>50</sup> According to Art. 11, foreigners could only be elevated to rank and dignity with the authorisation of the Council (*Europäische Verfassungsgeschichte*, eds. D. Willoweit, U. Seif (= Müßig), München 2003, p. 29). The Letter of Freedom of 1222 was the basis of Hungarian constitutional law until 1848.

<sup>51</sup> 'Magnates and prelates' only evolved into the upper house from 1608 (after which the bicameral system remained, apart from shorter periods, until 1945). This first or upper chamber (*Excelsi Proceres*) of the 'magnates and prelates' actually developed from the King's Council (*Curia Regia*). This group of people had been meeting in the castle of Pressburg (where the Imperial Diet sessions were held during the Habsburg period) since 1526 (following Mohacs, the catastrophic defeat against Sulejman). In short, magnates and prelates were always where the king was, as was the case everywhere in Europe in the Middle Ages.

<sup>52</sup> Of Béla III (ruled 1172–1196).

<sup>53</sup> With reforms in the Gregorian sense, the Hungarian church under Archbishop Lukas of Gran (Esztergom, ruled 1158–81) was able to establish itself as an independent power factor, and at the same time the royal chancellery was established.

<sup>54</sup> Due to the court's constant changes of location, the organisation of catering was a separate logistics office (of the palatine). Due to his position, the palatine also assumed other duties of the king; in particular he sat in court instead of the king (cf. also Art. 8 Golden Bull 1222). From the fourteenth century, there is evidence of the palatine court outside the royal court in Buda and Vizsoly. From 1485, the Palatine convened the Council of the Estates to elect the king, where he was also the first to cast the vote and the guardian of the minor king.

<sup>55</sup> The title *Banus* (Hungarian *bán*) is a Central and Southeast European term of Avar or Illyrian origin for a dignitary, corresponding to a margrave (G. Herm, *The Balkans: das Pulverfass Europas*, Düsseldorf–Vienna–New York 1993, p. 146). The territory over which a ban ruled was called a 'Banschaft' or 'Banat' (Hungarian *bánság*, Croatian, Bosnian, Serbian *banovina*). The Croatian ban was a viceroy after the Hungarian King Koloman was crowned King of Croatia. The title of the ruler of the historical region of Slavonia (in the east of present-day Croatia on the border with southern Hungary) is 'the ban'.

<sup>56</sup> Cf., for example, G. Pálffy, *The kingdom of Hungary and the Habsburg monarchy in the sixteenth century*, Hungary Studies Series, vol. 18, Boulder 2009, p. 21 ff. Cf. also the later centralised chancellery/offices in Vienna, *ibid.*, p. 54 ff.

assertion of royal supremacy over a geographically distinct territory, especially as 'the subjects [...] owed allegiance first and foremost to the Holy Crown'.<sup>57</sup>

### 3. Central Authority and Feudal Dependencies in Bohemia

The recognition of a Bohemian hereditary kingship in 1198–1212<sup>58</sup> did not disrupt the feudal dependence of the Přemyslid lands as an imperial principality (*regnum Boemia*).<sup>59</sup> The dispute over the imperial integration of the Bohemian possessions with the corresponding interventions of the German king and Roman emperor had hindered the development of a centralised administration in Prague, but central court offices (chamberlain, marshal, truchsess, and bailiff) were also evident there. Even before the reign of Přemysl Otakar II (1253–1278), who succeeded in anchoring Bohemia in the Electoral College,<sup>60</sup> a chancellery (*cancellaria*) was added, in which notaries, protonotaries, magistrates, and scribes issued and authenticated lordly documents (*landesherrliche Urkunden*).<sup>61</sup> This became even more important with the expansion of the Bohemian claim to power into Moravia, Austria, and Styria (aiming for legal integration through written acts of rule).

Long-distance trade (for example, the Golden Path from Passau) with sovereign trading centres (for example, in Pilsen) were a further important factor in strengthening the crown and, thus, the unity of Bohemian ducal and royal power; the economic attractiveness of the sovereign trading centres was not only based on fortified road crossings and fords, and the protection provided by castles, but also on the privileges of legal and royal protection for foreign merchants. In addition, the Přemyslid King and later the Luxembourgers (at the instigation of Emperor Henry VII) had a rich source of income for the crown thanks to gold, silver, and ore deposits. 'The sub-treasurer in charge of collecting municipal taxes was the prince's personal financial administrator. The royal *dominium's* supervision [...] was exercised by the burgraves [...]', whose dependence on the Bohemian king was reflected in their seats' relocation away from castles into the royal towns.<sup>62</sup>

However, large parts of the agriculturally valuable land were allodial property (freeholds), empowering the landowning noble families to lay claim to political rights

<sup>57</sup> L. Rácz, *Die Repräsentanten der ungarischen Staatstheorie* [in:] *Die Entwicklung der Verfassung und des Rechts in Ungarn*, ed. G. Máthé, Budapest 2017, pp. 35–91, 67.

<sup>58</sup> The Sicilian Golden Bull of Frederick II from 1212 (M. Wihoda, *Die sizilianischen Goldenen Bullen von 1212: Kaiser Friedrichs II. Privilegien für die Přemysliden im Erinnerungsdiskurs*, series: *Forschungen zur Kaiser- und Papstgeschichte des Mittelalters* (Beihefte zu J.F. Böhmer, *Regesta Imperii*), no. 33, Wien–Köln–Weimar 2012, p. 261 ff.).

<sup>59</sup> J.K. Hoensch, *Geschichte Böhmens: Von der slavischen Landnahme bis zur Gegenwart*, 3<sup>rd</sup> ed., München 1997, p. 79.

<sup>60</sup> The Bohemian king was also otherwise regarded as 'the most powerful and richest imperial prince [...] [who] had given his lands an "unexpected and favourable peace" (*inopinatam et optimam pacem*) through the unification of Bohemia, Moravia and Austria' (*ibid.*, supra Fn. 59, p. 87).

<sup>61</sup> *Ibid.*, supra Fn. 59, p. 93. From 1225 the chancellor was the provost of the Vyšehrad.

<sup>62</sup> *Ibid.*, supra n. 59, p. 95.

of co-determination, which amounted to particular corporate structures before 1620. Even at the first court meetings (*colloquia*), which the Bohemian duke-king could convene at will, the nobles' (legal) affairs were separated from those of the subject peasants. It was the court judge's office to represent the duke-king *vis-à-vis* the nobility; otherwise, the chamberlain (*Kämmerer*) presided over the regional court (*soud zemský, Landgericht*), which developed out of the court sessions (*Hoftagen*).<sup>63</sup>

Comparing the initial consolidation movements by the three crowns, the communicative correspondance with competing noble power claims becomes clear. The Polish, the Hungarian, and the Bohemian institutionalization story of the different crowns coincides with the need to come to terms with the other power players, notably the noble magnates. Legalization of these ambivalences had a twin face: providing a legitimizing tool for integration under royal power as the authority to provide a chancellery and the learnt personnel to issue written acts of rule, but, at the same, time allowing for a kind of professionalized independence beyond the control of mere lordly categories.

### III. On the Road to Polish-Lithuanian Aristocratic Republicanism under the Jagiellonian Kings

Further developments in the Polish-Lithuanian Commonwealth were dominated by increasing aristocratic influences. These contributed to the gradual transformation of the former Piast Kingdom into an aristocratic *res publica* (*Rzeczpospolita*, in the literal sense of the abovementioned notion *Quod omnes tangit ab omnibus comprobetur*, which denominated the political nation).<sup>64</sup> The basic features of this *res publica* may have been due to a peculiarly Polish noble corporatism beyond timely tax and judicial immunities. All noblemen from the richest baron to the poorest knight derived their power (that is, claims on taxes and services from the population, on income from market, customs, and judicial rights) from their loyalty shown to the royal prince in military and court service, without any personal vassalage or feudal relationship. This was the basis of the levelling between high nobility magnates and low nobility knights (*włodyki*)<sup>65</sup> among the numerous Polish '*nobiles*,'<sup>66</sup> whose common Latin name was

<sup>63</sup> *Ibid.*, supra n. 59, p. 94.

<sup>64</sup> In the Jagiellonian period, the term 'republic' did not imply the absence of a monarchical head or its insignificance. Like the Holy Roman Empire, Jagiellonian Poland was a corporate monarchy (*ständische Monarchie*) in which only the nobility, along with the king, was involved in the exercise of power, while the other estates (especially the bourgeoisie) were largely excluded from the political process. The Polish clergy did not amount to a separate estate, as the nobility had monopolised access to the higher clergy.

<sup>65</sup> The marginal group of dependent knights disappeared in the Middle Ages. What remains is a unified knighthood as part of the nobility. They are referred to as '*nobiles*' from Latin, and that is probably the most accurate term to use in a synthetic study.

<sup>66</sup> Polish Library Paris, J. Lelewel, *Légitimité de la Nation Polonoise*, Rouen [s.a.], pp. 5, 12.

meant to praise their fraternal unity (*braterstwo*) and equality (*równość*), irrespective of any differences in possession and wealth.<sup>67</sup>

Left without a male heir, the last Piast king, Kazimierz Wielki, formed a hereditary alliance with the House of Anjou, which ruled in Hungary, to secure the succession for his nephew Ludwik. Since Ludwik I the Hungarian (ruled 1370–82) remained without sons, he had to 'buy' the consent of the Polish *szlachta*, corporatively addressed as '*communitas nobilium*', to the succession of his (younger) daughter Jadwiga with far-reaching concessions. The 1374 Privilege of Koszyce stipulated an almost complete tax immunity for the nobility and their privileged appointability as crown officials or bishops. This Koszyce-guarantee, that new taxes (new here meant beyond the customary two groschen per cultivated peasant field) could only be levied with the nobility's consent, is held to be the nucleus of the Sejm's later tax-competence.

After Ludwik's death, his (younger) daughter Jadwiga was elevated to King (*rex*) of Poland in 1384. A year later, the nobles compelled her to marry in the Union Treaty of Krewo (near Vilnius) the Lithuanian Grand Duke Jagiello, who had been baptised<sup>68</sup> Władysław II Jagiello in 1386.<sup>69</sup> From the Lithuanian point of view, this Polish-Lithuanian (personal) Union was preferable to a union with Russia, especially as it annulled the arch-enemy's, the Teutonic Order's, 'right to pagan crusades'.<sup>70</sup> Lithuania remained a hereditary grand principality, while the Polish crown gradually became elective; even though the nobility's corporative right<sup>71</sup> to elect the king started only with the *vivente rege* election of Zygmunt August in 1530, Jagiello's son Władysław III was the first in

<sup>67</sup> The so-called 'private' towns are an impressive addition to the wealth of the nobility.

<sup>68</sup> The Lithuanians were probably the last non-Christian people in East-Central Europe; this was due to their peripheral location: unlike the Vistula or the Dūna, the Memel was not a transport route for long-distance trade.

<sup>69</sup> This marked the beginning of the Jagiellonian rule over Poland from 1386 to 1572. The newly founded Latin bishopric of Vilnius was subordinated to Gniezno. The Union's increase in power was enormous: Mazovia and Moldavia made the feudal oath in order to escape Hungarian influence. With the subjugation of Moldavia, Poland gained access to the Black Sea, which enabled more trade, and Lithuania profited from the recovery of the Smolensk region on the Dnieper (1404; conquered by the Grand Duchy of Moscow in 1514). For Władysław's reign as Grand Duke of Lithuania, both the Christianisation of Lithuania and his role as progenitor of the Jagiellonian dynasty were decisive.

<sup>70</sup> For the Teutonic Order, the union meant that there was no longer any need to wage war against the pagans. In 1404, the Pope withdrew the war order against the Lithuanians, thereby paving the way for the Polish-Lithuanian victory over the Teutonic Order at the Battle of Tannenberg (Grunwald) in 1410, and enabling a policy of actively shaping Lithuanian interests in Central Europe *vis-à-vis* Moscow. [Following the Peace of Thorn in 1411, the conflict with the Teutonic Order led to further wars (1419–22, 1431–35, 1454–66)]. In the Second Peace of Thorn (1466), the militarily and financially exhausted Order had to renounce Pomerelia with Danzig, the Kulmer and Michellauer Land, Elbing and Marienburg ('Royal Prussia'). Eastern Prussia with Königsberg remained with the Teutonic Order as a Polish fiefdom. After renewed fighting, the Order's High Master Albrecht von Brandenburg-Ansbach took the secularised 'Prussian ducal share', which had been seized by the Reformation, as a fief in 1525. The challenges by the Teutonic Order also lie at the heart of the so-called Polish tolerance, as articulated at the Reform Council of Constance 1414–18; it was the prominent theologian and Rector of Kraków University Paweł Włodkowic who took at stand for the pagans, banning the Teutonic Knights' violent conversion policy.

<sup>71</sup> Without having been previously appointed by the local *sejmiki*.

1434 to receive the (confirming) consent of the assembled nobility as king-elect (by the council). It was the Polish-Lithuanian Union that made any king's election a matter of negotiations and an occasion for concessions, despite the nobility's loyalty to the Jagiellonian dynasty. This resulted in the privileging of all nobles with the inviolability of their property (Privilege of Czerwińsk 1422)<sup>72</sup> and with the inviolability of their person (Jedlno/Kraków Privilege 1430–33, a Polish habeas corpus-prototype).<sup>73</sup>

The transformation into a real union in Lublin 1569<sup>74</sup> also relied on the common state-bearing function of the nobility; since the renewal of the Union Treaty of Horodło in 1413, the Lithuanian nobility, insofar as they were Catholic, became included in the heraldic associations of the Polish nobility. The Lithuanian nobility was well aware that their freedoms and liberties depended on the union, all the more so as they had it designed *aeque principaliter* in order to bar Polish visions of an accessory union. The core *fora* of aristocratic self-administration and jurisdiction were the regional assemblies (for a voivodeship or district) or provincial representation for Greater Poland or Lesser Poland, the *sejmiki ziemskie* and *prowinjonalne*. Originating from the local assemblies of the ruling class, civil servants, and the free population (mainly knights), and competent for the promulgation of princely legal acts and as regional courts for the nobility, their roots dated back to the period of fragmentation before 1320. Their involvement in legislation, tax collection, and land requisitioning (*pospolite ruszenie*) was confirmed by the 1454 Statute of Nieszawa by the Jagiellonian King Casimir IV Andrew. It was not until this time that a representative idea about the land messengers (*nuntii terrarum*) emerged, and the Thirteen Years' War against the Teutonic Order (1454–1466) was the decisive catalyst for convening them nationwide.<sup>75</sup> From 1493 onwards, the general assembly of the Sejm (*Conventum Generale, Sejm Walny*) is documented. This historic precursor of the Polish parliament (still under the same name) consisted of the Senate (staffed with dignitaries of the Royal Council)<sup>76</sup> as the

<sup>72</sup> The inviolability of aristocratic property prohibited confiscation as well as contributions, quartering, judicial interference, etc.

<sup>73</sup> *Neminem captivabimus nisi iure victum* prohibited the imprisonment and punishment of a settled nobleman without a court judgement (unless he was caught stealing or committing a public crime or was unwilling to post adequate bail). Together with the Czerwińsk Privilege of 1422, this Jedlno/Kraków Privilege 1430–33 amounted to the core 'constitutionalization' of noble freedom.

<sup>74</sup> Sigismund II August, King of Poland and Grand Principal of Lithuania, was the last (and childless) Jagiellonian; he voluntarily relinquished his hereditary title to Lithuania, to bring the both countries of the personal union on the same constitutional level of 'dependency' on the nobility and to waive the Lithuanian magnates' fear of losing political influence through assimilation into the Polish *szlachta*. It is remarkable that the Polish/Lithuanian duality of dignities for the Polish and Lithuanian 'nations' remained until 1791, while the real union established the Polish-Lithuanian Commonwealth with a common ruler and parliament, as well as a common currency (<https://cbhist.pan.pl/wp-content/uploads/union-von-lublin.pdf> [accessed: 2024.09.15]).

<sup>75</sup> Fundamental to this is W. Uruszczak, *Historia państwa i prawa polskiego*, t. 1: 966–1795, an excerpt of which is available in English in "Czasopismo Prawno-Historyczne" 2020, vol. 72, no. 2, pp. 93–113.

<sup>76</sup> What distinguishes the senators is their elevation to a senatorial office for life (as bishop, minister, voivode, or castellan). Of course, this honour could usually only be bestowed on a rich and influential person who had rendered outstanding services to the crown and was important for its politics.



upper house and the so-called *Landbotenstube*/Chamber of Messengers (envoys of the ordinary voivodeship and districts),<sup>77</sup> representing the entire population of all the provinces, as the lower house.<sup>78</sup>

With the constitution of the Sejm of Radom, the Privilege *Nihil Novi* of 1505,<sup>79</sup> the Chamber of Messengers was formally recognised as having the right to legislate. Its institutionalized equality with the Senate and, thus, the Sejm's formation as a bicameral assembly was intended to demonstrate the fraternal legal equality (*braterstwo, równość*) of the Polish *szlachta*, regardless of actual differences in land ownership and influence. The *szlachta's* insistence on the fraternal equality of all its members corresponds with the further upgrading of corporative representation to ensure the continued existence of the Polish-Lithuanian Commonwealth. Only a confederation of the gentry throughout both countries and the *viritim* entitlement to take part in the king's election could hinder the Union of Lublin, still in its infancy and only three years old at the time of the sudden childless death of Zygmunt II August in 1572, to fall into the hands of its shattering centrifugal political elements. It was this union-supporting effect of an aristocratic political representation that fueled the path to aristocratic supremacy (1569–1795) with the election of the king by the plenary assembly of the entire nobility,<sup>80</sup> and the *pacta conventa* on the conditions under which the crown was to function for the 'noble citizens of the republic' (*Rzeczpospolita szlachecka*).<sup>81</sup>

<sup>77</sup> And not representatives of the provincial assemblies (*sejmikis*), which increasingly disappeared, whereas the council (as precursor of the senate) has always existed.

<sup>78</sup> Giacomo Lauro's engraving of the Great Sejm 1622 (under Sigismund III Wasa; <https://polona.pl/item-view/b9a514be-c661-48d8-87b3-0b574d5c0d8e?page=14> [accessed: 2024.09.15]) documents the gathering of the spiritual (Roman Catholic archbishops and bishops) and secular (voivodes and castellans) senators sitting to the king's 'right' or 'left'. At their backs stand the noble members of the Sejm. The chairs facing the throne (presenting their backs to the viewer) were occupied by the ten most important ministers of the Polish-Lithuanian *Rzeczpospolita*: the Marshal of the Sejm, the Chancellor and the Treasurer of the Crown sit on the right, with the Lithuanian ministers on the left. This staging represents exemplarily the mirrored choreography approach of this article.

<sup>79</sup> See G. Rhode, *Polen-Litauen vom Ende der Verbindung mit Ungarn bis zum Ende der Vasas (1444–1669)* [in:] *Die Entstehung des neuzeitlichen Europa*, ed. J. Engel, Stuttgart 1971 (= Handbuch der europäischen Geschichte, Bd. 3), pp. 1003–1060, 1018: *Nihil novi constitui debeat per Nos et successores Nostros sine communi Consiliariorum et Nuntiorum Terrestrium consensu*. The above-mentioned *Nihil Novi* Act enshrined the constitutional principle that 'nothing new' may be introduced without the consent of the entire nobility. The king had withdrawn concessions previously made to the Senate (the upper house) and accepted the demands of the Chamber of Messengers (Lower House). Cf. also N. Davies, *God's Playground. A History of Poland*, vol. 1: *The Origins to 1795*, Oxford 1982, p. 321 ff.

<sup>80</sup> Like Copernicus and Kochanowski, Jan Zamoyski (1542–1605), who was the godfather of aristocratic republicanism, had studied in Kraków and Padua. In the negotiations following the death of Zygmunt II August in 1572, he insisted on *viritim* election and the *Pacta Conventa* between the crown candidate and the Sejm. Polish literature refers to 1454 or 1505 for the beginning of the aristocratic republic, cf. supra Fn. 34, 38, 48.

<sup>81</sup> The *pacta* formulated the conditions/promises to ascend the throne in order for the Sejm to approve the king's coronation. Accordingly, the *summa potestas* has been attributed to the Sejm since the sixteenth century.

The Henrician Articles obliged the King<sup>82</sup> to convoke the Sejm every two years, and in the periods between sessions he was to be advised by a group of senators. Any failure to observe any one of these articles absolved the nation of its allegiance. These articles were not a straightforward rise of parliamentary co-determination: even though the bulk of consultations and Sejm deliberations were transferred from the Senate to the Chamber of Messengers,<sup>83</sup> the political weight of the messengers/deputies initially remained low. According to the *Nic o nas bez nas* formulation of the 1505 constitution,<sup>84</sup> the Diet could refuse to pay taxes, but it could not make laws without the king's consent.

The Senate's influence must be considered in a different way, even if the monarch was not formally bound by its advice until 1609.<sup>85</sup> In the sixteenth century in particular, it was perceived in its two roles, as the upper house of parliament and as a mediating constitutional figure for the entire *Rzeczpospolita Obojga Narodów*, in the sense of a Montesquieu *pouvoir intermédiaire*.<sup>86</sup> During the sessions of the Sejm, the senators, under the chairmanship of the king, took part in decisions on matters of state. Between Sejm sessions, however, a group of senators elected by the Sejm (the so-called senator-residents) were to be permanently present at the king's court in accordance with the Henrician Articles of 1573 in order to monitor his behaviour and decisions.<sup>87</sup> When the senator-residents had to be appointed regularly from 1609 onwards, the nobility tried to ensure that their advice (that is, opinions, minutes of meetings with the king) had to be submitted to the Sejm on paper and that a unanimous opinion of the senator-residents should bind the king.

Such a transition into a republic with a kind of 'elective chief magistrate' sat uncomfortably within the contemporary rise of absolutist tendencies elsewhere in Europe, after Poland's golden age of the Renaissance (*Złoty Wiek*) had had

<sup>82</sup> After Henry's flight from Poland to become Henry III of France in 1574, an interregnum was declared, after the country had waited in vain for his return. To prevent any imperial candidature (Maximilian II had been suggested as a applicant), the *szlachta* was guided by Jan Zamoyski to elect the Transylvanian prince Stephen Báthory, who then also married the last surviving Jagiellonian princess Anna.

<sup>83</sup> *Nihil Novi* replaces the Mielnik Privilege of 1501, which granted the Senate the right to revoke obedience in the event of any breach of duty by the monarch.

<sup>84</sup> Nothing about us without us is, therefore, not a precursor to 1688 (England) or 1776 (America).

<sup>85</sup> In addition, it was the monarch himself who appointed the senators and, thus, determined their career in the hierarchy of offices, as well as entrusting the senators with the administration of parts of the crown domain.

<sup>86</sup> The Senate was the aristocratic element in Aristotle's idea of a mixed constitution. However, the appointment to offices or public estates needed royal grace. For details on the intermediary powers according to Montesquieu, see: U. Müßig, *Montesquieu's mixed monarchy model and the indecisiveness of the 19th century Constitutionalism between monarchical and popular sovereignty*, "Historia et ius" 2013, no. 3, paper 5, [http://www.historiaetius.eu/uploads/5/9/4/8/5948821/mussig\\_finale.pdf](http://www.historiaetius.eu/uploads/5/9/4/8/5948821/mussig_finale.pdf) [accessed: 2024.09.16].

<sup>87</sup> The kings did not want these supervisors around them. So the rule of electing the inhabitants was not implemented. Only the civil war (Rokosz Sandomierski 1606–1609, and the Sejm sessions of 1607 and 1609) forced King Zygmunt III to accept the senator-residents permanently at court.



a Europeanwide impact because of Nicolaus Copernicus<sup>88</sup> or Jan Kochanowski.<sup>89</sup> Monarchical absolutism's drive for concentration and efficiency amounted to a European frame of reference for the 'anarchic disintegration of the elective monarchy' (*Polska nierządem stoi*: Poland exists through its 'ungovernment'). The *liberum veto* as the guarantee of the *szlachta's* fraternal equality degenerated into the epitome of destructive procedural tactics, especially in the later period of the mid-seventeenth century with its defeats against Sweden, Russia, and the Cossacks).<sup>90</sup>

#### IV. The Balance of Power between the Hungarian Crown and the Nobility

The Magyar magnates' narrative of freedom differed essentially from the Polish *szlachta's* fraternal equality, though they coincided in the mirrored choreography with the crown and the varying strength of the Árpád kings. Whereas Poland's geographical challenges required a cautious distance from the Holy Roman Empire and the papacy, as Roman Catholic universalism was instrumentalized for the Teutonic Order's conquests, the Hungarian aristocracy borrowed successfully from the crown's Latin affinity and Christian legitimization.

With the settlement of the equestrian Magyar people, Saint Stephen I (Hungarian: *Szent István*, where *Szent* is derived from the Latin *Sanctus*) marked the beginning of a Latinity characterised by the leading role of the Church (the Archbishopric of Esztergom was founded in 1001), which is quite unique among other European countries (and nowadays member states of the European Union). Until 1840, Latin was the official language of debate in the Hungarian parliament. It is possible that the adherence to Latin as an administrative and chancery language was intended to demonstrate 'Magyar independence' *vis-à-vis* its imperial Habsburg neighbour even before the Austro-Hungarian Empire.<sup>91</sup> The Hungarian nobility was (nearly) as numerous as the Polish nobility, and the differences in rank between the high and low nobility disappeared from the thirteenth century onwards.<sup>92</sup> Steppe-derived nomadic

<sup>88</sup> On his European significance, see also: U. Müßig, *Kopernik and ReConFort: A Copernican Turn in Comparative Constitutional History?*, "Giornale di Storia Costituzionale/Journal of Constitutional History" 2019, no. 37 (Giustiziabilità del potere/Justiciability of Power), pp. 5–24.

<sup>89</sup> 1530–1584, his vernacular translation of the Psalter to Slavic literature is what the Lutheran translation of the Bible is to High German literature.

<sup>90</sup> In 1652, the veto of a messenger, who was merely a magnate's front man, caused the first Sejm to fail.

<sup>91</sup> Maria Theresa's request for assistance after the Prussian invasion of Silesia was answered by the Preßburg Diet with the Latin '*Vitam nostram et sanguinem consecramus*' (We consecrate our life and blood), G. Kolinovics, *Nova Ungariae Periodus*, ed. M.G. Kovachich, Buda 1790, p. 492, <https://www.digitale-sammlungen.de/de/view/bsb10010213?page=524,525&q=sanguinem> [accessed: 2025.05.17], only abbreviated '*vitam & sanguinem*'. Cf. also R.J. Evans, *Maria Theresa and Hungary* [in:] *Enlightened Absolutism, Reform and Reformers in Later Eighteenth-Century Europe*, ed. H.M. Scott, Basingstoke 1990, p. 189 ff.

<sup>92</sup> Cf. P. Engel, *The Realm of St Stephen, A History of Medieval Hungary, 895–1526*, series: International Library of Historical Studies, issue 19, New York 2001, p. 84. Cf. also B. Kálmán, *Habsburg Absolutism and*

traditions had prevented the formation of feudal ties to the crown and established the Magyar magnates' narrative of freedom.<sup>93</sup>

The first concentration of monarchical rule through legislation,<sup>94</sup> administration,<sup>95</sup> and ecclesiastical constitution<sup>96</sup> is associated with the holy founding king Stephen I. This continued under the subsequent Árpád kings,<sup>97</sup> particularly in defence against foreign interference in the succession to the throne (seniority or primogeniture),<sup>98</sup> until the expansion into Croatia and Dalmatia<sup>99</sup> exhausted the financial power of the crown and its military resources.<sup>100</sup> Subsequently (more precisely, 100 years later), Hungarian magnates supported by the royal freemen (*servientes regis*)<sup>101</sup> forced the

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*the Resistance of the Hungarian Estates in the Sixteenth and Seventeenth Centuries* [in:] *Crowns, Church and Estates: Central European Politics in the Sixteenth and Seventeenth Centuries*, eds. R.J.W. Evans, T.V. Thomas, New York 1991, p. 123 ff.

<sup>93</sup> J.M. Bak, *Hungary* [in:] *Lexikon des Mittelalters*, vol. 8, 2<sup>nd</sup> ed., München 2003, col. 1227. Initially, the royal freemen were indeed royal servants (*servientes regis*), whose participation in administration and jurisdiction, documented in 1276 against the background of a comprehensive concept of nobilis, established the lower noble class of *iobagie* (*jobbágy*). Cf. for *iobagie* E. Balogh, *The Hungarian Golden Bull and its place among European legal sources* [in:] *Golden Bulls and Chartas: European Medieval Documents of Liberties*, ed. *idem*, Budapest–Miskolc 2023, pp. 43–84, 66 ff. W. Reinhard (*Geschichte der Staatsgewalt...*, Fn. 2, p. 76) cites the assumption 'that the feudal system hardly played a role in Poland and Hungary' (author's translation). In medieval Hungary no feudal system comparable to the German '*Heerschildordnung*' developed. Rather, the Hungarian system resembled the English system following the Salisbury Oath in 1086, which established a centralised structure according to which all nobles were directly bound to the king: all nobles belonged directly to the king. Werbőczy formulated this relationship brilliantly: 'To the nobility the king can only do what the nobility can do to the king', *Opus Tripartitum iuris Consuetudinarii*, Pars I, Titulus 3, § 7 ('Quales caufe de curia regia rurfus in praeferentiam comitum parochialium remitti debeant'), [https://repertorium.at/qu/1517\\_opus\\_tripartitum\\_transkription.html](https://repertorium.at/qu/1517_opus_tripartitum_transkription.html) [accessed: 2025.05.17]. Cf. fundamentally on this, E. Balogh, *The Hungarian Golden Bull...*, pp. 62, 66 ff.

<sup>94</sup> With Bavarian elements S.W. Römmelt, catalogue text on Stephan the Saint, in: *Bayern – Ungarn: Tausend Jahre*, eds. W. Jahn, Ch. Lankes, W. Petz, E. Brockhoff, Augsburg 2001.

<sup>95</sup> In addition, he formed a centralized administrative system consisting of royal castle districts and border counties with dependent officials who could be removed at any time.

<sup>96</sup> Numerous archbishoprics, bishoprics, and abbeys were created under his ecclesiastical sovereignty.

<sup>97</sup> Under King Ladislaus I (1077–1095) and his nephew Koloman (1095–1116), the strength of the crown was expressed in royal legislation introducing private property and the Christian way of life (*Unganr* [in:] *Lexikon des Mittelalters*, vol. 8, 2<sup>nd</sup> ed., München 2003, col. 1227).

<sup>98</sup> Especially Emperor Henry III (ruled 1046–1056).

<sup>99</sup> Despite Byzantine and Venetian interventions, the Hungarian presence on the Adriatic continued until the early fifteenth century.

<sup>100</sup> In 1123, Stephen II supported an internal Russian opposition through a campaign together with Polish and Bohemian troops. The magnates were able to force King Stephen II to return home by threatening to elect another king if he did not end the campaign; this is the first documented case of a successful alliance of Hungarian magnates against the king. Under King Géza II, two to three thousand Rhineland and Walloon immigrants arrived as part of the colonisation of the undeveloped border areas and were given a privileged position in the royal domains in eastern Hungary, in Transylvania. The crown never recovered from the 'sell-out' of the crown estate through the extensive donations made by the sons of Béla III to their partisans in their succession disputes.

<sup>101</sup> The royal freemen (*servientes regis*) achieved the securing of their participation in administration and jurisdiction, as well as their privileges based on the model of the high nobility. This gave rise to

restoration of their freedoms granted by Andreas II in the Golden Bull of 1222<sup>102</sup> (*libertas [...] nobilium regni nostri, instituta a sancto Stephano rege*).<sup>103</sup> The extensive privileges, especially in tax and military matters, laid the foundations for autonomous noble counties. In addition, the lesser nobility was able to emancipate itself from the native nobility and thus join the unified noble class of equal freedom (*una et eadem libertate*) in the 1351 confirmation of the Golden Bull. The annual assembly of the nobility in Stuhlweißenburg became the Hungarian Imperial Diet, which Hungarian legal historians classify as not yet structured until 1608.<sup>104</sup> This was followed in 1223 by a corresponding codification of freedoms for the clergy, and in 1224 by the *Privilegium Andreanum* for the Transylvanian Saxons. The renewal of the Charter of Liberty in 1231–1232<sup>105</sup> under pressure from the Church replaced the right of resistance (of the bishops, magnates, and royal freemen collectively known as ‘*nobiles*’ in accordance with Art. 30 of the 1222 Bull)<sup>106</sup> with the ecclesiastical sanction of excommunication.<sup>107</sup> Even after the death of King Matthias Corvinus in 1490, Hungarian church princes and barons invoked their old privileges in order to roll back all other ‘innovations’ of the Renaissance king, especially with regard to new taxes.

After the devastating Tartar invasion and the defeat at the Battle of Mohi in 1241,<sup>108</sup> King Béla IV (ruled 1235–1270) succeeded in consolidating his rule, known as ‘*reformatio regis*’, only by making concessions for the building of castles<sup>109</sup> and by strengthening

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the lower noble class of the *iobagie* (*jobbágy*), which is also reflected in the extension of the term *nobilis* to the lower nobility. With the confirmation of the Golden Bull by King Louis I in the Privilege of 1351, they disappeared within the totality of the nobility (*universi nobiles*). For the Hungarian nobility, equality of rights (*una et eadem libertate*) applied between the high and low nobility. This is a purely legal proposition, not a political one, of course. Nevertheless, it is very important, because the equality of the Hungarian nobility before the law, that is, in various court proceedings, was actually ensured until around 1848, E. Balogh, *The Hungarian Golden Bull...*, p. 74 ff. Cf. also H. Göckenjan, *Ungarn* [in:] *Lexikon des Mittelalters*, vol. 1, München 2003, cols 140 f.

<sup>102</sup> Golden Bull of Andrew II, in: *Europäische Verfassungsgeschichte...*, Fn. 50, p. 26 ff.

<sup>103</sup> For example, judicial immunity and unrestricted succession to their estates: *Die Entwicklung der Verfassung und des Rechts in Ungarn...*

<sup>104</sup> Art. 1 Golden Bull 1222 (*Europäische Verfassungsgeschichte...*, Fn. 50, p. 27). The bicameral system (with the magnates and bishops as the upper house) was only established with a law of 1608, which functioned, apart from shorter periods, until 1945.

<sup>105</sup> The decree itself (*Andreas II Regnis Decretum II*) shows the date 1231 in its text; the edition (*Rerum Hungaricarum monumenta Arpadiana*, eds. S.L. Endlicher, A.G. Kästner, K. Mächler, St. Gallen 1849, p. 428 ff.) dates the renewal to 1232 and, thus, corresponds to the information in the literature (Th. v. Bogay, *Golden Bull of Kg. Andreas II of Hungary* [in:] *Lexikon des Mittelalters*, vol. 4, 2<sup>nd</sup> ed., München 2003, p. 1540).

<sup>106</sup> *Europäische Verfassungsgeschichte...*, Fn. 50, p. 33.

<sup>107</sup> Provision XXXV of the decree, (p. 433 in the quoted text edition): ‘Spontaneae consencientes, ut siue nos, siue filii nostri et successores nostri hanc a nobis concessam libertatem confingere uoluerint, archiepiscopus Strigoniensis, premissa legitima admonicione, nos uinculo excommunicationis et eos innodandi habeat postestatem’.

<sup>108</sup> The Mongol invasion (having burned the city of Pest and seized control of the Hungarian plain) weakened the Hungarian central power to such an extent that the local oligarchs expanded their positions of power into feudal anarchy.

<sup>109</sup> From then on, the magnates were able to resist the king from the stone castles on their lands.

the cities through privileges and fortifications. The towns became a political counterbalance to the landowning nobility, reinforced by the rise of mining towns. Upper Hungarian mining towns in particular, in the founding of which German and Italian settlers (*hospites*) played a significant role, became so rich through the mining of silver, gold, and copper that they achieved a high degree of self-government.<sup>110</sup> Transylvania (while remaining part of the Hungarian kingdom), therefore, evolved into a flourishing economic region and grew to be a distinctive autonomous unit, with its special *vaivode* (governor) and its own constitution, while the cities characterised the intellectual and cultural climate. Central Europe stretched as far as the Carpathian Mountains and beyond, especially as the cultural and ecclesiastical pan-European context had a formative influence.

For the House of Anjou, on the other hand, the strengthening of royal power on a centralized scale, especially in the personal union with Poland (from 1370 onwards), became essential. Louis I the Great (Hungarian: *Lajos I Nagy* 1342–1382 HU; 1370–1382 PL) ruled almost without diets,<sup>111</sup> reflecting the shift in power away from the old oligarchy towards a nobility more loyal to the king. The Hungarian diet had, in fact, been a permanent institution (*Parlamentum Publicum*, *Parlamentum Generale*), even though it was not until the first act after the coronation of 1608 that the (entitled) estates were defined: bishops, barons/high nobility, *nobiles*, and the citizens of the free royal cities.<sup>112</sup> Even though the confirmation of the Golden Bull in 1351 reaffirmed equal liberty (*una et eadem libertate*) for the high and low nobility,<sup>113</sup> and the Diet was organically unified until 1608, the magnates kept meeting separately with the bishops on some occasions.<sup>114</sup> The corporate equalisation of the lower and higher nobility was part of the reforms that consolidated Hungary's political power and allowed it to flourish economically.<sup>115</sup>

During various brief interregna<sup>116</sup> the barons took over the government 'in the name of the sacred crown'. This collective responsibility for a 'transpersonal state subject' was

<sup>110</sup> Trade routes led from the west of Upper Hungary via Dalmatia to Italy and from Kaschau via Poland to the eastern Slavic region. As part of this international network, the towns had an impact on the intellectual and cultural climate, and the mining industry (silver, gold, salt), in particular, attracted internationally active trading houses and Upper German patrician families.

<sup>111</sup> The brief personal union (Louis Casimir III inherited the throne in 1370) resulted in the adaptation of Polish aristocratic privileges to Hungarian models.

<sup>112</sup> Dissenting W. Reinhard (*Geschichte der Staatsgewalt...*, Fn. 2, p. 77), who wants to recognise a bicameral structure even before this, which even claimed the authorisation of new taxes and participation in legislation.

<sup>113</sup> The Law of 1351, originally only for the tributary lands, generalised this in the interpretation as legal equality. In 1351, the aristocratic liberties of Hungary were extended to the ducal territories (Croatia, Slovenia, Dalmatia, and perhaps also Transylvania). For this, see: M. Borgolte, *Mittelalter in der grösseren Welt: Essays zur Geschichtsschreibung und Beiträge zur Forschung*, München 2014, p. 209.

<sup>114</sup> Notwithstanding the royally constituted totality of the nobles (*universi nobiles*), the lower nobility continued to serve as *familiares* in the troops and courts of the magnates.

<sup>115</sup> The 'equalisation' of high and low nobility is specific to Hungary and Poland; in Bohemia, as in Austria, the separation of barons and knights emerged.

<sup>116</sup> Emperor Siegmund or Sigismund was captured on 28 April 1401 during a meeting of rebellious

reinforced during the transition to an elective kingship.<sup>117</sup> Under Matthias I Corvinus (1458–1490), a balance of power among the county nobility,<sup>118</sup> cities, and landowning magnates was once again briefly achieved. After this Renaissance king, conflicts of interest among the high nobility made cooperation impossible. The magnates refused to elect King Matthias' son Johannes Corvinus as his successor and stipulated that any new king should 'spend most of his time in Hungary, make only Hungarians his officials and not give the country's property into foreign hands'.<sup>119</sup>

Under these conditions, Hungary did not have much to bring against the Ottoman advance. In the Battle of Mohács in 1526, the country not only lost its King Louis II (1516–1526), almost all ecclesiastical and secular dignitaries, and a large part of its army, but also its political independence.<sup>120</sup> At Mohács, the medieval kingdom of Hungary fell with its united army, despite the double election of Ferdinand I of Habsburg (1526–1564) and János Zápolya (1526–1540). When the Sultan occupied Ofen in 1541, turning central Hungary into an Ottoman province and Transylvania into a feudal principality, subject to Turkish suzerainty,<sup>121</sup> the Habsburgs were left with only the western part of Hungary, today's Slovakia, and the neighbouring country of Croatia.

Hungary had a long history regarding a right of resistance, known as *ius resistendi*, which was established as early as 1222.<sup>122</sup> Even an armed association of nobles against the king (*rokosz*, known from Polish history) was legitimised by law when the king

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Hungarian magnates and released at the beginning of September 1401 (J.K. Hoensch, S. Kaiser, *Herrscher an der Schwelle zur Neuzeit 1368–1437*, München 1996, p. 103 ff.).

<sup>117</sup> Since 1387, when the Hungarian Queen Maria was imprisoned by rebels, the oath of electoral surrender had been part of the Hungarian elective kingship. The coronation as a 'right of the Regnum' is documented in the *decretum* of 1447 (issued by Ladislavs Postumus), which declared the election of the king to be a right of the estates.

<sup>118</sup> This is probably a linguistic reminder of the founding of the state by St Stephen, who actually adopted the Frankish model, the county system, as an example for structuring the country. However, since Latin was the official language until 1844, it was not the German variant of the word 'Grafschaft', but its Latin variant *comitas/Komitat* that was widely used.

<sup>119</sup> A. Kubinyi, *Die Wahlkapitulationen Wladislavs II. in Ungarn (1490)* [in:] *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze*, ed. R. Vierhaus, Göttingen 1977, pp. 140–162, 147 ff. (paraphrase translation by the author). Cf. W. Blockmans, *Wie der Römische König in Flandern zum Gefangenen seiner Untertanen wurde: um 1488* [in:] *Die Macht des Königs...*, Fn. 41, pp. 275–298, 282.

<sup>120</sup> There was a kind of tripartite division into a western part under Habsburg rule, a central part under Ottoman rule, and Transylvania (today located in Romania), which was obliged to pay tribute to the Sultan, but retained a certain autonomy through its policy of striking a balance between Istanbul and Vienna.

<sup>121</sup> That is, the part east of the Tisza (Transylvania and the Partium, that is, some eastern Hungarian counties, which were subsequently Protestant in character) that was granted to Szapolyai's son but was subject to tribute. See R.T. Göllner, *Grundzüge der ungarischen Geschichte, "Ost-West-Europäische Perspektiven"* 2007, vol. 8, issue 2, pp. 88–99, [https://epub.uni-regensburg.de/32216/1/goellner\\_owep\\_2007\\_88-99.pdf](https://epub.uni-regensburg.de/32216/1/goellner_owep_2007_88-99.pdf) [accessed: 2024.08.19].

<sup>122</sup> Art. XXX of the Golden Bull of 1222 formulated it thus: '*Statuimus etiam quod si nos vel aliquis successorum nostrorum aliquo unquam tempore huic dispositioni contraire voluerint, liberam habeant, harum auctoritate, sine nota alicuius infidelitatis [...] presentes et posteri, resistendi et contradicendi nobis et nostris successoribus in perpetuum facultatem*'. (W. Näf, *Herrschaftsverträge des Spätmittelalters, Quellen zur neueren Geschichte*, 2<sup>nd</sup> ed., Bern 1975, p. 10).

could not 'afford' a criminal court to suppress a Calvinist revolt of the nobility in 1607.<sup>123</sup> The suppression of the aristocratic right of resistance in the Habsburg remnant of Hungary is emblematic of the incipient absolutist centralisation of later Habsburg rule. In 1687, the Hungarian nobility even formally renounced their *ius resistendi* in favour of the Habsburgs, which is symptomatic of the smooth reconciliation of the interests of the Hungarian nobles with those of the Habsburg monarchs: Leopold I declared to the National Assembly of 1687 that he could introduce an absolute monarchy as in Bohemia by virtue of his right of conquest, but that he did not wish to do so out of 'innate leniency', but would 'respect the Hungarian order' if the Hungarians renounced their right to vote and resist in return.<sup>124</sup> The Leopoldine Diploma (1690) also preserved Transylvania's princely and corporative autonomy. Croatia-Slavonia, including the military border with the Ottoman Empire, became subordinate to Vienna, when the Habsburgs managed to establish themselves as sovereigns over Hungary and Transylvania 1699. Given this territorial separation, the nobility amounted to the 'aristocratic national' representation of the Hungarian nation ('*natio Hungarica*'), especially as noble tax exemption and the county constitution were preserved. As a result, it was the aristocracy that resisted the enlightened Theresian absolutism and its endeavours at economic reform. It was the national identification ('*natio Hungarica*'), that provided the Hungarian nobility with a framework beyond the ethical-cultural divisions of the Hungarian kingdom, in which they could assert its collective privileges and made them the 'natural bearers' of any resistance against external interferences, such as the Theresian reforms (as they were seen). Joseph II's political talent realized with an infallible power instinct that he had to abolish the counties' autonomy and to replace estates (elected) officials with imperial-royal civil servants.

<sup>123</sup> W. Reinhard, *Geschichte der Staatsgewalt...*, Fn. 2, p. 231; U. Augustyniak, *History of the Polish-Lithuanian Commonwealth. State – Society – Culture*, series: Polish Studies Transdisciplinary Perspectives, vol. 13, eds. K. Zajas, J. Fazan, Frankfurt am Main 2015, p. 109 ff.; *Zebrzydowski Rebellion* [in:] *Britannica*, 1998, <https://www.britannica.com/event/Zebrzydowski-Rebellion> [accessed: 2024.08.28]. However, this premise needs to be qualified in light of the following considerations: The Diet of Hungary, also known as '*Rokosz*', never intended an 'armed rally against the king'. In the Middle Ages the Imperial Diet, which was generally held abroad, was referred to as '*Rokosz*' in Slavic countries and particularly in Poland. Incidentally, the word comes from the name of a meadow (*Rákos*) near Buda, where there was enough space for the assembled delegates of the counties, free districts etc. to meet, because, as emphasised, until 1608 so-called mass, that is, unstructured imperial diets, were held. For the Hungarian nobles in question that meant the right to bear arms (similar to the U.S. equivalent granted in the Bill of Rights) and they were therefore 'armed' at all times.

<sup>124</sup> The so-called *Explanatio Leopoldina* was issued in 1690 as a royal decree, P. Okolicsanyi, *Historia diplomatica de statu religionis evangelicae in Hungaria*, [s.l.] 1710, p. 135 ff., <https://www.digitale-sammlungen.de/de/view/bsb10328891?page=7> [accessed: 2024.08.28]. Cf. L. Rácz, *Das Beziehungssystem Staat und Kirche im historischen Ungarn* [in:] *Die Entwicklung der Verfassung und des Rechts in Ungarn...*, pp. 321–358, 347, 349.



## V. The Special Position of the Duke of Bohemia as an Imperial Prince and the Identificatory Impact of the Estates' Struggle for Representation

The Bohemian mirrored choreography is displaced by the Imperial function of the Duke of Bohemia as Electoral Prince within the Holy Roman Empire and, vice versa, by the special position of the Bohemian duke among the imperial princes by virtue of his royal title,<sup>125</sup> which was established in 1198–1212. The veneration of the martyr duke Wenceslas (Václav, †929–935), who, like the Hungarian king Stephen, became a holy founder king and personified the legendary centralisation of the Bohemian tribes under the Czech Přemyslids, was decisive for the Bohemian nobility's self-identification.<sup>126</sup> Although the unity of Bohemian ducal and royal power was unquestioned,<sup>127</sup> the landowning nobility (the Hrabschitze, the Markwarde, the Witigonen, etc.) organised themselves at the *Landtage* (*sněmy*). Via *Landgericht* (*soud zemský*)<sup>128</sup> and *Landtafel* (*desky zemské*), the Bohemian nobility 'constitutionalized' its noble community (*obec*),<sup>129</sup> and claimed a speaking role for Bohemia from the thirteenth century onwards. These (recorded) claims of the Bohemian nobility to

<sup>125</sup> This made the Bohemian kings hereditary electors of the empire; the special status of the Wenceslas crown also included the use of their own national language, and election and enthronement at Prague Castle.

<sup>126</sup> In 845, the baptism of fourteen Bohemian 'duces' (tribal rulers) in Regensburg by King Louis II ('the German') is documented (*Annales Fuldenses, Die Jahrbücher von Fulda* in: *Quellen zur karolingischen Reichsgeschichte*, Dritter Teil, ed. R. Rau, Darmstadt 1975, p. 33; P. Mai, *Bemerkungen zur Taufe der 14 böhmischen duces im Jahr 845* [in:] *Beiträge zur Geschichte des Bistums Regensburg*, vol. 29, ed. G. Schwaiger, Regensburg 1995, pp. 11–18, 11 ff.), and, thus, the beginnings of Christianity in Bohemia before the middle of the ninth century. In the tenth century, the Bohemian Church, which had previously belonged to the Regensburg diocese, became independent with the foundation of the diocese of Prague, which is documented as a suffragan diocese of Mainz from around 973. See also the Libussa legend associated with the *Vyšehrad* as a founding myth for the city of Prague and the Přemyslid rule over Bohemia. Charles IV (ruled 1346; 1347; 1355–1378) issued the order that the future king had to walk up the *Vyšehrad* and that this route had to be taken at the beginning of the coronation ceremony in order to express the bond with the Přemyslid rule.

<sup>127</sup> In the chronicles of Cosmas of Prague (†1125), the land of Bohemia is already a fixed, institutionalised term (*Böhme, Politik und Regierung* [in:] *Lexikon des Mittelalters*, vol. 2, München 2003, col. 337).

<sup>128</sup> Still the Golden Bull 1365 confirms the juridical exemption of Bohemia from any imperial jurisdiction: no subject of the Bohemian king had the right to appeal to a 'foreign' court or to the emperor, nor could he be summoned before a non-Bohemian court.

<sup>129</sup> The *Landtafel* gathered official documents in which the judgements of the *Landgericht*, and the rights and privileges of both the nobility and the country as a whole were recorded from the thirteenth century. According to its function, the *Landtafelamt* was the archive of the kingdom and the margraviate (privileges of the estates, freeholds, the registry (chancellery) of the district court with its own jurisdiction). The *Landtafel* was also always regarded as an archive of the estates, as the privileges granted by the king to individual nobles and to the whole country and the resolutions of the Diet were entered in the *Landtafel*. After the defeat at the Battle of the White Mountain (*Bitva na Bílé hoře*) 1620, the *Landtafel* was subordinated to the king and the sovereign authorities. The estates had lost their archive.



power could not be pushed back by territorial expansion,<sup>130</sup> by the amplification of the city network (with the multiple adoption of German city rights), or by the resources of the newly exploitable mines.<sup>131</sup> Correspondingly, the distinction of the high nobility barons (*páni*) from the low nobility knights developed in Bohemia from the fourteenth century onwards.

They took over the country's administration after the extinction of the Bohemian Přemyslids (with the assassination of Wenceslas III in 1306). Their competition with the German-speaking patriciate of Prague and Kuttenberg (Kútina Hora) further strengthened the Bohemian nobility's self-awareness of being the (true) bearers of Bohemian unity. Even the actual 'architect' of the Bohemian crown, Emperor Charles IV (1347–78), was unable to stop this development; under his reign, Prague was expanded as the capital,<sup>132</sup> Prague New Town and Charles University were founded,<sup>133</sup> and the bishopric of Prague was elevated to an archbishopric. Nevertheless, Charles's Golden Bull of 1356 had to confirm the free election of the Bohemian king by the estates in the event of the extinction of the ruling family (through absence of heirs), leaving the Emperor only with the role of recognising and confirming the elected Bohemian king.<sup>134</sup> In addition, his codificatory drafts for a Bohemian Land Law, the *Maiestas Carolina* 1348 has never come into force,<sup>135</sup> as the Emperor Charles IV shied away from confrontation with the Bohemian nobility out of fear for his reputation in the Empire. The rejection of the Bohemian nobles was fuelled by the expansion of royal judicial power envisaged in the draft Land Law, the intended restrictions on their ability to

<sup>130</sup> Through the acquisition of ownership in Moravia, Upper and Lower Lusatia, and Silesia the Polish dukes of Silesia became feudal subjects of the Crown of Bohemia.

<sup>131</sup> The Golden Bull of 1356 granted the right to the Bohemian king to mint gold and silver coins.

<sup>132</sup> After Prague had become an archbishopric, Charles began the construction of St Vitus Cathedral and Karlštejn Castle. Under his building projects, Prague became the *de facto* capital and residential city of the Holy Roman Empire. (An inscription on the Old Town Hall reads *Praga Caput Regni*). Cf. also the Charles Bridge, Karlův most, for which Charles IV commissioned the famous architect Peter Parler from Schwäbisch Gmünd; the longest Gothic bridge in Europe was opened to traffic in 1383, but was finally completed only in 1403. The statue of Saint John of Nepomuk was the first to be placed on Charles Bridge in 1683. Around 1556, when the Jesuits arrived in Prague, there were hardly any Catholics left and, therefore, the bridge became decorated as a penitential walkway of horror, and the stone saints were used as propaganda for a 'Bohemian Reconquista'. In addition to Wenceslaus and Ludmila, there was also the hermit Ivan, followed by Veit, Ivo, Kajetan, Prokop, Kosmas, and Damian. People were to see that their homeland had originally been Catholic before the Protestant rebels set the country ablaze. By the way, Albert Einstein, who spent a year as a guest lecturer at Charles University in Prague in 1911, even speculated that 'The way to the moon is via Charles Bridge, then turn left at the Lesser Town Bridge Tower'.

<sup>133</sup> It was modelled on the Staufer foundation in Naples on the one hand and on the *Studium Generale* at the University of Paris on the other.

<sup>134</sup> However, the emperor could not grant Bohemia as a fief and could not even appoint the Bohemian king. Only the office of imperial archbishop and electoral prince was transferred to him as a fief.

<sup>135</sup> 1352 – Text edition of the land law draft by B.-U. Hergemöller, *Maiestas Carolina. Charles IV's draft codification for the Kingdom of Bohemia of 1355*, München 1995.

enrich themselves from pledged crown estates, the tightening of the deductibility of officials, and the ban on noble alliances and private feuds.<sup>136</sup>

Furthermore, the Hussite movement of the fifteenth century, and, thus, the antagonism between Hussite Bohemia and its Catholic neighbours, weakened the Bohemian crown<sup>137</sup> and led to the estate-based rule of the high nobility (Vladislav's Land Order of 1500).<sup>138</sup> After the burning of John Hus as a heretic in Constance in 1415, the crown had been discredited to pacify the religious reform movement, and anti-curial Wyclifism<sup>139</sup> under the symbol of the lay chalice became enriched with national and social aspirations. The imperial territory's reorganisation under the common penny Act (*gemeiner Pfennig*) in 1495 provoked a *de facto* spin-off of the Bohemian crown, which was thereby relinquished to the electoral claims of the Bohemian Diet. Further attempts to strengthen the position of the king through personal union with other countries also failed. The reign of the Jagiellonian Vladislav II, elected in 1471, who had also been King of Hungary since 1490, remained a mere formality.

From 1526, the Bohemian estates clashed with the centralising tendencies of the Catholic Habsburgs. In 1526, the Habsburg Ferdinand I succeeded his brother-in-law Louis II,<sup>140</sup> King of Bohemia, Croatia, and Hungary, who had fallen at Mohács. While he was accepted by all neighbouring countries, the Bohemian nobility insisted on their right to vote on his candidature. Of course, this Bohemian position was combined with religious resentments against the monarchical centralism of the Catholic Habsburgs, thus sparking off the Thirty Years' War in an interplay between monarchical reaction and

<sup>136</sup> E. Werunsky, *Die Maiestas Carolina*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung" 1887, no. 9, pp. 64 ff., 101 ff.

<sup>137</sup> In 1457, the Bohemian Diet elected the representative of the Utraquists and the high nobility, George of Poděbrad, as king.

<sup>138</sup> The last redaction of the Land Order 1564 before the monarchical revision in 1627 is available at: <https://www.bibliotekacyfrowa.pl/dlibra/publication/65275/edition/65226/content?ref=L3B1Ym xpY2F0aW9uLzY1ODh4L2VkaXRpb24vNjYwNDM> [accessed: 2025.05.17]. Only after the Hussite Wars historiography speaks of the 'Estates' State, K. Bosl, *Böhmen als Paradenfeld ständischer Repräsentation vom 14. bis zum 17. Jahrhundert* [in:] *Aktuelle Forschungsprobleme um die Erste Tschechoslowakische Republik*, ed. *idem*, München 1969, pp. 9–21.

<sup>139</sup> According to Wycliffe's doctrine of 'power by grace alone', only God himself directly grants all authority, and therefore no papal power claims can be laid. The Bohemian Wycliffe movement, formed by Jan Hus, demanded the serving of communion in both forms (*sub utraque specie*), free preaching, including the Czech mass, and the poverty of priests. After Hus's death in 1415, the names 'Hussites', 'Utraquists', or 'Calixtines' (*Kelchner*) were used interchangeably for all reform groups that followed Hus's teachings.

<sup>140</sup> After Vladislav II, the second and last king of Bohemia, Hungary, and Croatia, from the originally Lithuanian Jagiellonian dynasty.

estates' counter-reaction.<sup>141</sup> After the failure of the corporative regiment in Bohemia<sup>142</sup> and its military at the Battle of the White Mountain (Czech: *Bitva na Bílé hoře*, 1620),<sup>143</sup> Emperor Ferdinand ruthlessly enforced the restoration of his royal power and the re-establishment of religious unity in the Bohemian lands. The aristocratic barons (*páni*) involved in the uprising were arrested and executed.<sup>144</sup> On 9 April 1624, the Habsburg Emperor Ferdinand II issued a patent by which he allowed only the Catholic faith in Bohemia. A few days later, a further legal act followed, forbidding the royal cities from accepting non-Catholics as citizens and allowing only Catholics to pursue trades in the cities. Re-Catholicisation was carried out in different ways: on the one hand, with the uncompromising enforcement of the Roman Catholic faith, including the use of violence, and, on the other hand, with the attempt to evoke an interest in Catholicism through persistence. However, any kind of rebellion was suppressed. Subsequently, Bohemia and Moravia gradually became almost entirely Catholic. However, some

<sup>141</sup> In 1609, the Habsburg Emperor Rudolf II issued a letter of majesty in gratitude for the support of the Bohemian estates in the intra-Habsburg rivalry, granting religious freedom, prohibiting religious coercion by sovereigns and setting up a defensor college to protect the non-Catholic faithful, consisting of ten commoners, ten knights, and ten representatives of the nobility. In 1583 he moved his court from Vienna to Prague, and as a patron of the arts and sciences invited the alchemist Edward Kelly and the astronomers Johannes Kepler and Tycho Brahe to his court. When his Habsburg rival Matthias, Emperor and King of Bohemia from 1612, moved his residence back to Vienna, his governors strengthened Catholic forces in Bohemia. On 6 June 1617, Ferdinand I (later emperor, ruled 1556–1564) was elected King of Bohemia and immediately set about enforcing extensive re-Catholicisation measures in Bohemia, restricting the rights of the Estates, as guaranteed by his predecessor. When the Catholic League closed a Protestant church in Braunau and a non-Catholic church was demolished on the archbishop's lands in Klostergrab, the tensions turned into open hostility, and the Bohemian nobles protested to Matthias by a letter. The (responding) imperial ban on further noble gatherings resulted in the continued disobedience of the Protestant Bohemian estates. On 21 May 1618, they met (without representatives of the royal cities) in Prague's Karolinum. Two days later, some of noble participants (including Matthias Thurn, Albrecht Smiřický, Count Andreas Schlick, Wenceslas of Ruppá, the Řičan brothers, the Kinsky brothers, a brother of William of Slavata, Colonna of Fels, and William of Lobkowitz) went to Prague Castle to dispute with the governors Ladislaus of Sternberg, Diepold of Lobkowitz, Jaroslav Borsita of Martinic, and Wilhelm Slavata; the Bohemian representatives held an improvised court and threw the imperial governors Slavata and Martinic and the chancellery secretary Philipp Fabricius out of the castle windows. The Defenestration of Prague on 23 May 1618 marked the beginning of the Thirty Years' War.

<sup>142</sup> After the defenestration, on 24 May 1618 the rebels elected a thirty-member directorate from their ranks, made up of ten representatives from each of the estates. The formation of the Estates Regiment and the associated final break with the rulers in Vienna arose from the Bohemian desire for religious freedom and was supported neither by the bourgeoisie nor by the people at large. The resulting internal weakness of the uprising could not be compensated for by alliances with the Protestant Union, the Netherlands, and the Calvinists in England. Only Moravia joined the resistance on 2 May 1619.

<sup>143</sup> Cf. the conference volume: *Městské právo ve střední Evropě/Stadtrechtsgeschichte in Böhmen und Europa*, eds. K. Malý, J. Šouša, Prague 2013.

<sup>144</sup> Ferdinand had all those involved in the uprising arrested and in some cases executed, and their money and goods were confiscated (M. Alexander, *Kleine Geschichte der böhmischen Länder*, Stuttgart 2008, p. 231 ff.).

smaller Protestant groups remained in the Aš Corner (Lutherans) and in the Central Bohemian and Moravian Uplands (Moravian Brethren).

The New Land Ordinance (*Verneuerte Landesordnung*) of 1627 abolished the estate right to elect a king and declared Bohemia to be a hereditary Habsburg kingdom. In the course of this 'monarchical revision', legislation and the appointment of offices became royal prerogatives. Only the right to levy taxes remained with the Estates,<sup>145</sup> but only in return for their 'indefinite obligation' to render military service or to support mercenaries.<sup>146</sup> The old elites were dispossessed and new aristocratic families from abroad were favoured by the ruling Habsburgs. 'The formerly rich corporative state with its self-confident nobility had been reduced to an impoverished province of the Habsburg Empire',<sup>147</sup> and it remained under Habsburg 'foreign' rule until 1918.

Like the Habsburgian 'secondary' lands of Moravia and Silesia, the Kingdom of Bohemia was declared hereditary after the 1627 abolition of the estates-based constitution, as was the Hungarian fate according to the Pragmatic Sanction in 1713. This regionalisation could not eliminate the local particularities of the hereditary lands; even after the crushing defeat of the Bohemian and Moravian estates at the White Mountain in 1621, any governmental standardisation of the vast Habsburg dominions under a tight central authority was unattainable, as the Bohemian and Hungarian Court Chancellery demonstrate. Only the Austrian monarchy itself<sup>148</sup> provided the unity of the Habsburg conglomerate of lands.<sup>149</sup>

<sup>145</sup> The representatives of the Catholic Church were appointed as the first estate, followed by the titular nobility, and only then by the old Bohemian noble families. The towns lost their former position and had together only one vote in the Diet.

<sup>146</sup> M. Alexander, *Kleine Geschichte...*, Fn. 144, pp. 233, 234: 'Thus the Kingdom of Bohemia had become a different country. The formerly rich corporative state with its self-confident nobility had been relegated to an impoverished province of the Habsburg Empire' (paraphrased translation by the author).

<sup>147</sup> *Ibid.*, Fn. 144, p. 234.

<sup>148</sup> At a time that historians mark as the beginning of the Habsburg position as a great power, the Habsburgs would have achieved a higher rank through non-German royal crowns, like the House of Wettin in Poland in 1697, the House of Hohenzollern in Prussia in 1701, and the House of Welf in England in 1714, if they had not held the imperial title in the empire uninterruptedly since 1438. Leopold's reign was extensive (emperor of the Holy Roman Empire from 1658 to 1705, king of Hungary from 1655, king of Bohemia from 1656, and king of Croatia and Slavonia from 1657). It was also significant that during his reign, Tyrol and the forelands fell to the emperor in 1665. This further strengthened his position in imperial politics.

<sup>149</sup> Provincial diets (*Generallandtage*) got stuck in their beginnings, whereas the position of the traditional provincial diets (*überkommene Landstände*) remained comparatively strong. Well until the eighteenth century, the provincial diets (*Landstände*) retained the right of tax concession, the collection of taxes (*contributionale*), and the introduction of new tolls and indirect consumption taxes. At the head of each of the Habsburg lands was a governor (*Landeshauptmann*), who, himself a member of the local nobility, was appointed by the sovereign on the recommendation of the provincial diets and, as the highest representative of the state, was answerable to the emperor and the landed nobility.

## VI. New Horizons: Comparative Findings

1. As any centralized consolidation was out of reach for the Holy Roman Empire (HRE), imperial affiliation resulted from Emperor-related legal titles or the episcopal structure of bishoprics. On the basis of the Augustinian coincidence of worldly and celestial rule, it was a 'celestial orientation' towards the *civitas Dei* that laid the very worldly claim to subordinate the class hierarchy<sup>150</sup> to the Frankish emperorship; further backing emerged from the medieval canon of *ut non conturbaretur ordo*.<sup>151</sup> The intermingling of the Platonic primordial idea with Christian creation narratives was not just philosophical theorising; rather philosophical universality linked hands with an all-encompassing catholicism (etymologically, *katholikós* combines *katá* 'according' and *hólos* 'total, complete'), whereby the Empire's irrevocability and eternity mattered. Within this imperial environment, the Christianization of the Bohemian princes and leading social classes took place (around 894),<sup>152</sup> as did that of the Sorbs, the Elbe and Baltic Sea Slavs, and the Slovenes in the south.<sup>153</sup> Their baptized 'entrance' into the European world meant that the Latin episcopal structure was the organizational power tool to bring ducal central authority in dependency from the emperor and/or the pope. It was not by chance that Emperor Otto I made the Bishopric of Prague, the ecclesiastical organisation of the feudal Duchy of Bohemia, subordinate to Mainz,<sup>154</sup> the seat of his chancellor and later one of the most influential prince-

<sup>150</sup> According to Bishop Adalbero of Laon (d. 988), the three estates *oratores* (orators), *pugnatores* (warriors), *laboratores* (workers) are God-given (R. Lesaffer, *European Legal History, A Cultural and Political Perspective*, Cambridge 2009, p. 168).

<sup>151</sup> With regard to *ordo* and *ordinabiliter habitum* see: U. Müßig, *Reason and Fairness...*, supra n. 17, pp. 41 ff., 502 ff.

<sup>152</sup> N.H. Trunte, *Slavia Latina: An Introduction to the History of the Slavic Languages and Cultures of Eastern Europe*, Munich–Berlin 2012, p. 195 ff. For details see Trunte, pp. 69 ff., 76 ff., in particular table p. 79 ff., *ibid.* p. 81 on the 'border' between Slavia Latina and Slavia Orthodoxa. The earliest vocabulary of the word 'border' was not used by the Imperial Chancellery, but in 1315 at the French royal court in regard to the chain of castles marking the northern '*frontière*' against the County of Flanders.

<sup>153</sup> *Ibid.*, Fn. 153, pp. 243, 301 ff., 320. After Otto I's victory on the Lechfeld in 955, Carantania was incorporated into the empire in 962, with the margravates of Carinthia, Pettau, Carniola, Istria and Verona. Colonisation with peasants from Franconia and Swabia and thus a bulwark against Magyars and Croats.

<sup>154</sup> The Christianisation of the Slavs in Bohemia is anachronistically dated to 894 according to the *Chronica Boemorum* by Cosmas of Prague, written between 1119–1125. All other sources, especially the Church Slavonic legend of Wenceslas, are hagiographical in nature (*ibid.*, Fn. 153, pp. 69 ff., 139 ff.). Under pressure from the foundation of the archbishopric of Magdeburg, the Bohemian prince Boleslav II (rul. 972–999) the Pious from the Přemyslid dynasty endeavoured to establish his own Bohemian bishopric. In 1158, the Hohenstaufen emperor crowned the ruler of Bohemia as king (*rex Boemorum*) at the Regensburg Court Diet. Bohemia was elevated to kingship in exchange for the promise of Bohemian participation in the Second Italian Campaign against the Lombard cities. Without the Pope's consent, the elevation to the rank (on the part of the Curia) was only to apply to the person actually crowned. It was not until 1212 that Frederick II formally recognised the Bohemian hereditary kingship. The right of investiture of the Bohemian king was also confirmed and direct incorporation into the imperial church was ruled out.

electors. Therefore, the Bohemian case is characterized by the imperial framing of the ducal-royal power's consolidation. It was the feudal relationship to the emperor and any legally constituted community of the Bohemian nobility that grounded the representative claim for the existence of a Bohemian entity. The more cultural (than politically defined) narratives of Bohemian self-definition may be anchored in this; at any rate, it is remarkable how Masaryk's<sup>155</sup> humanitarianism<sup>156</sup> is said to be based on a 'natural' continuation of the Bohemian Brethren's ideals, thereby blending Christian salvatory individualism,<sup>157</sup> Hussite social criticism, and 'natural' folk romanticism (cf. the contemporary prominence of the Shepherds' Mass (*Rybovka*)<sup>158</sup> or Smetana's Moldau (*Vltava*) symphonic poems). With regard to this article's mirror-focus, the Bohemian crown's hierarchical degradation within an imperial frame of reference left only an asymmetric space for the estates' corporative representation, resulting in a kind of superiority-subordination thinking that overrode the *omnes tangit*-responsibility between crown and estate. It is remarkable how the constitutional and confessional rupture in 1618–27 erased any intermediary tones and nuances: the traditional understanding of a 'final' and definite end of a 'nationally glorified' corporative past with its confessional tolerance and social awareness leads to the pejorative summation of Habsburg domination as 'foreign lordly rule' and of the years 1620–1918 as the 'dark period' (*doba temna*).<sup>159</sup> Such an approach (in black and white) leaves only nature or culture as sources of rights. Ján Kollár's words 'Even if called serf, it is the human being that answers'<sup>160</sup> do not imitate the cosmopolitan humanism of the Western European Enlightenment or the human rights-cry of the French Revolution (the Declaration of the Rights of Man of 1789); rather, it is a romanticising, emancipatory approach to the rural *Grundholde* or the *Rybovka*'s shepherds. This seems even more plausible, as the folkloric reasoning in Masaryk's explanations of the rights of nationality and language, the importance of social and economic living standards, the rights of women and children allowed an immunised (and, thus, politically unobjectionable) manoeuvring through nineteenth-century Slavic cosmopolitanism (Karel Havlicek) and twentieth-century socialism's yearning to merge the individual into the masses through class moralisation.

<sup>155</sup> Main architect of the Czechoslovakian state (1918) and its long-standing president (1918, 1920, 1927 and 1934).

<sup>156</sup> <https://www.gleichsatz.de/b-u-t/archiv/kriko/masaryk1human.html> [accessed: 2024.09.17].

<sup>157</sup> In the late medieval universal controversy, this was a strong nominalist argument: God does not love man, i.e. the genus, but Peter or Paul, i.e. individuals. Therefore, the individuals, not the genera must be primarily real. Cf. also the See Genezareth narrative of the calling of the disciples: if you want to follow me, you shall not say goodbye at home.

<sup>158</sup> Cf. the Passau performance in December 2022 with the author at the traverse flute (<https://deggendorf.niederbayern.tv/de/mediathek/video/boehmische-hirtenmesse-von-jakub-jan-ryba-pa> [accessed: 2024.09.17]) from minute 6:30 onwards, within the research programme 'Constitutional Communication via Music'.

<sup>159</sup> Named after a novel by Alois Jirásek.

<sup>160</sup> One of the founders of Pan-Slavism, *O literární vzájemnosti mezi kmeny a nářečími slávskými* (*Über die literarischen Gemeinsamkeiten zwischen slawischen Stämmen und Dialekten*), published in 1836.



2. In contrast, a mirrored choreography focus on Polish and Hungarian corporate and proto-national representations could start from the autonomy of Poland and Hungary *vis-à-vis* the East Frankish and later the Holy Roman Empire; their Christianisation is part of the imperial narrative to be so powerful as to manage the spread of Christianity 'beyond the traditional imperial borders'. Under Otto III, the 'Servant of the Apostles' (*Servus apostolorum*), the spread of Ottonian rule structures through Christianisation extended beyond the borders of the empire to Poland and Hungary. It was the end-time logic<sup>161</sup> of the Christian imperial rule that made the subjugation of the pagans an imperial affair.<sup>162</sup> The imperial pilgrimage to Gniezno (1000)<sup>163</sup> was meant to deliberately indicate that imperial power was unsurmountable, as it reached even beyond the traditional imperial 'borders'. Defining the Polish ecclesiastical province as the Archbishopric of Gniezno resulted in Poland's having its own ecclesiastical organisation, independent of the imperial federation. The appointment of the Polish Duke Boleslaus<sup>164</sup> as 'brother and collaborator in the empire' (*socius et amicus*)<sup>165</sup>

<sup>161</sup> Cf. the doctrine of the four kingdoms, which the church father Jerome related to the four empires of Babylon, Persia, Greece, and Rome. According to this doctrine, one empire replaces the other and the Last Judgement comes at the end.

<sup>162</sup> Supported by his teacher and advisor Gerbert of Aurillac, later Pope Sylvester II (from 999). San Bartolomeo all'Isola (on the Tiber Island in Rome), Otto III's only church foundation in Rome, was dedicated to St Adalbert of Prague (Adalbert Vojtech), and the Adalbert Monastery (consecrated in 1001 in the presence of Otto III), which was to serve as a home for the monks of the Slavic mission, provided a suitable spiritual bracket: the Bishop of Prague had set off on a missionary journey to the Prussians from Mainz via Gniezno and Gdańsk in December 996 and was slain by Prussian pagans on an island near Elbing in April 997. The body of the saint was said to have been guarded by an eagle for thirty days until the pagans threw Adalbert into the sea. The spot was then marked by a shining pillar so that the body and head of the dead man could later be recovered and brought to Gniezno (cf. the bronze doors of Gniezno Cathedral from 1170–80).

<sup>163</sup> The significance of the 'Act of Gniezno' associated with Otto III's pilgrimage to Adalbert's tomb in Gniezno (1000) is disputed; the majority of Polish historical writing assumes that the Polish prince Bolesław was proclaimed king. In any case, Bolesław I was granted the right to independently appoint bishops, which, according to a papal decree of the time, was reserved exclusively for kings. The establishment of the archbishopric of Gniezno with the suffragan subordination of the bishops of Kolberg, Kraków, and Wrocław is equally undisputed. The missionary bishopric of Poznań was not subordinated to Gniezno.

<sup>164</sup> Bolesław I (called Chrobry, 'the Brave').

<sup>165</sup> Quoted from J. Strzelczyk, *Das Treffen in Gnesen und die Gründung des Erzbistums Gnesen* [in:] *Europas Mitte um 1000: Beiträge zur Geschichte und Archäologie*, eds. A. Wiczorek, H.M. Hinz, Darmstadt 2000, p. 496. The copy of the Holy Lance of St Mauritius brought by the emperor, in which a cross relic was integrated, served as a counter-gift for the arm relic of St Adalbert to the emperor. With close, but not always conflict-free ties to the Roman-German Empire, Bolesław I Chrobry (the Brave) (ruled 992–1025) won Lesser Poland (Polonia Minor, around Kraków), Pomerania, Silesia, Moravia, western Slovakia, and Lusatia. The good understanding with Emperor Otto III, who had visited Gniezno in the year 1000 and agreed to the establishment of an archdiocese directly subordinate to Rome, was superseded under Emperor Henry II by struggles over the Margraviate of Meissen and Lusatia, which were not settled until 1018 in the Peace of Bautzen. Bolesław I acquired the royal dignity in 1025 with papal approval. Bolesław II Śmiały (the Bold) (1058–79) was able to regain the kingship lost under the successors of Bolesław I in 1076. Despite the temporary reconquest of Pomerania (1102–22) and the renewed attempt to utilise the weakness of Kievan Rus to gain territory in the east, only Greater



described a royal elevation to a higher rank. Christianisation opened up the Latin language and culture to Poland,<sup>166</sup> and made the Piasts appear as natural lords (*domini naturales*).<sup>167</sup> The Piasts were the largest landowners between the Oder and Warta rivers,<sup>168</sup> and their military and fiscal organisation was supported by an aristocratic elite. It was not by coincidence that this early Piast period saw the first mention of a Polish commonwealth (*salus Poloniae*) in the sources.<sup>169</sup>

**3.** Slightly different from the establishment of the archbishopric of Gniezno with the bishops of Kolberg, Kraków, and Wrocław as suffragans was the foundation of the archbishopric of Gran (1001, today, Esztergom-Budapest).<sup>170</sup> Duke Vajk, who was baptised Stephen, was crowned king (1001–38) with the crown of St Stephen sent to

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and Lesser Poland, Mazovia, and Silesia were permanently part of Polish territory in the early and high Middle Ages. For this, see, H. Ludat, *Bolesław I Chrobry, König von Polen* [in:] *Lexikon des Mittelalters*, vol. 2, München 2003, cols 359–364.

<sup>166</sup> Initially, Latin remained limited to the liturgy and to use as a chancery language, with the required liturgical codices coming not only from Bohemia but also from Cologne via Regensburg, and later also from Lorraine. Until the end of the eighteenth century, Latin fulfilled the role of a general written language in Europe and offered the advantage over Church Slavonic of opening up access to the classical educational heritage.

<sup>167</sup> The term 'Piast dynasty' was first coined by the Polish historian Adam Naruszewicz in the eighteenth century. Neither the Latin nor the Polish version of this family name is recorded in the sources between 1000 and 1400. According to N. Davies (*Im Herzen Europas...*, Fn. 34 p. 259), Piast rule began in 965 with Prince Mieszko I (†992), who was baptised Catholic and married a Czech princess. His son Bolesław I Chrobry ('the Brave') was Duke from 992 and later became the first King of Poland. He died in 1025. Until the thirteenth century, the Polish church was an imperial church closely linked to Piast princely power.

<sup>168</sup> Starting from the tribal territory of the Polans (*pole* means field in Polish) on the middle Warta, Duke Mieszko I (around 960–992) from the Piast dynasty was able after adopting Latin Christianity in 966–967 to elevate Poland with the core territory of Greater Poland (*Polonia Maior*) to the north-easternmost outpost of the Western community of states, and he received an independent missionary bishopric in Poznań in 968. Greater Poland was bordered to the south-west by Silesia and to the south-east by Lesser Poland. To the north and east of Greater Poland were the regions of Kujawy and Mazovia, which, together with Greater Poland, belonged to the dominion of the first Piast prince Mieszko I (around 966). The Vistula River also runs through this area. Around 1000, Mieszko's son Bolesław I was able to expand his territory to include Silesia, Lesser Poland, and Pomerania.

<sup>169</sup> The term '*salus Poloniae*' is documented by the chronicler Gallus Anonymus, a Benedictine monk from southern France who came to Poland via Hungary after 1100 and wrote the '*Cronica et gesta ducum sive principum Polonorum*' (which is divided into three books). Cf. G. Labuda, Gallus Anonymus [in:] *Lexikon des Mittelalters*, vol. 4, 2<sup>nd</sup> ed., München 2003. The name 'Polani' is documented for the year 1015 in the Hildesheim Annals (*Annales Hildesheimenses*, ed. G. Waitz, Hannover 1878, repr. 1947, p. 31). It speaks of the '*dux*' Bolizlav, the Pole ('*Bolizlavum Polianorum*'), who came to Merseburg in 1015. According to M. Alexander, *Kleine Geschichte Polens*, Stuttgart 2008, p. 17, this is the first evidence of the name 'Polani'.

<sup>170</sup> In April 1001, the emperor and pope authorised the establishment of an archbishopric in Gran at a synod in Ravenna. Like Poland, Hungary received a copy of the Holy Lance, the most important imperial insignia at the turn of the millennium, and relics of St Adalbert of Prague, whose mortal remains were to hold the empire and its eastern neighbours together like a spiritual bond. Until the conquest by the Turks in 1526, Hungary was a military bulwark (against Islam).

him by Pope Sylvester II.<sup>171</sup> The fact that the pope sent the crown to the Hungarian duke and that the latter did not receive it from the emperor's hands, made the Hungarian royal crown a symbol of Hungary's sovereignty.<sup>172</sup> Hungary was not under the patronage of the German Emperor. At the same time, this completed the Hungarian turn towards Latin instead of Orthodox Christianity, which had already been initiated by Stephen's father Prince Geisa (Geza), great-grandson of Arpad.<sup>173</sup> The myth of the Holy Crown of Hungary still has political significance today.<sup>174</sup>

4. My historical comparison indicates that the formative impact of corporative representation depended on the existence of a collective identity and, as such, of a 'perceived' counterpart to the crown. Furthermore, there is no simple crown-estate dualism, and especially no adversarial confrontation. Of course, more research needs to be done to understand the proceeding-like nature of the sessions of early corporate assemblies. The 'dual authority' of prince and estates for the politics of the realm seems to be a common pattern because of the similar processes of the estates' assemblies through the expansion of the *Curia Regis* along a common basic pattern: no right of self-assembly, tax authorisation, and partial political participation. From the comparative point of view, the different compositions or stratifications are hardly significant, of just as little significance as deviating social preconditions.

5. Contemporary discourses did not hesitate to regard corporate assemblies in the hands of the nobility to be democratic. In regard to vast entities like Poland-Lithuania or the Habsburg Empire, it becomes obvious that, depending on their degree of integration, there could be horizontal assemblies with parallel, coequal, but quite

<sup>171</sup> Due to the harmonious co-operation between the emperor and the pope in *Ostpolitik* with the participation of Otto III.

<sup>172</sup> Cf. for further details on the crown, *Bayern – Ungarn, Tausend Jahre...*, p. 43 ff. The Hungarian kingdom never belonged to Slavic dominions. The Kingdom of Dalmatia, Croatia, and Slavonia had been in personal union with Hungary since the end of the eleventh century (until 1918), but Dalmatia, in particular, remained a regular theatre of war involving Byzantium, Venice, and Hungary.

<sup>173</sup> At the beginning of 1001, Stephen the Saint (969–1038, canonised on 20 August 1083) was crowned Hungary's first king in Gran/Esztergom. The Magyar people had only settled in the Carpathian Basin a little over a hundred years earlier under their leader, the Grand Duke Árpád (845–907). Both Byzantine and Roman Christianity sought to Christianise the newly arrived steppe people. Prince Geisa (Geza), the great-grandson of Árpád and father of Stephen, had already made the historically significant decision to join the Roman Church by being baptised. He asked the German emperor to send missionaries and wooed the Bavarian princess Gisela for his son Waik, who had been baptised in the name of the Passau diocesan saint Stephen. (For detailed information on Gisela's tomb in the Maria-Parz chapel in Niedernburg, Passau, see K. Szántó, *Das Leben der seligen Gisela, Die erste Königin von Ungarn*, Thaur 1988, p. 132 ff.; J.-P. Niemeier, *Die Erhebung der Gebeine der seligen Gisela* [in:] *Bayern-Ungarn Tausend Jahre...*, pp. 91–98. On the authenticity of the tomb in Niedernburg Abbey W.M. Schmid, *Das Grab der Königin Gisela von Ungarn, Gemahlin Stephans I. des Heiligen*, München 1912, p. 22.)

<sup>174</sup> J. Deér, *Die heilige Krone Ungarns*, Graz–Wien–Köln 1966, p. 11; A. Horn, *Die Wandlungen des ungarischen Staatswappens: politische und ideologische Hintergründe* [in:] *Supplement to: Symbole im Dienste der Darstellung von Identität*, ed. P. Michel, Bern 2000, p. 1 ff.

unbalanced assemblies; central assemblies (such as the Polish *Sejm*) in a vertical relation between regional and central assemblies were secondary, emerging later than the local ones, but able to mediate the primary local assemblies (as the *sejmikis* disappeared). Vertical systems allow the integration of an extended royal council as a first chamber (for example, the Polish Senate).

**6.** Without vassalage, the Polish and Hungarian nobilities' narrative of freedom became legally guaranteed; aristocratic resistance was fuelled by the Hussite Reformation, but Bohemian noble liberties have never been legally rationalised, as was the case in the Polish Czerwińsk Privilege of 1422, the Jedlno/Kraków Privilege 1430–33, the Henrician *Articles* in 1573, or the Hungarian Golden Bull of Andrew II in 1222.<sup>175</sup> The Polish crown remained prevented from making any absolutist moves, whereas in Hungary royal centralization managed to prevail under Habsburg supremacy after 1526. As in Bohemia, constitutional and religious resistance were linked in Hungary, and the uprisings against the Habsburgian Roman Catholic centralisation efforts found support in the semi-independent principality of Transylvania, where five religions were tolerated. It was only in 1687 (Leopold I's triumphed over the Ottomans in 1683) that the Hungarian parliament agreed to the heredity of the crown and the abolition of the right to resist. Still at the beginning of the eighteenth century, when excessive taxation met Hungarian resistance, the privileges of the Hungarian nobility, including its 'internal' rule over Hungary, were not touched by Vienna, and Protestants were tolerated. This 'corporative success' had a pacifying effect, until the monarchical 'monopoly on the use of force' within the centralisation efforts of Joseph II has finally undermined the Hungarian corporative system.

**7.** Finally, this paper demonstrates that the European context itself needs explanation when comparing constitutional processes. Particularly within Central Eastern Europe, the diversity of levels of constitution-building processes is obvious and bears witness to European distinctiveness from its Byzantine, Mongolian, Ottoman or Great Russian neighbours, as '[e]verything colossal and uniform is clearly un-European' (Oskar Halecki).<sup>176</sup> The pluralistic rivalry of powers has always been the motor of constitution formation, and Central Eastern European settings make it clear that in Europe any aspiration to hegemony was precluded or, at least, not permanent because of aristocratic and other competitors, be it the Swedish aggression, the Habsburg empire's expansion, or the later French revolutionary and Napoleonic armies.

The mirrored choreography focus on organizing corporate representation in late medieval Poland, Hungary, and Bohemia has revealed how much the European

<sup>175</sup> *Europäische Verfassungsgeschichte...*, Fn. 50, p. 26 ff.

<sup>176</sup> O. Halecki, *Europa – Grenzen und Gliederung seiner Geschichte*, Darmstadt 1957, p. 6. The quotation continues: 'and this is the secret of all the refinement and peculiarity of European civilisation. At the same time, it is the deepest reason for the development of local autonomies and for the importance of small countries, even city-states, in European history and especially in the comparative history of individual cultural contributions to a common legacy' (English paraphrase, translation by the author).

rationales of past constitutionalization need an etymological reconsideration of context in the original Latin sense of *contexere*: to weave together, to link, to connect. Taking such an integral<sup>177</sup> approach (*contexere*) towards the disparate historical geneses of the estates' representation within (Bohemia) and beyond the HRE's 'borders' corresponds to the overall response structures of law and constitutional formation. Domination and its constituted regulation never arise or exist in themselves. Rather, they cannot be rendered ontologically absolute<sup>178</sup> because of the immanent relatedness of human beings (to other human beings, to materials, to the natural environment, and to transcendental levels).<sup>179</sup> Supplementing my earlier research on the functionality of justice<sup>180</sup> or on the broad understanding of constitution formation beyond norm-related textuality, this article incorporates recent sociological research.<sup>181</sup> Law creation starts from subjective entitlements, asserted or disputed in the case of conflict;<sup>182</sup> and the most successful arguments amount to a web of legal customs according to historical contemporaries' conceptual world. Such an interest in the formative power of historical sources' wording does not amount to any relativistic Foucauldian scepticism towards the institutionalized consistency of expressions, nor to any phenomenological subjectivism as within the early *Annales* of Marc Bloch. Organising corporative representation as mirrored choreography opens up the protective rationales of noble assemblies for conflict situations within the consolidation processes of the crowns. The mirror-metaphor serves as an expression of this communicative interest in the determination of meanings, the contextualisation and semantic networks of relationships. Without native-speaker access to either Polish, Hungarian, or Czech, all results put forward remain approximate. Hopefully, they open up a truly comparative stage as does the new journal edited by Anna Tarnowska and Michał Gałędek.

<sup>177</sup> Cf. 'integral conceptions of European history' (B. von Jussen, *Einleitung* [in:] *Die Macht des Königs*..., Fn. 41, p. XII).

<sup>178</sup> This, however, would be the inherent consequence of the concepts by Hobbes, Bodin, and Schmitt, (still followed today: see H. Bredekamp, *Bild Recht Zeit: Ein Plädoyer für die Neugewinnung von Distanz*, ed. H. Meier, München 2021, p. 14 ff.). Against such an absolutized approach cf. the research programme of the Advanced Grant ReConFort, infra note 11, and ERC-AG-SH6 – Advanced Grant No. 339529.

<sup>179</sup> Cf. the *nostri*-Anapher by Manetti (U. Müßig, *Drafting Dignity*, "Giornale di Storia Costituzionale/ Journal of Constitutional History" 2022, no. 44, pp. 157 ff., 159).

<sup>180</sup> U. Müßig, *Reason and Fairness*..., supra n. 17, p. 27 ff.; eadem, *Recht und Justizhoheit, Der gesetzliche Richter im historischen Vergleich von der Kanonistik bis zur Europäischen Menschenrechtskonvention, unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, England und Frankreich*, series: Schriften zur Europäischen Rechts- und Verfassungsgeschichte, vol. 44, 2<sup>nd</sup>, corrected and supplemented ed., Berlin 2009, pp. 36–38.

<sup>181</sup> Cf. H. Rosa, *Resonanz. Eine Soziologie der Weltbeziehung*, 4<sup>th</sup> ed., Berlin 2020, pp. 52 ff., 144 ff., 365, 381 ff., 435 ff., 747 ff.

<sup>182</sup> D. Willoweit, S. Schlinker, *Deutsche Verfassungsgeschichte*..., Fn. 7 § 1 II 2, Rn. 6. Fundamentally also D. Willoweit, *Gerechtigkeit und Recht, Zur Unterscheidung zweier Grundbegriffe der Jurisprudenz*, München 2018; also: <https://publikationen.badw.de/de/044876905/pdf/CC%20BY> [accessed: 2023.07.25]; *idem*, *Recht* [in:] HRG, 2<sup>nd</sup> ed., col. 1079–1084.

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## Summary

*Ulrike Müßig*

### **Emerging Parliaments between Corporative Representation and Interaction with the Royal Courts: Parliamentary History in Late Medieval and Early Modern Central Eastern Europe**

Parliamentary History in late medieval Central Eastern Europe emerges between a collective (proto-national) identity and a contemporarily 'perceived' royal counterpart. While in Poland the Piast kings managed to establish a common royal administration, it was the Hungarian magnates' power and the symbolic significance of St. Stephen's crown that provided identificatory factors for a proto-national coherence within the Pannonian Basin. In Bohemia, royal power could only be solidified by tackling with vast allodial areas of power and the special position of the Duke of Bohemia as Electoral Prince. Though all case studies corresponded in court struc-

tures' institutionalisation, their manners to consolidate central authorities' varied greatly. The mirrored choreography-focus on the constitutionalization of the crown estates-relation serves as *tertium comparationis* in accordance with the functional comparative research interest in noble assemblies' conflicts with the crowns' strive for consolidation. The Bohemian mirrored choreography seems somehow displaced by the Bohemian duke's imperial function, whereas the Magyar magnates' freedom narrative differed essentially from the Polish *szlachta's* claims. Whereas Poland's geographical challenges required a cautious distance from the Holy Roman Empire and the papacy, as catholic universalism was the Teutonic Order's instrument, the Hungarian aristocracy borrowed successfully from the crown's Latin affinity and Christian legitimization. The Polish-Lithuanian aristocratic *Rzeczpospolita* (*Res Publica*, denominating the political nation on a *Quod omnes tangit* – share between nobility and crown) relied on a legally confirmed corporatism (1422, 1430/33, and 1573); both electoral crowns remained the decisive counterpart for the representative assemblies, and the proto-national representation needed this kind of mirrored choreography: still, the Polish May Constitution of 1791 referred to a constitutional 'contract' between king Stanislas August and the *szlachta* on behalf of the political nation.

**Keywords:** Comparative Constitutional History, corporative representation, parliament, royal administration.

## Streszczenie

Ulrike Müßig

**Parlamenty w fazie kształtowania – między reprezentacją stanowo-korporacyjną a interakcją z dworami królewskimi. Parlamentaryzm w Europie Środkowo-Wschodniej późnego średniowiecza i wczesnej epoki nowożytnej**

Historia parlamentarna w późnośredniowiecznej Europie Środkowo-Wschodniej wyłania się pomiędzy zbiorową (proto-narodową) tożsamością a współcześnie „postrzeganym” królewskim odpowiednikiem. Podczas gdy w Polsce królowie piastowscy zdołali ustanowić powszechną administrację królewską, to władza węgierskich magnatów i symboliczne znaczenie Korony św. Stefana dostarczyły czynników identyfikacyjnych dla proto-narodowej spójności w Kotlinie Panońskiej. W Czechach władzę królewską można było umocnić jedynie poprzez zajęcie się rozległymi alodialnymi obszarami władzy i szczególną pozycję monarchy czeskiego jako księcia elektora. Chociaż wszystkie powyższe studia przypadków polegały na instytucjonalizacji struktur dworskich, to sposoby konsolidacji władz centralnych w tych krajach były bardzo różne. Choreografia lustrzanego odbicia – skupiająca się na konstytucjonalizacji relacji między koroną a stanami – służy jako *tertium comparationis* zgodnie z funkcjonalnym badaniem porównawczym, interesując się konfliktami między zgromadzeniami szlacheckimi a dążeniem koron do konsolidacji. Choreografia lustrzanego odbicia w Czechach wydaje się w jakiś sposób wyparta przez cesarską funkcję czeskiego władcy, podczas gdy narracja o wolności magnatów węgierskich zasadniczo różniła się od roszczeń polskiej szlachty. W czasie, w którym wyzwania geograficzne Polski wymagały zachowania ostrożnego dystansu do Świętego Cesarstwa Rzymskiego i papieża, ponieważ katolicki uniwersalizm był instrumentem zakonu krzyżackiego, węgierska arystokracja z powodzeniem zapożyczyła od korony łacińskie powinowactwo i chrześcijańską legitymizację. Polsko-litewska arystokratyczna Rzeczpospolita (*Res Publica*, określająca naród polityczny

na zasadzie *Quod omnes tangit* – dzielonej między szlachtą a koroną) opierała się na prawnie usankcjonowanym korporatyzmie (1422, 1430/33 i 1573); obie elekcyjne korony pozostały decydującym odpowiednikiem dla zgromadzeń przedstawicielskich, a proto-narodowa reprezentacja potrzebowała tego rodzaju choreografii lustrzanego odbicia: mimo to polska Konstytucja 3 maja z 1791 r. odnosiła się do konstytucyjnej „umowy” między królem Stanisławem Augustem a szlachtą w imieniu narodu politycznego.

**Słowa kluczowe:** porównawcza historia konstytucyjna, korporacyjna reprezentacja, parlament, administracja królewska.

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## Constitutional Proposals Unveiled: A Detailed Study of Unrealised Drafts in Czechoslovakia

### Introduction

Throughout its seventy-five-year existence, Czechoslovakia<sup>1</sup> enacted four constitutions: in 1918, 1920, 1948, and 1960. These were complemented by other significant constitutional texts, including the initial constitutional provision that marked the establishment of the Czechoslovak state on 28 October 1918, and the ‘Little Constitution’, which led to the federalisation of Czechoslovakia in 1969 while preserving the revised 1960 constitution. In Slovakia, the 1939 and 1992 constitutions hold particular significance. In the lead-up to Czechoslovakia’s dissolution, the Czech Republic adopted its constitution in 1992. These constitutional advancements, unrealised proposals, and visionary concepts constitute the foundation of our research.

However, several entities submitted elaborate proposals for new constitutions during this time. All the unrealised constitutional proposals from more than seventy years of Czechoslovak constitutional history were recently presented to the Czech professional public in two publications by the authors of the Brno and Bratislava law faculties.<sup>2</sup> Some of them were given a separate entry in volume XIX of the

<sup>1</sup> The Czechoslovak state was proclaimed on 28 October 1918. It was initially referred to as the *Czechoslovak Realm*, while the name *Czechoslovak Republic* became official on 13 November 1918. Following the Munich Agreement in 1938, the state adopted the name *Czecho-Slovak Republic*, and the term *Second Republic* is also used in historical literature. In March 1939, Slovakia and Carpathian Ukraine declared independence, while the historical Czech lands were occupied by Nazi Germany and transformed into the *Protectorate of Bohemia and Moravia*. Later in 1939, the Czechoslovak exile movement began to assert that the Munich settlement was null and void, relying more on civil than constitutional legal arguments. After the Second World War, the country reverted to the name *Czechoslovak Republic*, and the period before the 1948 constitution is often referred to as the *Third Republic*. On 11 July 1960, the state was renamed the *Czechoslovak Socialist Republic*. As of 1 January 1969, it became a federation of the *Czech Socialist Republic* and the *Slovak Socialist Republic*. In March 1990, the name was changed to *Czechoslovak Federative Republic*, and in April 1990 to the *Czech and Slovak Federative Republic*.

<sup>2</sup> K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní systém meziválečného Československa*, Ostrava 2020, p. 931; *eidem*, *Ústava a ústavní systém socialistického Československa*, vol. 2, Ostrava 2022, pp. 631,

Encyclopaedia of Czech Legal History.<sup>3</sup> Several of these constitutional drafts were found in archival fonds that have not yet been fully explored, either in the National Archives, the Archives of the Chamber of Deputies, or the Office of the President of the Republic. However, many were also found in the yellowed pages of now-completely forgotten newspapers and magazines. This article, thus, introduces these never-realised constitutional proposals to a foreign audience for the first time. It contributes to a richer understanding of history, politics, and society in the Czech lands and Slovakia. The study of unrealised constitutional proposals not only illuminates the spectrum of legal and political ideas that shaped the historical trajectory of a state, but also reveals alternative paths of development, enhancing our understanding of constitutional legitimacy, state identity, and the fragility of political consensus.

The interwar Czechoslovak Republic represented the initial attempt by the Czech and Slovak peoples to actualise their state-law aspirations within a modern state framework. The prevailing international circumstances, particularly during the 1930s, coupled with the frequently unreasonable and morally questionable policies pursued by Czech political representatives towards other nationalities, resulted in the relatively swift establishment of Czechoslovak statehood within the European context of that era, which lasted merely twenty years.

The unimplemented propositions of the institutions involved may offer a fresh perspective not only on the legal intricacies of this era and on the public administration of the First Republic, but mainly on the political landscape, which was far from the idealised harmony often portrayed in contemporary historical literature. Despite the contradictions stemming from these propositions, an impartial evaluation of First Republic Czechoslovak constitutionalism compared to other regions heavily influenced by fascism in Europe indicates that the Czechoslovak Republic during the interwar period was among the most democratic states globally. Consequently, it presents numerous contemporary lessons, both negative and positive.

Throughout the First and Second Czechoslovak Republics and the immediate post-war period, numerous individual proposals were presented to amend the 1920 Constitution or to formulate a new one. For the sake of brevity, this article exclusively addresses comprehensive proposals for a new constitution, omitting consideration of partial amendment proposals because of spatial constraints.

Our article integrates careful archival research with historical-legal analysis to elucidate the reasons behind the failure of numerous constitutional proposals and to consider their potential ramifications on Czechoslovakia's political, legal, and constitutional framework.<sup>4</sup> This approach furnishes a comprehensive perspective on

606; some constitutional drafts are also found in the document series J. Grónský, *Komentované dokumenty k ústavním dějinám Československa* (vol. 1: 1914–1945, vol. 2: 1945–1960, vol. 3: 1960–1989, vol. 4: 1989–1992), Praha 2005–2007, pp. 584, 510, 441, 649.

<sup>3</sup> *Encyklopedie českých právních dějin*, vol. 19: *U–Ú*, eds. K. Schelle, J. Tauchen, Plzeň 2020, p. 806.

<sup>4</sup> Naturally, a broader spectrum of political and ideological concepts concerning the constitutional arrangement of Czechoslovakia existed, including various individual or minority visions. However, this article focuses exclusively on those constitutional drafts that were formulated as coherent texts with

the constitutional advancements and political discourse that have profoundly shaped the trajectory of Czechoslovakia and, subsequently, the Czech Republic.

From a theoretical standpoint, this analysis is informed by modern constitutional theory, particularly the concepts of constitutionalism as a process rather than a static document, and the role of counterfactual constitutional imaginaries in shaping political identity. The article engages with the notion that constitutional proposals – even those never enacted – can function as expressions of competing visions of sovereignty, legitimacy, and collective self-understanding. These dynamics are particularly evident in multinational or transitional states, where constitutional design is not only a legal act but a reflection of contested statehood.

## 1. Constitutional proposals from the interwar period (1918–1938)

### 1.1. Slovak and Ruthenian Constitutional Proposals

The positions of Slovakia and Ruthenia within the new Czechoslovak state were notably distinct, underscored by significant political agreements. The Pittsburgh Agreement, Cleveland Agreement, Washington Agreement, and Martin Declaration all played pivotal roles in supporting Slovakia's position. On the other hand, Ruthenia was integrated through an international treaty facilitated by the Rusyn emigration to the United States, marking a crucial turning point in its history.<sup>5</sup> The new state was connected with the idea of a Czechoslovak nation, derogatorily termed Czechoslovakism (primarily in Slovak wartime propaganda<sup>6</sup>). Although largely fictitious, this concept was constitutionally sanctioned, limiting the formulation of Slovak constitutional propositions.

In May 1921, the Slovak People's Party advocated for increased autonomy,<sup>7</sup> a testament to their unwavering spirit. Three proposals for constitutional amendments followed, each one a step towards their goal. Ferdinand Juriga's proposal, published in the *Slovenské ľudové noviny* on 10 June 1921, aimed to make Czechoslovakia a confederation, a bold move towards Slovak self-governance.<sup>8</sup> On 19 June 1921, deputy Ľudevít Labay published a more legally thorough proposal in the daily *Slovák*. Crucial matters were to be handled by a joint assembly in Prague consisting of Slovak

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at least a theoretical potential for political realisation or public debate. Fragmentary proclamations, informal manifestos, or marginal expressions without systemic structure or legal articulation are not included, as they do not meet the criteria of constitutional proposals in the proper sense of the term.

<sup>5</sup> L. Lipscher, *Verfassung und politische Verwaltung in der Tschechoslowakei, 1918–1939*, München 1979, p. 15.

<sup>6</sup> E. Broklová, *Češi a Slováci 1918–1938*, "Sociologický časopis" 1995, no. 1, pp. 34–35.

<sup>7</sup> J. Rychlík, *Češi a Slováci ve 20. století*, Zv. 1: *Česko-slovenské vztahy 1914–1945*, Bratislava 1997, p. 104.

<sup>8</sup> *Ibid.*, pp. 104–105.



Provincial Assembly members. One-third of the ministers were to be Slovaks, and the president, elected indirectly, would alternate between a Czech and a Slovak.<sup>9</sup>

The third proposal, by Vojtech Tuka, was announced in February 1921 and elaborated in the daily *Slovák* from 24 June to 8 July 1921.<sup>10</sup> Tuka called for a union of two fraternal nations, with Slovakia having its government, parliament, and judiciary. Shared responsibilities included foreign affairs, national debt, customs, and more. Tuka's detailed draft law proposed a Charter of the Czechoslovak Union Republic, envisioning two nation-states with their constitutions and shared functions. However, Tuka's proposal was controversial, seen as serving Hungarian interests,<sup>11</sup> and was met with disappointment as Slovak representatives rejected it.<sup>12</sup>

The Slovak People's Party initially worked with the Czechoslovak People's Party, which moderated Slovak activism. In November 1921, Slovaks left the joint parliamentary faction, signalling a shift in their political strategy. In January 1922, the Slovak People's Party initiated a legislative process based on Labay's proposal.<sup>13</sup> This was a significant step towards advocating increased autonomy, demonstrating the party's commitment to its political agenda. However, Juriga's proposal needed to be revised, and Tuka's was seen as a tool for the Hungarian absorption of Slovakia. Labay's proposal was slightly expanded to bring in Ruthenia's position but remained promotional rather than practical. It suggested broad self-government for Slovakia and Ruthenia within the Czechoslovak Republic. Still, it was never discussed,<sup>14</sup> highlighting the challenges faced by the Slovak representatives in their pursuit of increased autonomy.

In May 1930, the Slovak People's Party submitted a second proposal attributed to Karol Mederly.<sup>15</sup> This concise proposal extended constitutional guarantees granted to Ruthenia to Slovakia, proposing broad autonomy while maintaining the state's unity.<sup>16</sup> However, Czech political parties ignored it.<sup>17</sup>

Ruthenian proposals during the First Czechoslovak Republic aimed to implement constitutional guarantees of autonomy but remained limited at sub-constitutional levels.<sup>18</sup> Thus, no Slovak or Ruthenian proposals resulted in a fundamental transformation of the Czechoslovak constitutional order before the Munich Agreement.

<sup>9</sup> L. Labay, *Návrh zákona o zemskej autonomii Slovenska*, "Slovák" 1921, no. 137, pp. 1–2.

<sup>10</sup> V. Tuka, *Autonomia Slovenska*, "Slovák" 1921, no. 28, p. 1; *idem*, *Autonomia Slovenska*, "Slovák" 1921, no. 29, p. 1; *idem*, *Návrh zákona o samospráve Slovenska*, "Slovák" 1921, no. 141, pp. 1–2; *idem*, *Návrh zákona o samospráve Slovenska*, "Slovák" 1921, no. 142, pp. 1–2; *idem*, *Návrh zákona o samospráve Slovenska*, "Slovák" 1921, no. 143, pp. 1–2; *idem*, *Návrh zákona o samospráve Slovenska*, "Slovák" 1921, no. 144, pp. 1–2; *idem*, *Návrh zákona o samospráve Slovenska*, "Slovák" 1921, no. 146, p. 2.

<sup>11</sup> Z. Peška, *Poznámky k návrhům slovenských autonomistů na změnu ústavy*, "Národnostní obzor" 1932, no. 2, p. 101.

<sup>12</sup> J. Rotnágl, *Češi a Slováci: vzpomínky a úvahy nad dopisy a zápisky z let 1907–1918*, Praha 1945, p. 264.

<sup>13</sup> L. Cabada, *Český stranický systém 1890–1939*, Plzeň 2000, p. 78.

<sup>14</sup> K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní systém...*, Ostrava 2020, pp. 400–401.

<sup>15</sup> *Ibid.*, p. 402.

<sup>16</sup> E. Broklová, *Československá demokracie: politický systém ČSR 1918–1938*, Praha 1992, p. 123.

<sup>17</sup> J. Rychlík, *Češi a Slováci ve 20. Století...*, p. 122.

<sup>18</sup> M. Dudová, *Ústavní návrhy na autonomii Podkarpatské Rusi (1920–1930)* [in:] *Encyklopedie českých právních dějin...*, vol. 19, pp. 501–505.

## 1.2. German constitutional proposals

German political representation faced initial rejection,<sup>19</sup> and later, dissatisfaction arose with the constitutional system introduced by the Constitution of 29 February 1920.<sup>20</sup> This dissatisfaction stemmed from the fact that national minorities were not represented in the first National Assembly (1918–1920), thus lacking influence over the Constitution. Many viewed the Constitution as an *imposed*, a term that encapsulates their perception of its illegitimacy.<sup>21</sup>

German parties consistently proposed amending the 1920 Constitution during the First Czechoslovak Republic. However, the most notable attempt at a comprehensive new constitution was the Draft Principles for the Revision of the Constitutional Charter of the Czechoslovak Republic, drafted in December 1932 by Fritz Sander,<sup>22</sup> a constitutional law professor at the German Law School in Prague. Sander's proposal was intended for discussion at the German Law Days in June 1933 but was unfortunately postponed.

Sander's proposal presented a clear vision<sup>23</sup> for a federation or federal state.<sup>24</sup> Legislative power was to be divided between an Imperial Council and state assemblies. The Imperial Council, consisting of 150 members elected for four years, would hold full legislative power and issue framework laws. Czechoslovakia was divided into national registers, with seats corresponding to national composition. Only uniform national lists of candidates could be submitted, and the council was divided into six national *curiae* to safeguard minorities from majority decisions. Voting in the council was to be conducted by political parties representing nations and political interests.

An Estates' Assembly was to include representatives of essential professions appointed by professional corporations. The President of the Republic was to be elected for four years, and the presidency would rotate every third term to a citizen

<sup>19</sup> On the state-law status of the German minority in Czechoslovakia, see: O. Kolář, *Státoprávní postavení německé menšiny v ČSR (1918–1938)* [in:] *Encyklopedie českých právních dějin*, vol. 16: *Správa veřejná–Suché*, eds. K. Schelle, J. Tauchen, Plzeň 2019, pp. 393–398; an overview of the state-law ideas of German political parties in interwar Czechoslovakia is given by L. Novotný, *Státoprávní představy německých politických stran v meziválečném Československu (přehled)* [in:] *Encyklopedie českých právních dějin...*, vol. 16, pp. 511–515.

<sup>20</sup> N. Nedelsky, *Defining the Sovereign Community*, Philadelphia 2012, p. 74.

<sup>21</sup> For more details on the issue of the status of the German minority in interwar Czechoslovakia and its state-law requirements, see: J. Kuklík, R. Petráš, *Minorities and law in Czechoslovakia 1918–1992*, Praha 2017, pp. 55–137; R. Petráš, *Menšiny v meziválečném Československu: právní postavení národnostních menšin v první Československé republice a jejich mezinárodněprávní ochrana*, Praha 2009, pp. 165–194, 332–344. On the matter of the *imposed* constitution, see D. Kolumber, *Das Münchner Abkommen*, "Beiträge zur Rechtsgeschichte Österreichs" 2022, no. 2, p. 359.

<sup>22</sup> For details of the life and work of Fritz Sander, see: J. Tauchen, *Fritz Sander* [in:] *Encyklopedie českých právních dějin*, vol. 25: *Biografie právníků S–Ž*, eds. K. Schelle, J. Tauchen, O. Horák, D. Kolumber, Plzeň 2024, pp. 32–34.

<sup>23</sup> Sander's proposal was published in print as *Vorschläge für eine Revision der Verfassungsurkunde der Tschechoslowakischen Republik*, Reichenberg 1933, p. 107.

<sup>24</sup> Sander's other works dealing with the revision of the constitutional situation in Czechoslovakia include *Das Problem der Demokratie*, Brünn 1934, p. 144.

from the German or Hungarian *register*. The President and a proportionally divided government would hold executive power, not requiring a vote of confidence from the Imperial Council or Estates Chamber. The Reich and Estates elected a supervisory committee overseeing the President and the Government.

The Czechoslovak Republic was to be divided into separate national lands: Czech, German, Ruthenian, Slovak, and Hungarian. Provincial assemblies would handle cultural and economic interests. Executive power in the states was vested in a Land Government. Officials from the relevant nationality register, including the provincial gendarmerie and police, would staff courts and offices in each country. Sander's proposal listed national minorities' rights (educational, cultural, and language rights) but assumed an undemocratic organisation based on the nationality principle, rejecting some democratic principles; this was unacceptable to Czech political representation. In the 1930s, Sander's proposal<sup>25</sup> was reviewed and reacted to by experts in newspapers and specialist journals, but mainly in a negative light (Emil Hácha, Jiří Hoetzel, and Franz Adler).

Despite his mixed reception, Sander's role<sup>26</sup> in 1938 as a mediator between the Czechoslovak government and the Sudeten German party on Czech-German relations was a testament to his influence and diplomatic skills.

## 2. Constitutional proposals from the period of the Second Republic (1938–1939)

The transformation of the Czechoslovak state logically led to consideration of the adoption of an entirely new constitution. As reported by most of the media at the time, the relevant work should have been started in October 1938, but the constitutional law experts contacted never agreed to participate. The periodicals of the time even agreed in principle on the proposed constitution's description while under presentation.<sup>27</sup>

The initial details regarding the draft of the new constitution were made public on 21 October 1938, by the daily newspaper *Venkov*, which announced the formation of a political and professional preparatory commission.<sup>28</sup> Subsequently, *Národní listy* reported on the preliminary content of the new constitution, which was expected to

<sup>25</sup> For more on Fritz Sander's proposal, see: E. Broklová, *Právní cesta sudetských Němců 1933. Návrhy Fritze Sandera na reformu československé ústavy* [in:] *Československé právo a právní věda v meziválečném období (1918–1938) a jejich místo ve střední Evropě*, eds. K. Malý, L. Soukup, Praha 2010, pp. 515–556.

<sup>26</sup> It was an attempt to resolve the difficult situation into which the Czechoslovak state found itself at the end of the 1930s. The Nationality Statute was supposed to be a major reform of minority policy and was supposed to concern not only the German minority but also all other minorities and their legal status, issues of language law, education, state administration, and social security. However, it did not envisage a fundamental revision of the constitutional legal situation in Czechoslovakia. For more on this, see: J. Kuklík, J. Němeček, *Od národního státu ke státu národnosti? Národnostní statut a snahy o řešení menšinové otázky v Československu v roce 1938*, Praha 2013, p. 450.

<sup>27</sup> K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, Ostrava 2020, p. 416.

<sup>28</sup> *Ibid.*

be outlined in rough form.<sup>29</sup> The proposed constitution entailed modifications to the president's authority, granting the president the power of veto and emergency powers for maintaining order. The president was tasked with overseeing the government's functioning, serving as representative of the state, and maintaining the balance of power. The government would include a president, a deputy, three joint ministers (foreign affairs, defence, and finance), eight Czech-Moravian ministers, five Slovak ministers, and three Ruthenian ministers. It was planned that the ministries would undergo reorganisation, and the Czech-Moravian cabinet members would administer their responsibilities within the framework of the historical territories and in agreement with the Slovak and Ruthenian representatives at the national level. Each minister would have state secretaries to manage additional central administrative offices. The constitution proposed the establishment of four legislatures: a 140-member Bohemian-Moravian parliament, a fifty-member Slovak parliament, a ten-member Ruthenian parliament, and a national parliament consisting of 200 members (comprising members from the three sub-parliaments). To mitigate majoritarianism, a second chamber of the parliament, the Senate, was to be instituted with the right of suspensive veto against resolutions of the joint parliament. The Senate would be composed of eight senators from each of the three parts of the republic, totalling 24 senators. The provincial assemblies would elect two-thirds of the senators, and the president would appoint one-third. The president could decide in a dispute between the joint parliament and the Senate. The electoral system was also slated for significant changes, with the introduction of a majority voting system and direct elections aimed at reducing the role of political parties and strengthening the position of individual candidates. The Supreme Court, the Supreme Administrative Court, and the Supreme Military Court were to be retained, with at least one based in Bratislava.<sup>30</sup>

In late October 1938, Slovak Prime Minister Jozef Tiso dismissed the proposals, contending that they were contrary to the principle of three equal subjects.<sup>31</sup> Subsequently, in November 1938, the Slovak people presented the theses of a new constitution, advocating the transformation of the Czechoslovak Republic into a federal state. This proposal entailed the adoption of four constitutions: federal, Czech-Moravian, Slovak, and Ruthenian. The common constitution was to delineate common issues and precisely designate the governing bodies. In contrast, the federal constitution explicitly stipulated that all other matters fell within the purview of the federal states and were to be regulated by the state constitutions. Emphasising the right to self-determination of the Czechs, Slovaks, and Ruthenians, the new constitution emphasised that the Republic was a federal state. It was envisioned as an international, military, and economic entity with provisions for a unified foreign policy, joint embassies, a shared army, finance, a single currency, and a customs regime. The

<sup>29</sup> *Ibid.*, pp. 416–417.

<sup>30</sup> For a detailed discussion, see: D. Kolumber, *Československá ústava 1938* [in:] *Sborník konference: Mezinárodní vědecká konference oblasti práva a právních věd – Právní ROZPRÁVY 2014*, Hradec Králové 2014, pp. 357–358.

<sup>31</sup> K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, Ostrava 2020, p. 417.

proposal outlined the establishment of joint authorities, including a federal president elected by the Federal Parliament, a federal government comprising ministers of joint departments (foreign affairs, defence, and finance) and representatives of the state governments, and a federal parliament composed of delegates from a Province Council. The parliament was to consist of 120 to 160 members, with safeguards in place to prevent majoritarianism through a four-fifths majority veto. Additionally, the proposal included provisions for a mutual central bank, Supreme Court, and Supreme Administrative Court, with judges appointed by the federal president based on the proposal of the state governments. The proposal also outlined a separate tax system in the individual provinces, proportional representation of the various nations in the authorities, and the organisation of the army and the financial guard (Customs and Revenue Guard) to ensure that representatives of different nations would serve in their respective territories under their own officers.<sup>32</sup>

In December 1938, however, members of Hlinka's Slovak People's Party merely confined themselves to criticism of the contemporary situation,<sup>33</sup> describing the republic as a federal state of three unequal nations, in which Czech superiority was reflected, especially in the fact that the Czech parliament and government also performed the functions of the central parliament and government. They implied that the unitary state had left matters of local importance only in its eastern parts to local parliaments and governments, which was not in keeping with the contemporary conception and was then to be explicitly addressed in the new constitution.<sup>34</sup> At the end of the year, the President of the Republic, Emil Hácha, commented on adopting the new constitution, advocating its adoption after the consolidation and calming of the overall situation.<sup>35</sup>

In February 1939, a draft of the Estates' Constitution by Ladislav Švejcar also emerged.<sup>36</sup> It appears that this was not just a republication of an earlier draft, but rather a reflection of the ideas of a social group that supported the contemporary concept of the Estates' State. This concept was being implemented elsewhere in Europe, particularly in fascist Italy and Portugal. The Italian legal system had a significant influence during this period of Czechoslovak history.<sup>37</sup>

The Constitutional Enabling Act (No. 330/1938 Coll.) authorised the President to issue decrees with the force of constitutional law. However, expert public opinion held that issuing a new constitution in its entirety by this method was not permissible. They did acknowledge, however, that partial amendments to the constitutional charter

<sup>32</sup> For more detail, see: O. Pokorný, *Nová ústava, "Nástup"* 1938, no. 8, pp. 75–76.

<sup>33</sup> In this context, it is possible to draw attention to the problematic conditions of the Czechs in Slovakia. For more detail, see: T. Procházka, *The Second Republic: The Disintegration of Post-Munich Czechoslovakia (October 1938 – March 1939)*, Boulder 1981, p. 62.

<sup>34</sup> O. Pokorný, *Musíme bojovat' dále, "Nástup"* 1938, no. 10, pp. 98–99.

<sup>35</sup> K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní systém...*, Ostrava 2020, p. 418.

<sup>36</sup> *Ibid.*, p. 420.

<sup>37</sup> On the parallels between the legal development of the Second Republic and Fascist Italy, see: D. Kolumber, *Aspetti giuridici della autoritaria democrazia cecoslovacca alla luce dello sviluppo dell'Italia fascista*, "Scientia Nobilitat Studies" 2015, no. 1, pp. 4–18.

could be made using decrees.<sup>38</sup> It was emphasised that the National Assembly should adopt the new constitution. However, because of post-Munich developments, the Assembly needed to restore its legitimacy through elections because it had become a limbless torso after losing the presence of many deputies and senators, particularly those from Ruthenia.<sup>39</sup> Unfortunately, elections to the national legislature were never held because of turbulent developments at the beginning of 1939. As a result, the National Assembly was dissolved on 21 March 1939,<sup>40</sup> and further considerations of a new Czecho-Slovak constitution became irrelevant.

### 3. Draft Constitution of the Protectorate of Bohemia and Moravia (1939–1945)

In connection with the autonomist efforts of Slovak political representatives and the proclamation of an independent Slovak state, the President of the Second Republic, Emil Hácha, requested an audience with Adolf Hitler in Berlin on 14 March 1939. However, no negotiations on the future of the Czech lands took place, and Hácha was informed that they would be occupied by German troops the following day. On 16 March 1939, the Protectorate of Bohemia and Moravia was proclaimed, the legal basis of which was the decree of the Führer and the Reich Chancellor on the Protectorate of Bohemia and Moravia.<sup>41</sup> Public administration and law during the Protectorate were based on the principle of the double track. A distinction had to be made between the imperial (German, occupation) and autonomous (Czech) authorities and administration, which in some areas was wholly abolished and in others operated entirely under the control of the imperial one. The Czech Parliament no longer met after December 1938, and based on the Constitutional Enabling Act, legislative power belonged to the government and the president.<sup>42</sup> Hitler's decree did not directly abrogate the Czechoslovak Constitution of 1920, but those provisions which contradicted the meaning of the German Reich's assumption of protection were no longer valid.

<sup>38</sup> J. Krejčí, *Moc vládní a výkonná jako ústavodárce a zákonodárce* [in: *Sborník prací k počtě šedesátých narozenin Františka Weyra*, ed. K. Engliš, Brno 1939, p. 151.

<sup>39</sup> D. Kolumber, *Projekce pomnichovského vývoje na složení československého Národního shromáždění* [in: *Češi a Němci v meziválečném Československu*, ed. J. Tauchen, Ostrava 2013, pp. 167–169.

<sup>40</sup> K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, Ostrava 2020, p. 421.

<sup>41</sup> Erlaß des Führers und Reichskanzlers über das Protektorat Böhmen und Mähren vom 16. März 1939 (RGBl. I., p. 485).

<sup>42</sup> On the state-legal characteristics of the autonomous and occupation administration, see in particular the works of Pavel Maršálek: *Pod ochranou hákového kříže: nacistický okupační režim v českých zemích 1939–1945*, Praha 2012; *Protektorát Čechy a Morava: státoprávní a politické aspekty nacistického okupačního režimu v českých zemích, 1939–1945*, Praha 2002; *Veřejná správa Protektorátu Čechy a Morava v letech 1939–1945*, Praha 1999. See also, for example: J. Tauchen, *Das Protektorat Böhmen und Mähren und seine Rechtsordnung (1939–1945)*, "Beiträge zur Rechtsgeschichte Österreichs" 2020, no. 2, pp. 260–268.



The proposal to amend the 1920 constitution was drafted by Jan Malypetr, former Speaker of the Chamber of Deputies of the National Assembly, and sent to State President Emil Hácha at the end of April 1939. It consisted of 102 paragraphs. The draft was limited to retaining the existing structure of the separation of powers and changing only what was contrary to Hitler's decree of 16 March 1939. However, President Emil Hácha was well aware of political realities after meeting with Hitler and did not deal with the proposal, as evidenced by a note in the file dated 24 May 1939: 'Mr President gave no order'.<sup>43</sup>

Malypetr's proposal thus testifies to a certain naivety of Czech political circles, which thought that the Protectorate's proclaimed autonomy would be respected. However, the opposite was true, and the autonomy often emphasised by the Nazis was only on paper.

Malypetr stated at the beginning of the draft of the Protectorate Constitution that 'the Protectorate of Bohemia and Moravia belongs to the territory of the Reich and comes under its protection, and that territorially the Protectorate forms a territorial unit and a single customs territory with the Reich, but politically the Protectorate retains a certain state independence within the Reich'. Legislative power was to be exercised for the entire territory of the Protectorate by a unicameral National Assembly of 120 members. Malypetr is silent on the conditions for exercising the mandate of a member of the National Assembly, as well as on its powers and the method of its constitution. He does not refer to a particular law. It was precisely the determination of the powers and their delimitation concerning the imperial authorities that was the crucial question. The term of office of the National Assembly was to be five years. Bills were to come either from the government or from the National Assembly.

Malypetr's draft constitution shows his need for more awareness and practicality. Surprisingly, he does not consider the involvement of the Reich authorities in the legislative process, despite being aware of Hitler's decree and the initial intervention of the occupation authorities in the autonomous legislature. His proposal suggests the constitutional enshrinement of enabling legislation. According to his proposal, the National Assembly could empower the Government, by a majority of its members, for a certain period to modify, amend, or supplement laws or take measures that would typically require a law via decrees co-signed by the President of the State. Additionally, with a three-fourths majority of all its members, the National Assembly could authorise the President of the State, for a specified period, to amend or supplement the constitutional charter of the Protectorate by decree, based on the unanimous proposal of the Government. Malypetr entrusted executive power to the state president and the government. The State President of the Protectorate was to be elected by the National Assembly for five years.

<sup>43</sup> Archiv kanceláře prezidenta republiky [Archive of the Office of the President of the Republic], fond Kancelář prezidenta republiky (KPR) [Office of the President of the Republic (KPR)], carton 223, no. 1288, D 3612/39.



The final part of Malypetr's proposal concerned the enshrinement of rights, freedoms, and civic duties. The following principles were explicitly regulated: equality, liberty of person and property, freedom of the home, freedom of the press, the right of assembly and association, the right of petition, confidentiality of letters, freedom of learning and conscience, and freedom of speech. Once again, one cannot but repeat the naivety of the author of this constitutional proposal because the occupiers could never have agreed to its wording, as subsequent developments made abundantly clear.<sup>44</sup>

#### 4. Constitutional proposals from the post-war period (1945–1948)

After the Second World War ended, a reconstruction of the Czechoslovak constitutional system on entirely new foundations was necessary. Although the 1920 Constitution was still formally in force,<sup>45</sup> the system of state institutions underwent significant changes. In 1946, the Constituent National Assembly was elected as a unicameral legislative body. It was established based on the last democratic elections, and its main task was to adopt the new Constitution of Czechoslovakia. The National Assembly set up a preparatory Commission of Experts to draft the text of the new constitution. This commission began to work intensively, and after the Communists took power in February 1948, the basis for adopting the constitution became the Communist draft, which was mainly written by Vladimír Procházka, a professor at Prague Law School. The Parliament adopted Procházka's draft in May 1948, today referred to as the "Constitution of 9 May."

In 1946–1948, however, there were clashes of opinion between the various political parties, especially a conflict of democratic and communist concepts. Nevertheless, almost every political party had its own idea of the form the new constitution should take.<sup>46</sup> Not all of these proposals were sufficiently developed, however. They differed mainly on the position of Slovakia within the Czechoslovak state and the powers of the Slovak authorities. The most precise and comprehensive constitutional proposal was presented by the National Socialist Party, whose author was Vladimír Kubeš, then Dean of the Faculty of Law of Masaryk University in Brno. For this reason, we will deal with this proposal in more detail.

Since Kubeš was also a legal philosopher, in addition to the paragraphed text of the new constitution, he also set out the philosophical basis of the new constitution,

<sup>44</sup> Jan Malypetr's constitutional proposal was published in K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, Ostrava 2020, pp. 859–870.

<sup>45</sup> G. Brunner, M. Hofmann, P. Holländer, *Verfassungsgerichtsbarkeit in der Tschechischen Republik*, Baden-Baden 2001, p. 161

<sup>46</sup> The proposals of individual political parties are printed in K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, vol. 2, Ostrava 2022, pp. 220–312. Charakteristika jednotlivých návrhů viz Z. Ryšavý, *Ústavní návrhy (1946–1948)* [in:] *Encyklopedie českých právních dějin...*, vol. 19, pp. 524–526; and K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, vol. 1, Ostrava 2022, pp. 319–331.

which he had been working on intensively since the end of the war.<sup>47</sup> In his draft of the new constitution, Kubeš based his proposal on the constitutional system under the 1920 Constitution, with the central ideas being a national, separate, independent, and unified state and the concept of political democracy. According to Kubeš, only a constitution underpinned by a unified ideological foundation (as with the Austrian Civil Code of 1811, that is, a solid piece of legislation based on modern natural law doctrine) had a chance to succeed. Marxism rejected this and considered the appropriate philosophical basis for a new constitution to be a tiered system of ideas, with the concept of humanity at its apex.

In his proposal,<sup>48</sup> Kubeš departed from the 1920 Constitution regarding legislative power and entrusted it to a unicameral National Assembly of 300 deputies and three provincial assemblies (Czech, Moravian-Silesian, and Slovak). He, therefore, based his proposal on the provincial system, which implemented the principles of federalism. The legislative competence of the provincial assemblies included, for example, health care, education, social welfare, transport, construction, and agriculture.

Executive power was vested in the President of the Republic, the Government, and the provincial governments. The President of the Republic could be a citizen over thirty-five years of age elected by the National Assembly for a seven-year term, which was quite a long term. The position of the President of the Republic was constructed as essentially representative only. The President of the Republic appointed the Prime Minister. If the prime minister were Czech, his first deputy would have to be Slovak, and vice versa. The executive power in the individual countries was headed by provincial governments, which were to be based in the capitals of the individual countries (Prague, Brno, or Bratislava).

Following the post-war administrative structure, internal state administration and self-government were to be exercised by district and local national committees. As representative bodies, they were to be elected by the people for four-year terms.

The Constitutional Court was to decide on the conformity of laws with constitutional rules and the conformity of provincial laws with regulations. It was also competent to deal with individual constitutional complaints from natural or legal persons if they claimed that the state had infringed their constitutionally guaranteed rights and freedoms. Therefore, the Constitutional Court and its powers were constructed differently and much more broadly than in the period of the first Czechoslovak Republic when the court's functioning was very problematic.

Kubeš's proposal also included a catalogue of fundamental rights and freedoms.<sup>49</sup>

<sup>47</sup> V. Kubeš, *Filosofický základ nové ústavy*, "Vědecká ročenka právnické fakulty Masarykovy university v Brně" 1947, no. 1, pp. 86–107.

<sup>48</sup> Kubeš's draft constitution was published in 1947 under the title V. Kubeš, *O novou ústavu*, Praha 1948, p. 140.

<sup>49</sup> Kubeš writes in detail about his draft constitution in his memoirs: V. Kubeš, J. Tauchen, ...*a chtěl bych to všechno znovu. Filozofické vypořádání s pesimistickým světovým názorem*, Brno 2022, pp. 125–135; see also: the work of V. Kubeš, *Dějiny myšlení o státu a právu ve 20. století se zřetelem k Moravě a zvláště Brnu*, Díl první, Brno 1995, pp. 51–153.

## 5. Constitutional proposals from the socialist period (1948–1989)

Towards the end of the 1950s, the leadership of the Communist Party of Czechoslovakia concluded that, as in the Soviet Union, socialism had already been established in Czechoslovakia, and according to the legal theory of the time, it was necessary to adapt the constitutional situation to this, that is, to issue a new constitution. This took place on 11 July 1960. It was hastily prepared within half a year without any extensive analysis of the functioning of the existing state system or foreign legal arrangements.

In Czechoslovakia, the 1960s represented a gradual reversal of the existing policy. In 1968, democratisation efforts resulted in the concept of 'socialism with a human face', which openly opposed centralisation, the bureaucratic way of running the state, and the lack of democratic elements in the management of the party and the state. At the same time, a discussion on a new state structure for Czechoslovakia was initiated, as Slovak political groups had long considered the current situation unsatisfactory.

It follows from the very nature of the totalitarian regime that was socialist Czechoslovakia that no proposals for a new constitution were drafted or submitted, as they would have had no chance of being adopted. On the contrary, such efforts could have been perceived as anti-state acts. The only exception to this is the proposal for a tri-federation in 1968. In addition to the national demands of the Slovaks, the idea of a three-member federation consisting of three countries – Czech, Moravian-Silesian, and Slovak – began to spread slowly in Moravia and Silesia from late March and early April 1968. This was a reaction to the abolition of the regional system in 1948 and the centralisation of the state. In the spring of 1968, a tri-federation began to gain tens of thousands of supporters in Moravia, who united in the newly formed Society for Moravia and Silesia. Initially, this brought together mainly intellectuals and artists from Moravia and Silesia, but later, it became a mass organisation. However, the idea of creating a tri-federation was also taken up by local administration and Communist Party officials in South Moravia.

The South Moravian Regional National Committee (KNV) created a working group to draft a proposal on state and territorial organization.<sup>50</sup> The working group consisted of two types of members: representatives of the South Moravian KNV and experts, among whom were Vladimír Kubeš, as well as former professors of the closed Masaryk University Faculty of Law, Hynek Bulín, František Čáda, and Jaroslav Pošvář. The working group presented and developed three alternatives: alternative I – a three-part state-law arrangement of the future federation (ensuring the equal status of Moravia and Silesia); alternative II – a provincial system; and alternative III – a two-part (dualistic) arrangement.

The most developed alternative was the first, which was also considered the baseline alternative and is the focus of our attention here. It was based on creating three separate state units, each with its legislative assembly (about 100 members), a body

<sup>50</sup> The proposal for a model of a tripartite federation is reprinted in K. Schelle, J. Beňa, J. Tauchen *et al.*, *Ústava a ústavní system...*, vol. 2, Ostrava 2022, pp. 452–462.

acting as head of state, a government, and a supreme court. Alternative I considered the most appropriate administrative division to be the abolition of regional and national committees and direct management of the district national committees by the state unit's government (two-stage procedure). All three state units were to conclude a state treaty on creating a federation, including the possibility of unilateral withdrawal from this state union. Within the federation, legislative power would then be exercised by two chambers: the first chamber of the legislature with 300 deputies and the second chamber of the parliament with 150 deputies, to which each state unit would delegate 50 deputies. Both chambers would elect a federal head of state to appoint the federal government. Two Secretaries of State from states other than the Chief Minister were to be appointed in each ministry. On the proposal of the federal head of state, the two chambers of the federation were to establish a federal supreme court, a supreme military court, and a constitutional court of the federation to examine whether the federal laws and the laws of the various state units were according to the constitution of the federation.

In 1968, the concept of a trialist state in Moravia, especially in Brno, gained considerable support among its inhabitants. Still, despite the appearance of success at the time, the efforts of the Moravian movement ended in complete failure. The dualist conception of the organisation of the state, which was enshrined in the constitutional law of the Czechoslovak Federation of October 1968, prevailed. This is sometimes also referred to as the "small constitution", as it was in force at the same time as the 1960 constitution, which it modified significantly.<sup>51</sup>

From 1987, a new socialist constitution was being prepared. The draft constitution was approved by the Presidium of the Central Committee of the Communist Party of Czechoslovakia on 4 May 1987, and a working commission and a commission of the National Front of the Czechoslovak Socialist Party were created. Deputy Prime Minister Karol Laco headed the working commission.<sup>52</sup> In November 1988, a 153-member Commission of the Communist Party of Czechoslovakia and the National Front of the Czechoslovak Socialist Republic for the preparation of the new Constitution of the Czechoslovak Socialist Republic was elected, headed by the General Secretary of the Communist Party of Czechoslovakia, Miloš Jakeš. In January 1989, a twenty-member working group was formed under the leadership of Marian Čalfa. The constitution was to be adopted after the 1990 Congress of the Communist Party of Czechoslovakia and was conceived as a triune constitution for Czechoslovakia, the Czech Republic,

<sup>51</sup> For details on the proposal for a trialist state structure, see: J. Tauchen, *Vladimír Kubeš a jeho podíl na přípravě trialistické koncepce uspořádání státu v roce 1968* [in:] *Pocta Janu Svatoňovi k 70. narozeninám*, eds. J. Benák, J. Filip, V. Šimíček, Brno 2022, pp. 101–118; V. Goněc, *K jihomoravským projektům federalizace. O širším ideovém a politickém pozadí návrhů tzv. Trializace* [in:] *Pokus o reformu v roce 1968. Historicko-politologické pohledy*, Banská Bystrica 1999, pp. 16–179; *idem*, *Od zmařeného ústavy ke zmařenému ústavnímu zákonu* [in:] *Proměny evropského právního myšlení: k odkazu profesora Vladimíra Kubeše*, ed. T. Machalová, Brno 2009, pp. 68–77; J. Pernes, *Pod moravskou orlicí, aneb dějiny moravanství*, Brno 1996, pp. 204–205.

<sup>52</sup> J. Žatkuliak, *Ústavní návrh tzv. trojjediné ústavy ČSSR, ČSR a SSR (80. léta 20. století)* [in:] *Encyklopedie českých právních dějin...*, vol. 19, pp. 565–588.

and Slovakia. The constitution was not to glorify the leading role of the Communist Party, which was considered an objective reality in the theory of the time, and the changes were primarily to affect the catalogue of fundamental rights, which was to take into account the development of a socialist society. The constitution provided for a constitutional judiciary at the federation level and the two republics.<sup>53</sup> The adoption of the new constitution was to be dealt with by a unique constitutional law, and the two national councils agreed to the procedure in October 1989 but revoked their decision in December 1989 and rejected the idea of a new triune constitution.<sup>54</sup>

## 6. Constitutional proposals from 1989–1992

A non-communist constitution began to be drafted before 1989, mainly in opposition to the intended triune socialist constitution. The principal author of the non-communist proposal was Pavel Rychetský, who discussed the proposal with several experts, especially in the wake of discussions on the concept of the new constitution conducted by university lecturers who had to leave the Prague Faculty of Law after 1969 (Zdeněk Jičínský, František Šámalík, Václav Pavlíček, Vladimír Mikule, and Petr Pithart). In December 1989, the Civic Forum published a draft of a new constitution (without attribution) to glorify the essential elements of a democratic, social, and legal state with respect for civil rights and freedoms. Regarding relations within the federation and the republics, the draft was based mainly on the existing arrangements, although it envisaged the adoption of the republics' constitutions.<sup>55</sup>

The continued existence of the socialist constitution was unsustainable. It was subjected to frequent revisions. At the same time, it was decided to adopt a new federal constitution. At a joint meeting of the House of People and the House of Nations of the Federal Assembly on 18 September 1990, a Commission of Deputies was set up to prepare the new Constitution of the federation, consisting of delegates from the federal and republican parliaments. The principle of proportional representation was applied in the composition of this Commission of Deputies. Alexander Dubček, chairperson of the Federal Assembly, was elected chairman of the commission, and Dagmar Burešová and František Mikloško were elected vice-chairpersons. The election of the presiding officers of the national councils as vice-chairmen of the Commission for the Preparation of the New Constitution and the representation of their deputies in the commission were intended to enable coordinated progress of the work on preparing the Federal Constitution and the republican constitutions. The Presidium of the Federal Assembly appointed a Commission of Experts as a working body of the Commission of Deputies, to which it appointed eighteen leading experts in constitutional law and state organization. The chairman of the Commission of Experts

<sup>53</sup> J. Grónský, *Komentované dokumenty...*, vol. 3: 1960–1989, Praha 2007, pp. 390–391.

<sup>54</sup> V. Pavlíček, *Ústavní právo a státověda*, II. díl: *Ústavní právo České republiky*, Praha 2011, p. 285.

<sup>55</sup> J. Grónský, *Komentované dokumenty...*, vol. 4: 1989–1992, Praha 2007, pp. 45–47.

was Marián Posluch. The timetable for the work envisaged that the draft federal constitution would be prepared so that a first reading would take place in October 1991 and a second reading a month later. The Commission of Deputies met eight times to prepare the new Federal Constitution. In the first three meetings, held in 1990, the draft Charter of Fundamental Rights and Freedoms was discussed. At the next meetings in 1991, the basic problems of preparing the new Constitution and the drafts of its chapters prepared by the Commission of Experts were discussed. The main obstacle encountered by the Commission of Deputies was that the issues of the state structure (the division of powers between the Federation and the Republics and the status of Moravia and Silesia) were not resolved and that negotiations on them were also held at the level of representatives of political parties and movements and among the Presidencies of the National Councils, that is, outside the Commission of Deputies. The expectation that the membership of the national councils' members and their chairpersons in the Commission of Deputies would facilitate the solution of the state structure was not fulfilled because the MPs and officials of the national councils could not compensate for the lack of consensus of the chairs of the national councils. The drafts of the individual chapters of the constitution, in which the Commission of Experts often included variant solutions, were critically examined by the Commission of Deputies, and recommendations for further action were made to the experts. In addition, during the drafting process, the federal parliament discussed some proposals that had a basis in the draft being prepared, or, conversely, some of the proposals discussed influenced the content of the draft constitution. At the end of August 1991, the Commission of Experts completed drafting the Federal Constitution, except for the division of powers between the Federation and the Republics. This draft was circulated in September 1991 to the Commission of Deputies' members, the Federal Assembly's deputy groupings, and some political parties not represented in the Federal Assembly. From November 1991 to January 1992, meetings were held by an ad hoc committee of Commission of Deputies members, the Commission of Experts, and some members of the so-called Political Bureau (chairpersons of parliamentary parties). The results of the work of the Commission of Deputies were used to exercise the legislative initiative of the deputies by proposing an amendment to the Constitutional Act of the Czechoslovak Federation. In this parliamentary proposal to amend the small constitution, it was recommended that at least three titles of constitutional law concerning the legislative, presidential, and executive powers be amended. However, the motion did not pass the House of Nations, falling three votes short of acceptance. A conciliation meeting ensued, which resulted in fairly insubstantial proposals for amendments that were agreed upon by the Joint Conciliation Committee. However, neither the Committee nor the Political Bureau could reach a consensus on the major points of concern. Therefore, on a re-vote (3 March 1992), the proposal was again adopted only by the House of Peoples but not in the House of Nations. The previous unsuccessful negotiations of the Presidencies of the National Councils indirectly influenced these voting results. Thus, in April 1992, a working draft version of the entire Federal Constitution was prepared, except for the chapter on the division of powers between the federation and the republics. Of the

envisaged constitution, the Charter of Fundamental Rights and Freedoms (adopted on 9 January 1991) was adopted in the interim, as were the constitutional arrangements for the judiciary at the federal level (adopted on 27 February 1991), the judiciary and the prosecutor's office (adopted on 16 July 1991), and, finally, referendums (adopted on 18 July 1991). Otherwise, the work on the federal constitution was unsuccessful, which was explained by the similar situation in Hungary and Poland, where new constitutions were also not adopted, but mainly by the absence of agreement on the principles of the state system. Although it was envisaged that work would continue on a new constitution in April 1992, the elections in June 1992 eventually led to the dissolution of the federation. A new federal constitution was, thus, never adopted.<sup>56</sup> In addition, proposals by, for example, the Movement for Self-Governing Democracy – Society for Moravia and Silesia (1990), President Havel (March 1991), the Moravian National Party (March 1991), the Republicans (May 1991), and the Czech Socialist Party (July 1991) were still being discussed between 1990 and 1992.<sup>57</sup>

From August 1990, a new Czech constitution was in the process of preparation. The Presidium of the Czech National Council established a permanent commission of the Presidium of the Czech National Council for preparing the Constitution of the Czech Republic. In July 1991, a group of experts submitted the first version of the draft Constitution of the Czech Republic, which the permanent commission of the Presidency did not consider. Interestingly, the draft was based on the Czech affiliation to the federation,<sup>58</sup> which was a variant proposal that the head of the republic should not be a functionary of the National Council, but the Prime Minister. However, the fear of transferring this concept to Slovakia prevented its implementation.<sup>59</sup> A qualitatively completely different constitution was prepared after the summer of 1992 when it was clear that the federation would cease to exist. Still, the relevant commissions took into account the 1991 proposal. The new constitution was prepared by committees of the Czech National Council Presidency, which was composed according to the proportional representation of the parliamentary parties and by a Government Committee, and the result was the Constitution of the Czech Republic, adopted on 16 December 1992.<sup>60</sup>

Between 1990 and June 1992, nine drafts of the Slovak Constitution were prepared by individual parliamentary political parties and by the Joint Commission of the Slovak National Council and the Slovak Government. One draft did not envisage the existence of a federation. The other drafts primarily contemplated unions with other states or the conclusion of a state treaty with the Czech Republic. To unify these proposals, in June 1991, the Presidium of the Slovak National Council established the Commission to prepare a joint draft Constitution of the Slovak Republic. This joint draft was

<sup>56</sup> P. Polakovič, *Ústavní návrhy politických stran (1990–1992)* [in:] *Encyklopedie českých právních dějin...*, vol. 19, pp. 596–601.

<sup>57</sup> *Ibid.*, pp. 598–600.

<sup>58</sup> V. Pavlíček, *Ústavní právo a státopěda...*, II. díl, pp. 285–286.

<sup>59</sup> J. Filip, *Příprava Ústavy ČR v období do voleb 1992* [in:] *Pocta Prof. JUDr. Václavu Pavlíčkovi, CSc. k 70. narozeninám*, eds. V. Jiráková, R. Suchánek, Praha 2004, pp. 299–301.

<sup>60</sup> P. Polakovič, *Ústavní návrhy politických stran...*, p. 601.



submitted for public discussion in December 1991. Its fundamental shortcoming was that it was drafted in essential parts in alternatives and did not give an unambiguous answer to whether it should be a draft constitution of a member state of the federation or a constitution of an independent state. Although the results of this public debate, which attracted 670 submissions, were developed by experts and submitted to the Presidency of the Slovak National Council in March 1992, they remained essentially unused in the following period. After the elections in June 1992, a new commission was established under the leadership of Milan Čič. In July 1992, the Čič Commission submitted a new constitutional proposal. Then, it was submitted as a government proposal to the Slovak National Council, which adopted it on 1 September 1992.<sup>61</sup>

## Conclusions

During the interwar period, the Czechoslovak Republic was one of the most democratic countries in the world.<sup>62</sup> Interwar Czechoslovakia was a unitary state but simultaneously faced a significant problem: a fundamental contradiction. The introduction of the theory of Czechoslovakism, that is, the idea of a unified Czechoslovak nation, was necessary to gain international recognition for the new state. However, concerning practical domestic politics, this theory proved difficult to sustain in the long term, as illustrated by the constitutional proposals concerning the status of Slovakia, Ruthenia, and German-inhabited territories. Shortly after establishing the mutual state, dissenting voices began to be heard from these parts of the republic; they were often responsible for suggesting complex projects for a new state-law arrangement.

Although some proposals for the federalisation of Czechoslovakia or for its transformation into a federal state in which these minorities would be guaranteed autonomy were put forward by individual national minorities, Czech political circles were never willing openly to discuss them and never agreed to any change in the constitutional situation. Czech leaders did not discuss their minorities until 1938 when the Czech Germans were already radicalised and under the influence of Nazi Germany. By then, however, it was too late.

In particular, the constitutional proposals of the Second Republic demonstrate the intense efforts of many politicians at the time to resolve an essentially intractable situation. However, these efforts were lost in the shadow of the growing fascism of the political scene and the separatist tendencies of Slovak and Ruthenian nationalists. These secessionist tendencies, combined with German world interests and the passive acquiescence of Western governments, destroyed the remnants of pre-Munich democracy in just a few months. The adoption of the Enabling Act in December 1938

<sup>61</sup> N. Petranská Rolková, *Ústava Slovenskej republiky a jej dvadsaťpäť rokov (1992–2017)*, Bratislava 2017, pp. 31–63.

<sup>62</sup> M. Cabo Villaverde, *La posibilidad de una isla: Checoslovaquia como contraejemplo de la crisis de la democracia en entreguerras*, "Revista da Faculdade de Letras: História" 2020, vol. 10, no. 1, pp. 130–152.

removed the vestiges of constitutionalism and created a situation that led to the incorporation of the Czech lands into the Third Reich, the creation of a puppet Slovak state, and the facilitation of the occupation of Ruthenia by fascist Hungary.

After the end of the Second World War, however, constitutional conditions did not return to pre-war conditions. Although a new constitution was intensively drafted and several proposals were made, the communist one prevailed after the communist takeover in 1948. In the forty years of socialism, only 1968 allowed a completely different state system to be freely discussed. But Soviet tanks ended this discussion.

In the second half of the 1980s, the communist regime's leaders began to realise the unsustainability of the constitutional situation, the foundations of which had been laid by the 1960 constitution, and began to prepare a new socialist constitution. However, political developments were more rapid, and work on them was not completed.

Following the social and political changes made after November 1989, a new constitution had to be adopted. The overwhelming number of proposals documents an almost opaque pluralism of opinions, but also the hopelessness of efforts to achieve an optimal state-law structure. The contradictory ideas about the future state-law form of Czechoslovakia indicate the impossibility of finding a compromise and, simultaneously, a fair solution to the state-law relationship between the Czech and Slovak nations. However, none of this was heard in the ultimate solution. This final solution, however, was no longer a common Czechoslovak (or Czech-Slovak) state but rather its dissolution. The Slovak parliament issued its own Slovak constitution, thus foreshadowing further developments that ended with the division of the federation.

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## Summary

**Jaromír Tauchen, David Kolumber**

### Constitutional Proposals Unveiled: A Detailed Study of Unrealised Drafts in Czechoslovakia

This article discusses the compelling history of unrealised constitutional plans in Czechoslovakia, from its establishment in 1918 to its dissolution in 1992. Through careful scrutiny of primary documents and historical sources, the study reveals unrealised plans and visionary concepts that played a crucial role in shaping the political and legal framework of the Czechoslovak state. The focus is on pivotal periods and contexts in which these proposals were introduced, aiming to uncover the underlying reasons for their failure or neglect. This research provides valuable insights into the intellectual currents and political discourse that influenced Czechoslovak society, shedding light on significant moments that had the potential to alter the country's trajectory but that remained confined to the realm of theoretical propositions. The constitutional drafts presented offer an interesting glimpse into the path the Czechoslovak Republic could have taken, emphasising the intricate relationship between politics and law in a tumultuous era.

**Keywords:** Czechoslovak Republic, Czechia, Slovakia, constitutional development, constitution, constitutional proposals, politics and law.

## Streszczenie

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### Ujawnienie konstytucyjnych planów – szczegółowe studium niezrealizowanych projektów w Czechosłowacji

Artykuł zagłębia się w pasjonującą historię niezrealizowanych planów konstytucyjnych w Czechosłowacji, od jej powstania w 1918 r. do jej rozwiązania w 1992 r. Poprzez skrupulatną analizę dokumentów źródłowych i źródeł historycznych badanie ujawnia niezrealizowane plany i wizjonerskie koncepcje, które odegrały kluczową rolę w kształtowaniu polityczno-prawnych ram państwa czechosłowackiego. Skupia się na kluczowych okresach i kontekstach, w których te propozycje zostały przedstawione, mając na celu odkrycie podstawowych przyczyn ich niepowodzenia bądź rezygnacji z nich. Badania te dostarczają cennych spostrzeżeń na temat prądów intelektualnych i dyskursu politycznego, mających wpływ na społeczeństwo czechosłowackie, rzucając światło na znaczące momenty, które miały potencjał zmiany krajowej trajektorii, ale pozostały ograniczone do sfery teoretycznych propozycji. Przedstawione projekty konstytucyjne oferują fascynujące spojrzenie na ścieżkę, którą mogła obrać Republika Czechosłowacka, podkreślając zawiły związek między polityką a prawem w burzliwej epoce.

**Słowa kluczowe:** Republika Czechosłowacka, Czechy, Słowacja, rozwój konstytucyjny, konstytucja, propozycje konstytucyjne, polityka i prawo.



# Judical Review







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## **Freedom of Assembly before the Courts: A Case Law Overview from the European Court of Human Rights and Polish Courts<sup>1</sup>**

**Thesis:** In the practice of the post-transformation era in Poland, administrative and common courts have played a key role in safeguarding citizens' freedom of assembly. While decisions by municipal authorities have at times been inconsistent and insufficiently justified, the courts have often rectified these deficiencies, developing well-established lines of jurisprudence in favour of freedom.

### **Introduction**

As reflected in jurisprudence, the positivisation of freedom of assembly that has taken place in constitutional acts and legislation poses an interesting research challenge. In the following review, we focus on constitutional and administrative dimensions, consciously leaving aside criminal problems associated with violations of the law of assembly (and other laws containing criminal provisions).<sup>2</sup>

<sup>1</sup> This article has been written based on research conducted as part of a research project entitled. 'Does the law on assemblies matter? Analysis of the evolution of freedom of assembly in Poland', carried out at the Nicolaus Copernicus University (*Uniwersytet Mikołaja Kopernika*) and led by Anna Tarnowska (grant of the National Science Centre – *Narodowe Centrum Nauki* – within the OPUS 25 programme, Contract No. 2023/49/B/HS5/02600).

<sup>2</sup> This is a separate phenomenon worth an in-depth analysis if only in the context of the misuse of administrative-punitive measures by police authorities to impede participation in a lawful

We have selected for our analysis key structural issues of freedom of assembly: 1) the issue of the definition of assembly; 2) the organiser of assemblies (the applicant); 3) the obligations of the applicant and the authority receiving the notification; and 4) the limitations on the right to organise an assembly in Polish legislation since 1990. For the sake of consistency and uniform methodology, we limit our analysis to the period of democratisation of the political system and consolidation of the constitutional foundations of the Third Republic of Poland.

We also felt that, alongside the interpretation of the law of assembly by Polish courts, the review should include the voice of the European Court of Human Rights (ECtHR), based on Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>3</sup> but only in cases directly concerning Poland. We begin with Polish cases before the ECtHR. Next, we examine the jurisprudence of the Constitutional Tribunal. Finally, we analyse rulings of administrative courts (mainly from 1990 to 2015) and common courts (under the 2015 Act), both of which resolve key disputes under the law on assemblies.

Thus, the content of the review reflects a changing legal framework, beginning with the law of 5 July 1990,<sup>4</sup> the first act of the transition period that addressed the issue of freedom of assembly.<sup>5</sup> This law was created in a new political situation, in which citizens exercised the right in question while ignoring the requirements of the 1962 communist law.<sup>6</sup> The 1990 law is an overly concise act concerning public assemblies, excluding electoral ones, as well as those organised by state and local government bodies and churches. It provides for a simple procedure based on notifying the municipal authority of a planned assembly at least three days before the date of the assembly. The municipal authority has the power to prohibit the assembly in two cases: when the purpose of the assembly or its conduct is against the law, or the

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assembly. Cf. the Ombudsman's (*Rzecznik Praw Obywatelskich*) correspondence with the Capital Police Headquarters (*Komenda Stołeczna Policji*), for example, <https://bip.brpo.gov.pl/pl/content/policja-intervencja-srodki-przymusu-bezposredniego-ksp-odpowiedz> [accessed: 2024.09.20]; A. Płoszka, M. Szczaniecki, *Dajcie mi człowieka, a znajdzie się paragraf. O instrumentalnym stosowaniu kodeksu wykroczeń do tłumienia protestów* [Give Me a Man and a Paragraph will be Found. On the Instrumental Use of the Code of Offences to Suppress Protests], Warszawa 2024. Amnesty International as an organisation also takes action in practice, observing the course of proceedings concerning the right of assembly or issuing an *amicus curiae* opinion, for example, in the case of Joanna Wolska before the Regional Court (mid-level common court) in Bielsko-Biała (VII Ka 235/24).

<sup>3</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5, and 8 and supplemented by Protocol No. 2 (*Polish Journal of Laws* 1993 No. 61, item 284).

<sup>4</sup> *Journal of Laws* No. 51, item 297.

<sup>5</sup> A brief overview of Polish legislation on freedom of assemblies after 1990 can be found in: R. Grabowski, *Ewolucja ustawowych regulacji zgromadzeń w Polsce* [The Evolution of Statutory Regulations on Assemblies in Poland] [in:] *Wolność zgromadzeń* [Freedom of Assembly], eds. R. Balicki, M. Jabłoński, Wrocław 2018, pp. 31–35; E. Kubas, *Constitutional freedom of assembly and its limitations*, "Polityka i Społeczeństwo" 2022, no. 4(20), pp. 160–170.

<sup>6</sup> Sejm Library, Sejm of the People's Republic of Poland/RP, 10th legislature (1989–1991), lp. PRL/RP/10/30, Sejm session of 17–18 May 1990, columns (*łamy*) 179–191; statements by Jan Błachnio and Janina Kuś, [https://bs.sejm.gov.pl/F?func=direct&doc\\_number=000023590](https://bs.sejm.gov.pl/F?func=direct&doc_number=000023590) [accessed: 2024.09.20].

assembly could endanger the life or health of people and property of significant size. The organiser could initially appeal against this decision to a higher administrative authority, and later to the administrative court. A controversial issue was the strict definition of an assembly<sup>7</sup> as a gathering of at least fifteen people.

The new regulation on the law of assemblies, the Act of 24 July 2015,<sup>8</sup> is much more comprehensive. Its creators considered some objections formulated by academics and practitioners, such as the positivization of spontaneous assemblies (taking place ‘in connection with a sudden and unpredictable event’) in Article 3(2) of the Act. It also includes various examples of guidance from Constitutional Tribunal jurisprudence. While maintaining the notification system, the legislator clarifies the necessary elements of notification and addresses the issue of organising two or more assemblies simultaneously at the same time and location. Finally, the Act changes the system of monitoring municipal bodies’ decisions concerning notifications. The prohibition of the assembly is lodged directly with the ordinary courts; their judgments need to be issued within twenty-four hours and are immediately enforceable.

The amendment of 13 December 2016 also introduces a new, previously unknown type of assembly – the cyclical assembly.<sup>9</sup> The legislator privileges the organisers of cyclical assemblies by giving them priority over other, ordinary assemblies and waiving the notification requirement in their case. It should be noted that this regulation was adopted *ad casum*, most likely for a specific political need, that is, to ensure preferential treatment of specific assemblies, the monthly gatherings commemorating the airplane crash in Smolensk.<sup>10</sup>

Another glaring example of episodic legislation was the Act of 28 April 2022, prohibiting spontaneous assemblies during the World Copernican Congress held

<sup>7</sup> The Polish term *zgromadzenie* includes both formal assemblies and public gatherings, the regulation of which we analyse here. Outside the normal regulation of assemblies remain mass events, which are regulated separately.

<sup>8</sup> *Journal of Laws* 2015, item 1485.

<sup>9</sup> Act of 13 December 2016 amending the Law on Assemblies (*Journal of Laws* 2017, item 579). A cyclical assembly is organised ‘by the same organiser in the same place or on the same route at least four times a year according to the schedule or also at least once a year on the days of national and state holidays and such events were held in the last three years, even if not in the form of an assembly, and aimed in particular at commemorating momentous and significant events in the history of the Republic’.

<sup>10</sup> The website of the Mazovian Voivodeship Office records for its region (including the largest city in Poland, the capital Warsaw) fifteen such assemblies since the amendment came into force. Smolensk monthly commemorations are repeated on the list; other such assemblies commemorate, among others, the Warsaw Ghetto Uprising, the Warsaw Uprising, the restoration of independence (11 November), and commemoration of Epiphany on 6 January (<https://bip.mazowieckie.pl/artykuly/441/informacja-o-miejscach-i-terminach-zgromadzen-organizowanych-cyklicznie> [accessed: 2024.09.20]). These gatherings, organised by the Law and Justice party, commemorate the crash of a Polish government plane near Smolensk in 2010. The then President of the Republic of Poland, Lech Kaczyński, the plane’s crew and all passengers forming part of the accompanying delegation of top officials and parliamentarians died. Later, during the Law and Justice government (which lasted until December 2023), the monthly commemorations became state ceremonies, and the regulations on cyclical assemblies no longer applied to them.

in February 2023 in Toruń.<sup>11</sup> The regulation raised numerous constitutional doubts, which the Ombudsman signalled.<sup>12</sup>

## 1. ECtHR jurisprudence in Polish cases

Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to conduct public assemblies. The ECtHR has summarised its standards concerning this freedom in a separate guide, updated as of 31 August 2024.<sup>13</sup> The guide refers to the few key cases adjudicated against Poland, among others, *Bączkowski and Others v. Poland* (issued on 3 May 2007),<sup>14</sup> *Grzęda v. Poland* (15 March 2022),<sup>15</sup> and *Stowarzyszenie Wietnamczyków w Polsce 'Solidarność i Przyjaźń' (Association of the Vietnamese in Poland 'Solidarity and Friendship') v. Poland*.<sup>16</sup> The ECtHR also communicated several cases concerning the freedom of assembly, related to the ban on assembly during emergencies (including the Polish-Belarusian border crisis<sup>17</sup> and COVID-19 measures),<sup>18</sup> as well as holding counter-demonstrations against cyclical assemblies.<sup>19</sup>

We will focus only on the case *Bączkowski and Others v. Poland*, because it considers the issues of admissibility and merits of the freedom of assembly encapsulated in Article 11 of the Convention.

The case was lodged under Article 34 of the Convention by Mr. Tomasz Bączkowski, Mr. Robert Biedroń, Mr. Krzysztof Kliszczyński, Ms. Inga Kostrzewa, Mr. Tomasz Szypuła, and by the Foundation for Equality on 16 December 2005. The applicants complained that their right to peaceful assembly had been breached by how the domestic authorities had applied relevant domestic law to their case. They alleged that there was no effective procedure available to secure a final decision ahead of the planned assemblies.

The authorities banned the assemblies planned by the applicants. The appellate authorities quashed the first-instance decisions, criticizing them for being poorly justified and in breach of the applicable laws. The ECtHR emphasized that these decisions were given after the dates on which the applicants had planned to hold the demonstrations.<sup>20</sup>

<sup>11</sup> Act of 28 April 2022 on the Copernicus Academy (*Journal of Laws* 2022, item 1459).

<sup>12</sup> <https://bip.brpo.gov.pl/pl/content/rpo-kongres-kopernikanski-zakaz-zgromadzen-spontanicznych-mein-kprp-odpowiedz> [accessed: 2024.09.20].

<sup>13</sup> [https://ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_11\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_11_eng) [accessed: 2024.09.06].

<sup>14</sup> Application no. 1543/06.

<sup>15</sup> Application no. 43572/18.

<sup>16</sup> Application no. 7389/09, judgment of 2 May 2017.

<sup>17</sup> Applications nos. 8520/22 and 10335/22. (The right to the independent and impartial tribunal established by law has also been invoked in this case).

<sup>18</sup> Application no. 39750/20.

<sup>19</sup> Application no. 13375/18.

<sup>20</sup> The Case of *Bączkowski and Others v. Poland* (Application no. 1543/06), p. 66.

The Court acknowledged that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them, despite the official ban in force at the time. The assemblies were held without a presumption of legality, which constituted a vital aspect of the effective and unhindered exercise of freedom of assembly and expression. According to the Court, the refusals to give authorization could have had a 'chilling' effect on the applicants and other participants in the assemblies. It could also have discouraged other individuals from participating in the assemblies because they lacked official authorization. Therefore, the authorities did not provide any official protection against potentially hostile counter-demonstrators.<sup>21</sup>

According to the Court, when the assemblies were held, the applicants were negatively affected by the refusals to authorise them. The legal remedies available could not alleviate the applicants' situation, as the relevant decisions were given in the appeal proceedings after the date on which the assemblies were held. The Court referred in this respect to its jurisprudence on Article 13 of the Convention (effective remedy before a national authority). Thus, the Court stated that there was an interference with the applicants' rights guaranteed by Article 11 of the Convention.<sup>22</sup>

Furthermore, the Court noted that the timing of public meetings to express certain opinions may be crucial for the political and social weight of such meetings. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration if such a refusal is compatible with the requirements of Article 11 of the Convention. However, the authorities cannot change the date on which the organisers plan to hold an assembly. Suppose a public assembly is organised after a given social issue loses its relevance or importance in current social or political debate. In that case, the meeting's impact may be significantly diminished. Freedom of assembly, if prevented from being exercised at a propitious time, may be rendered meaningless.<sup>23</sup>

In the Court's view, it is vital for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time limits within which the State authorities should act. In the adjudicated case, the applicable laws provided time limits for the applicants to submit their requests for permission. In contrast, the authorities were not obliged by any legally binding time frame to give their final decisions before the planned date of the demonstration. The Court was, therefore, not persuaded that the available remedies, being entirely post hoc, could provide adequate redress for the alleged violations of the Convention.<sup>24</sup>

Ultimately, the Court determined that the applicants had been denied an effective domestic remedy regarding their freedom of assembly. Consequently, the Court concluded that there was a violation of Article 13 in conjunction with Article 11 of the Convention.<sup>25</sup>

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<sup>21</sup> *Ibid.*, p. 67.

<sup>22</sup> *Ibid.*, p. 68.

<sup>23</sup> *Ibid.*, p. 82.

<sup>24</sup> *Ibid.*, p. 83.

<sup>25</sup> *Ibid.*, p. 84.

## 2. Law of assembly – interpretations of key elements in the jurisprudence of the Polish Constitutional Court

### 2.1. Attempts at definition

The Constitutional Tribunal has on several occasions undertaken to reconstruct the concept of ‘assembly’. In the judgment K 34/99,<sup>26</sup> the Tribunal points out that the concept of assembly ‘consists of two essential elements: gathering at least several persons in one place and the psychological link among the assembled persons’. Further, it emphasises that, ‘the term “assembly” as used in Article 57 of the Constitution includes in its scope gatherings for the purpose of joint deliberation or the joint expression of a position’. What often unites strangers and anonymous individuals into an assembly is the desire to exchange opinions or views. In its judgment K 44/12,<sup>27</sup> the Court indicates that there should be an ‘intellectual relationship’ among the participants in an assembly, consisting of a desire to express a particular position or to externalise an experience. According to another ruling (Kp 1/04),<sup>28</sup> an assembly is, in principle, a planned and intentional event. By holding an assembly and being together at a specific time and place, citizens want to express their opinions, positions, and experiences: ‘an assembly is most often a meeting planned and called by specific individuals. The term assembly encompasses gatherings whose purpose is to deliberate together or express a position collectively, whether the participants convey their views verbally or otherwise. The mere fact of being physically present together with others in a particular place may constitute a form of expression of an individual’s beliefs’. The subject of the freedom of assembly is every individual; however, this freedom is exercised collectively. The Tribunal adopts a broad understanding of the concept of assembly, which includes not only assemblies convened to express attitudes, opinions, and demands on political and public matters but also assemblies of a non-political nature (for example, religious or private). The judgment also emphasises the occasional nature of an assembly and the anonymity of its participants: participants in an assembly are not bound by a permanent formal bond, and participation in the assembly itself does not require the exact identity of the participants. These factors distinguish an assembly from an association, which is characterized by assumed permanence, a formal bond among identifiable (non-anonymous) members, and an organisational structure. It should be considered a duty of the state to allow this freedom to be exercised as freely as possible and to guarantee the security of both the participants in the assembly and third parties. ‘Constitutional protection’, says the Constitutional Tribunal, ‘extends both to assemblies indoors and to assemblies in the open, including, *inter alia*, assemblies on public roads’. Only peaceful assemblies enjoy constitutional protection: ‘The concept of peaceful assemblies should be referred to the

<sup>26</sup> Judgment of 28 June 2000 (K 34/99), OTK – 142/5/2000 (*Journal of Laws* 2000 No. 53, item 649).

<sup>27</sup> Judgment of 18 September 2014 (K 44/12), OTK – 92/8/A/2014 (*Journal of Laws* 2014, item 1327).

<sup>28</sup> Judgment of 10 November 2004 (Kp 1/04), OTK – 105/10/A/2004 (*Monitor Polski* No. 48, item 826).



conduct of the assembly [...] with respect for the physical integrity of individuals and private as well as public property'. As a result, peacefulness 'excludes the use of violence or coercion by participants, whether directed at fellow demonstrators, third parties, or public officials'. The Tribunal also emphasizes that the purpose and intentions of the organisers are relevant to the peaceful nature of an assembly, although caution must be exercised before deeming an assembly non-peaceful: 'An assembly does not yet lose its peaceful character if there are isolated incidents or disturbances. It ceases to be peaceful when the disturbances become serious; there is violence against individuals or property'. Any prohibition of assemblies should be treated as an exception and must be subject to a legally defined mechanism of appeal or review. In conclusion, the Tribunal points out that the essential elements of the freedom of public assembly consist of: 1) the assembly's peaceful nature; 2) the anonymity of participants; and 3) the absence of organisational ties among individual participants, as well as between the organiser and participants.

The Tribunal strongly emphasises the importance of assembly in the legal order: in its view, assembly is 'an extremely important means of interpersonal communication, both in the public and private spheres, and a form of participation in public debate and, consequently, also in the exercise of power in a democratic society. The purpose of freedom of assembly is not only to ensure the autonomy and self-realisation of the individual but also to protect the social communication processes necessary for the functioning of a democratic society. It is therefore underpinned not only by the interests of the individual but also by the interests of society as a whole. Freedom of assembly is a necessary element of democracy and conditions the exercise of other freedoms and human rights relating to the sphere of public life' (K 34/99, see K 21/05, P 15/08, K 44/12, Kp 1/17). The Tribunal emphasizes the stabilizing and corrective role of assemblies within the political and social order. They enable the public to express discontent, criticism, or rejection of the existing legal or social framework, thereby serving as an early warning mechanism that alerts both state authorities and society to potential or already existing sources of tension.

## **2.2. Organisers of and participants in an assembly in the jurisprudence of the Constitutional Tribunal**

According to Article 57 of the Constitution, the freedom to organise assemblies includes, among other things, the freedom to choose the time, place, and form of the assembly, as well as to plan its course. Freedom of assembly also includes the right not to participate in an assembly. Public authorities are, therefore, not only obliged to refrain from interfering with the organisation and conduct of assemblies, but also to take positive measures to enable the effective exercise of this right (K 34/99).

A participant in an assembly may remain anonymous, whereas an organiser may not, because of the obligation to meet statutory formal requirements (Kp 1/04). The notion of an assembly presupposes the existence of an organiser as well as a clearly defined purpose and location.

The concept of a 'participant' includes both those who support the purpose of the assembly and those who express other views provided they act peacefully and do not disrupt the course of the event. In practice, however, distinguishing participants from casual onlookers or passers-by may prove difficult (Kp 1/04).

Separately, the Tribunal declares Article 1(2) of the Act of 5 July 1990, Law on Assemblies, which requires a gathering to consist of 'at least fifteen persons', to be incompatible with the Constitution (K 44/12). In its reasoning, the Tribunal formulates a general principle: the Constitution does not allow the limitation or weakening of rights of assembly at the statutory level based on arbitrary criteria such as the number of participants. As stated in the official reasoning, 'both constitutional and statutory provisions guarantee the freedom of assembly to everyone'.<sup>29</sup>

### **2.3. Legalization and notification of an assembly in the assessment of the Constitutional Tribunal**

The Tribunal explains that two forms of regulation of the relationship between the organiser of the assembly and the public authority can be distinguished: the notification model and the permit model. In 1990, the legislator adopted the notification model, considering the introduction of the permit unconstitutional because it grants 'excessive discretionary power to public administration bodies' (K 21/05).

Notification primarily fulfils an informative function and consists of the transmission of information about the date, place, duration, and number of the assembly (K 44/12). The purpose of the notification is to register the gathering formally and 'to enable the public administration authorities to take appropriate measures, on the one hand, to prevent gatherings whose objectives are contrary to the law, and, on the other, to ensure the protection of those organising and participating in lawful assemblies, when there are no grounds for prohibition' (P 15/08). Notification, therefore, fulfils not only an informative but also a guaranteeing function, allowing the public authorities to ensure the peaceful nature of the assembly by taking proper security measures. The complete absence of a notification requirement would impair the ability of public authorities to fulfil their duties of safeguarding and ensuring the peaceful conduct of assemblies. Notification also enables the resolution of conflicts between assemblies scheduled at the same location and time (K 44/12). As the Tribunal states in its judgment K 44/12, 'it is not sufficient in this context to state that there is indeed an identity of time, place, or routes of passage of two or more assemblies that cannot be separated. It is necessary to demonstrate an actual and real threat arising from plans to hold assemblies of similar size at the same place and time'.

The adoption of the notification model does not mean that the non-notified assemblies are not allowed in the light of the Constitution (K 44/12). As the Tribunal explains, 'the failure to notify an assembly to the municipal authority constitutes in

<sup>29</sup> M. Bartoszewicz, *Liczba uczestników zgromadzenia i jej znaczenie prawne w obecnym i dawnym prawie zgromadzeń* [The Number of Participants in an Assembly and Its Legal Significance in Current and Historical Assembly Law] [in:] *Wolność zgromadzeń...*, pp. 100–103.

itself only a breach of the rules of order (procedural requirements). However, the failure to notify cannot cause such far-reaching interference by the public authorities that the mere “holding” of such a non-notified (incorrectly notified) assembly justifies treating it as a prohibited assembly’. An unregistered assembly cannot be equated with an illegal assembly.

The Tribunal, in its ruling P 15/08, recognises the existence of the category of spontaneous assemblies ‘as groupings of people unprepared in advance that, without a previous plan, develop into an assembly’ or ‘assemblies not prepared in advance, triggered by a sudden, unexpected impulse or event and for this reason not subjected to formal procedures at all or subjected to them too late.’<sup>30</sup> This judgment served as a crucial catalyst for the inclusion of spontaneous assemblies in the Act as a distinct legal form of public gathering.

In 2017, the Tribunal was called upon to address the issue of the constitutional validity of the introduction of the previously mentioned category of cyclical assemblies (Kp 1/17). The Tribunal argues that ‘The introduction of another, third category of assembly [...] is a manifestation of the realisation of the freedom of assembly. This is because it is a way of addressing the changing social situation through a formula that orders new states of affairs. It is a matter of classifying the emerging successive types of manifestations of the realisation of the freedom of assembly, which can be organised and systematised and, due to their specificity, require a separate standardisation, making it possible to ensure a more effective realisation of the freedom of assembly and to fulfil the related obligations of the state’. According to the Constitutional Tribunal, the specific nature of cyclical assemblies justifies granting them priority over notified assemblies, that is, a status with ‘the characteristics of a privilege’, grounded in the particular values they represent. It should be noted that the Tribunal discontinues the proceedings in the remaining parts of the case. Four judges issued dissenting opinions on this controversial judgment, criticizing especially the lack of judicial review against a ban on ‘ordinary’ assembly imposed by local authorities, which they deemed unconstitutional.<sup>31</sup> The judgment is also heavily criticized by legal literature (for example, Monika Haczkowska and Kinga Dreniowska).<sup>32</sup>

<sup>30</sup> This type of assembly was recognised earlier by European courts and academic literature, for example, A. Bodnar, M. Ziolkowski, *Zgromadzenia spontaniczne* [Spontaneous Assemblies], “Państwo i Prawo” 2008, issue 5, pp. 38–50.

<sup>31</sup> Because of the refusal of the President of Poland to swear in the three Tribunal judges still elected by the outgoing parliamentary majority in 2015, the then new coalition in power elected the judges themselves, commonly referred to as ‘doubles’. This was one of the key symptoms of the rule of law crisis in Poland.

<sup>32</sup> M. Haczkowska, *Skutki wyroku Trybunału Konstytucyjnego Kp 1/17 dla konstytucyjnej wolności zgromadzeń* [The Effects of the Constitutional Tribunal’s Judgment Kp 1/17 on the Constitutional Freedom of Assembly] [in:] *Wolność zgromadzeń...*, pp. 69–91; K. Dreniowska, *Wolność zgromadzeń w Polsce po nowelizacji ustawy z dnia 24 lipca 2015 – Prawo zgromadzeń* [Freedom of Assembly in Poland After the Amendment of the Act of 24 July 2015 – Law on Assemblies] [in:] *Wolność zgromadzeń...*, pp. 57–66.

### 3. The right of assembly in the jurisprudence of administrative and common courts

As indicated, judicial review of decisions issued by regional state administration authorities, acting as supervisory bodies over self-governing municipal decisions, was initially conducted only by the Supreme Administrative Court, and later also by local administrative courts. In some cases, the state administration upheld the municipal body's point of view, and the potential organisers then turned to the administrative court. There were also cases in which the local state authorities supported assembly organisers, and the municipal body challenged the decision. Administrative courts did not issue many rulings on the decision concerning freedom of assembly. Between 2004, when the local administrative courts gained competencies on the analysed matter, and November 2011, we were able to identify just over 40 rulings (including only three by the Supreme Administrative Court).<sup>33</sup>

Administrative courts laid the groundwork for assembly law, particularly in interpreting when assemblies can be banned. Since 2015, common courts have also helped strengthen the protection of this democratic freedom. Przemysław Szustakiewicz and Malwina Jaworska, in their analysis of the relevant case law, observed that administrative courts consistently challenged any attempts by public authorities to impose de facto restrictions on the freedom of assembly. On the one hand, the courts interpreted the statutory grounds for banning or dispersing assemblies narrowly; on the other, they demanded that officials provide a thorough and reliable assessment of the facts of each case, ensuring that any restriction on the freedom of assembly was genuinely supported by evidence.<sup>34</sup> However, another scenario is worth considering. Given how often courts repeat the same reasoning, now familiar to local municipal officials, it seems that they have used it to issue administrative bans on assemblies they politically oppose, expecting courts to overturn the decision. In doing so, they shifted responsibility for allowing such gatherings onto the courts.

#### 3.1. The form of an assembly

Courts examining decisions banning assemblies have rarely had to undertake more serious considerations of the definition of an assembly. We have already mentioned that the Constitutional Tribunal's jurisprudence has contributed to a better understanding of the nature of assemblies. Nevertheless, it is possible to cite the judgement of the local

<sup>33</sup> Based on reports on the activities of administrative courts 2004–2011; data collected by P. Szustakiewicz, *Przesłanki i procedura zakazu zgromadzeń w świetle orzecznictwa sądów administracyjnych* [The Grounds and Procedure for Banning Assemblies in the Light of the Jurisprudence of Administrative Courts], "Ius Novum" 2012, no. 1, p. 160.

<sup>34</sup> *Ibid.*; M. Jaworska, *Sądy administracyjne jako organy wymiaru sprawiedliwości w sprawach z zakresu wolności zgromadzeń, orzecznictwa w świetle orzecznictwa sądów administracyjnych* [Administrative Courts as Judicial Authorities in Matters Concerning the Freedom of Assembly: Jurisprudence in the Light of Administrative Court Case Law], "Przegląd Prawa i Administracji" 2020, no. 123, pp. 205–223.

Administrative Court in Poznań (IV SA/Po 888/09),<sup>35</sup> which had to cope with a rather peculiar limiting understanding of assembly by a municipal authority. The decision states that the term ‘passage’ should be interpreted literally. The authority considered that a planned bicycle ride did not meet the prerequisites set out by the legislator for an assembly. It takes the form of another social activity, such as a rally. The authority emphasized that the protection of constitutional freedoms of assembly, as guaranteed by Article 57 of the Constitution, cannot be enjoyed by all public meetings, including rallies.

This view was challenged by the local authority and the administrative court of first instance, who argued that the distinction between the concepts of ‘passage’ and ‘ride’ was unfounded. They noted that upholding such a distinction could, among other things, lead to the exclusion of people using wheelchairs from participating in assemblies. The ruling establishes a consistent practice permitting assemblies involving motor vehicles, such as cars or tractors. Incidentally, it is worth noting that the 1932<sup>36</sup> Polish law explicitly allowed ‘demonstration passages on carts and cars’.

Separately, common courts examining assembly law cases since 2015 have reached similar conclusions. In one case, a mayor attempted to block an assembly organised by roller skaters, intended to ‘popularise skating as a means of transport in the city and to promote the City of Warsaw as a place friendly to physically active people’. Municipal authorities argued that the application required a ‘route of passage’ and that ‘the relevant regulation does not allow for assemblies conducted in forms other than on foot’. This interpretation would imply that participants on roller skates would be treated as road users and, therefore, be subject to the provisions of the Road Traffic Act. The court found that the municipal authority had, in effect, imposed an unjustified ban on the assembly. It further holds that if the assembly’s purpose is lawful, then ‘the planned form of expression [...] is irrelevant’. The court concludes that ‘it cannot therefore be assumed that the planned assembly does not fall within the cited definition of an assembly’.

### 3.2. Notification of an assembly

In the context of assembly notifications, one can recall the decision of the local Administrative Court in Gliwice issued in June 2022, in which the court rejects the complaint of the organiser of an assembly.<sup>37</sup> The complainant stated that on 23 October 2020, they submitted a notification for a public assembly scheduled for 24 October 2020 at 7 p.m. The administrative authority stated that the notification had been submitted too late and demanded that the date of the assembly be changed.

<sup>35</sup> Judgment of the Administrative Court in Poznań of 20 November 2009 (IV SA/Po 888/09).

<sup>36</sup> Act of 11 March 1932 on assemblies (*Journal of Laws* No. 48, item 450).

<sup>37</sup> Judgement of the Administrative Court in Gliwice of 29 June 2022 (III SAB/GI 39/21). The parties to the proceedings still filed a cassation complaint with the Supreme Administrative Court. Still, it was rejected on the grounds that a professional attorney should have drawn it up (see also the decision of the Supreme Administrative Court of 22 March 2023, III OZ 135/23).

However, this decision was not issued in the proper legal form of an administrative decision as required by Article 107 of the Code of Administrative Procedure, which became the basis for an attempt to challenge it by means of a complaint for inaction. The court agreed with the claimant's argument but held that, prior to initiating court proceedings, the claimant should have formally requested the authority to issue a proper administrative decision.

### **3.3. Grounds for prohibition: 'threat to the life and health of citizens'**

A frequently raised ground for the prohibition of the organisation of an assembly by municipal authorities under Polish law on assemblies is the circumstance of 'a threat to the life or health of citizens'. Judgments referring to this premise are, therefore, numerous.

For instance, the decision of the administrative court in Bydgoszcz (II SA/Bd 242/15)<sup>38</sup> points out that it is the duty of public administration bodies not only to offer conjectures as to possible threats but also to identify and indicate these threats against the background of the case's specific circumstances. This requires an investigation that assesses the powers and interests of the entities involved, examines how these interests interact, and determines how any resulting conflicts justify the decision taken.

The obligation to verify the actual nature of the threat cited by the authorities banning an assembly is also stressed in a decision issued by the administrative court in Gdańsk (III SA/Gd 524/14).<sup>39</sup> The organisers intended to hold a protest in front of the residence of the sitting Prime Minister. The local authorities banned the assembly, arguing that the town where it was to take place had the status of a health resort. In their decision, they emphasise that local residents have a right to peace, particularly on public holidays. They also cite safety concerns for children spending time at a nearby playground. They invoke Article 47 of the Constitution of the Republic of Poland, which states that everyone has the right to the legal protection of their private life, family life, honour, and good reputation, and to decide on their personal life.

The administrative court in Gdańsk found that evidence presented in the case did not substantiate the authorities' claims. They should be precisely based on concrete circumstances and not only on assumptions or presumptions. In such a case, the authority must establish and demonstrate that, in the circumstances of the specific case, the threat to human life or health or property of a significant size is real. The court notes that the case file did not even contain a situational sketch of the place indicated by the organiser as the place where the assembly was to be held, nor any information on whether the playground was fenced and, if so, how high the fence was. The court assesses that the circumstances of fundamental importance for evaluating the application had not been established.

<sup>38</sup> Judgment of the Administrative Court in Bydgoszcz of 7 October 2015 (II SA/Bd 242/15).

<sup>39</sup> Judgment of the Administrative Court in Gdańsk of 8 July 2014 (III SA/Gd 524/14).

Let us draw attention to the Supreme Administrative Court judgment of 10 January 2014.<sup>40</sup> The municipal authorities assessed that the assembly, because of the time and place of its organisation (resulting in heavy traffic at the designated point), posed the threat of a disturbance to public order and danger to vehicular and pedestrian traffic. As a consequence, it could endanger the life or health of people or property of significant size, especially as the declared number of participants (twenty-five to thirty persons) could increase in an uncontrolled manner. However, the complainant pointed out that authorities did not fully substantiate the existence of those circumstances in the relevant case. He argued that the location of the declared assembly was a square closed to vehicular traffic, which had previously been used to host various cultural events, without causing a real threat to the safety of participants and others. The complainant believed that the reason for the ban was also 'extra-legal considerations, that is, pressure from persons and organisations not accepting the values promoted by the organiser of the assembly'. The court found the complaint justified and overruled the authorities' decisions. In its justification, it cites the jurisprudence of the Constitutional Tribunal and also the judgment of the ECtHR of 24 July 2012 in the case of *Faber v. Hungary*. This ruling highlights the state's positive obligations to ensure adequate conditions for exercising this freedom. It is the responsibility of the competent authorities to assess the security threat and the risk of interference and then apply the appropriate measures dictated by evaluating such risk. Such measures should, in principle, be the least restrictive ones and allow demonstrations to proceed. The court disagrees with the position of the authorities, according to which the fulfilment of the premise of a threat to life and health, conditioning the prohibition of an assembly, is determined by the anticipated obstructions to pedestrian and vehicular traffic alone. As the court brilliantly pointed out, 'in principle, every gathering will be associated with such impediments'.

Another case was adjudicated by the common court (mid-level) in Olsztyn in February 2024.<sup>41</sup> It upheld the decision of the municipal authorities prohibiting the organisation of an assembly in the form of a blockade by tractors of a roundabout and a municipal road for seven days. The roundabout was to be blocked entirely, and the organiser planned to let only emergency vehicles through. A joint-stock company, one of whose buildings was located on the aforementioned road, argued that the complete blocking of the road exit would result in, among other things, the presence of out-of-date goods at the company-owned centre and, because of a prolonged lack of supply, the closure of 213 grocery shops supplied from this centre. The company claimed that, for these reasons, the losses would reach the amount of 125 million PLN and could be even higher due to fixed costs, such as staff and maintenance of the distribution centre and shops. The municipal authorities organised a meeting to persuade the organisers to allow cars and services to pass. However, a final agreement was not achieved; so the local authorities announced the decision to ban the assembly. The decision was

<sup>40</sup> Judgment of the Supreme Administrative Court of 10 January 2014 (I OSK 2538/13).

<sup>41</sup> Judgement of the Regional Court in Olsztyn of 19 February 2024 (I Ns 46/24), LEX no. 3695269.



challenged in court, which found that the authorities had taken all necessary steps to clarify the facts of the case accurately, had exhaustively considered the necessary evidence, and had attempted to resolve the conflict in a consensual manner. In the court's view, 'the losses of the order of 125 million PLN represent a significant amount of property', and 'the circumstance that the indicated loss could occur was sufficiently demonstrated in the decision'.

### 3.4. Pluralism of views and the problem of counter-demonstration

At the outset, let us refer to the judgment of the Supreme Administrative Court of 2006 (I OSK 329/06).<sup>42</sup> In this case, the premise already analysed above was used to prohibit an assembly. However, it refers to possible damage caused not by the participants in the notified assembly but by the participants in a counter-demonstration. The municipal authorities, by a decision of 15 November 2005, after considering the notification from the Organising Committee, banned the assembly, justifying the ban on the grounds that holding the assembly and marching on the indicated route could endanger property of significant size. The authorities referred to the course of the assembly-march on 20 November 2004 on the occasion of the International Day of Tolerance,<sup>43</sup> during which opponents of the assembly threw stones and eggs, resulting in the destruction of property and the wounding of a police officer. According to the authority, such behaviour and damage to shop windows, advertisements, and benches was possible during the assembly planned for 19 November 2005. A possible closure of pedestrian traffic along the route of the march would have violated citizens' constitutional right to freedom of movement. It would not have prevented opponents' intrusion on the march's route. Thus, the premise for the prohibition did not concern the notified assembly itself but rather the anticipated behaviour of counter-demonstrators. The Supreme Administrative Court emphatically emphasised in the operative part of its judgment that 'it is not the task of public administration bodies and administrative courts to analyse slogans, ideas, or content that do not violate the provisions of the law in force and which the assembly is intended to serve, from the point of view of the moral convictions of persons acting on behalf of an administrative body or judges sitting on the bench of a court, or the convictions of any part of the population'. This would nullify the constitutional freedom of assembly (Article 57 of the Polish Constitution) and violate the law on assemblies.

In a case considered by the administrative court in Gdańsk in May 2011,<sup>44</sup> the municipal authority banned a public assembly in December 2010 because the content

<sup>42</sup> Judgment of the Supreme Administrative Court of 25 May 2006 (I OSK 329/06), ONSAiWSA – 45/2/2007.

<sup>43</sup> In the publication of the judgment in question, it only mentions 'International Day [...]', thus omitting the specific context of the ban. The International Day of Tolerance was established by UN General Assembly Resolution 51/95 of 12 December 1995 at the initiative of UNESCO, and is celebrated on 16 November.

<sup>44</sup> Judgment of the Administrative Court in Gdańsk of 12 May 2011 (III SA/Gd 68/11); cf. also B. Kołaczowski, *Polityczne uwarunkowania rozstrzygnięć administracji lokalnych w sprawach*

of the notification submitted by the organisers, in their view, bore the characteristics of a criminal offense. The authority found that the form and nature of the received notification violated public morals and the rights and freedoms of others: the organiser had repeatedly used offensive words and slandered the Prime Minister of the Republic of Poland, the Minister of the Interior Affairs and Administration, the Prosecutor General, the City President and other persons connected with the Prosecutor's Office and the Police, in violation of the Penal Code.

The court finds that the city authority had made its own incorrect assessment of the purpose and conduct of the planned assembly by assuming that the use of insulting language in the notification, directed at individuals holding state or local government positions, violated public morals, the freedom of others, and specific articles of the Penal Code. The Court notes that the right to organise peaceful assemblies includes, within its scope, the possibility of expressing dissatisfaction with the views or behaviour of state or local authorities. Disapproval of certain actions of those in power is often the subject of public assemblies during which participants express their views on a given matter. In this context, the Court finds that the municipal authorities failed to provide convincing substantiation of the relationship between the content of the notice and the potential violation of the cited criminal provisions.

In turn, the Administrative Court in Wrocław assesses in a judgement issued in November 2013 that the decisions of the municipal and local administrative authorities, banning the organisation of a public assembly aimed, as indicated by the organiser, at 'popularising a healthy lifestyle by informing about the advantages of the egg diet and encouraging the use of scooters [...] as an alternative to bicycle transport'.<sup>45</sup> The justification for the ban was based on a letter from the Chief of Police, in which he warned that the assembly was most likely organised as a camouflage counter-manifestation for a previously reported 'Equality March'. According to the police, the assembly would not serve the purposes indicated in the law on assemblies (to hold joint deliberations or to express common positions) because its only aim was to obstruct another assembly. Law enforcement warned the authorities that the assembly posed a real threat of disruption of the 'Equity March' by individuals sympathising with far-right circles and identifying themselves as fascists.

The Court remained critical of the findings of the city authorities and the Police Chief. Despite agreeing with the indications of the police that the complainant had already held assemblies with 'a nationalistic and homophobic tinge', the Court states that this fact could not be the only reason to ban future assemblies. The alleged 'tinge' could not, by itself, justify prohibiting future assemblies. The court also refers to the police authority's proposal to request that the assembly organiser change its time and place. The city authorities had indeed requested a change in the time of the assembly but did not request a change in the location.

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*zgromadzeń* [Political Determinants of Local Administration's Decisions on Assemblies], "Acta Politica Polonica" 2016, vol. 37, no. 3, pp. 39–49.

<sup>45</sup> Judgment of the Administrative Court in Wrocław of 19 November 2013 (IV SA/Wr 762/13).

The court emphasises that only a threat to the life or health of people or property of significant size should result in a ban on an assembly at a specific place and time and for a specific purpose. In the court's view, this had not been sufficiently demonstrated in the case under review. The authorities argued that there was a risk of disrupting a gathering taking place near the applicant's assembly. The anticipated consequences of such disruption were described as 'verbal taunts, provocations, and even attempts to physically assault the participants', allegedly coming from 'individuals sympathizing with or identifying themselves with fascist circles and holding extreme right-wing views.' However, it was not established that these individuals were actually participants in the complainant's assembly.

In turn, already under the 2015 Act, the Lublin common court of the highest instance also expresses its position on the same issue.<sup>46</sup> The thesis of the judgment states that 'it is impermissible to make the possibility of exercising the freedom of assembly dependent on the reaction of the opponents of the assembly'. The correct interpretation of Article 14 of the Law on Assemblies should consider 'that the assessment of whether holding an assembly may endanger the life or health of people, or property of significant size, must refer to the organisers and participants of that assembly'. This judgment concerns a situation where two notifications had been submitted concerning assemblies taking place 140 metres apart. The city authorities, as well as the court of first instance, considered that the organiser, by submitting a notification to hold a public assembly, was unable to adequately ensure the safety of participants. The Ombudsman did not share this position. In his opinion, the assumption that the fact of organising two gatherings of social groups of different socio-political persuasions on the same day, at approximately the same time and in close proximity to each other, constituted sufficient grounds to ban the assembly on the grounds of a threat to property of significant size, and life or health of the participants was only potential and based on speculation. As such, it did not constitute grounds for restricting the freedom of assembly. The Court uses elements of the Ombudsman's reasoning to justify its decision.

### **3.5. The organiser of an assembly in the jurisprudence of administrative and common courts**

The applicant was directly referred to in the judgment issued by the Administrative Court in Poznań in February 2006.<sup>47</sup> In this case, the municipal authorities prohibited the assembly because they assessed that the organiser – M. R., had been 'convicted by a non-final judgment of the District Court [...] for the incident related to the demonstration in front of the Consulate [...]. In addition, M. R. was convicted by a non-final verdict [...] for participating in an illegal demonstration organised during the stay of Russian President Vladimir Putin'. As a result, a change of venue was proposed,

<sup>46</sup> Order of the Appeal Court in Lublin of 12 October 2018 (I ACz 1145/18), LEX no. 2559817.

<sup>47</sup> Judgment of the Administrative Court in Poznań of 23 February 2006 (IV SA/Po 440/04), LEX no. 835420.

but M. R. refused to accept it, stating that the purpose of the assembly was to protest against the genocide in Chechnya and that the place was the most appropriate point.

Under current Polish law, there is no basis for evaluating the organiser's personal background if the assembly itself meets the requirements of Article 3(1) of the Law on Assemblies. In particular, the authorities cannot assess the issue of organisers' criminal records or their personal histories in terms of determining whether the organiser 'provides guarantees for the peaceful conduct of the gathering'. The organiser's refusal to move the assembly to a different location than the one indicated in the notification cannot affect the merits of the case. The court states that neither the purpose nor the holding of the assembly conflicted with the law, so 'The circumstances cited by the administrative authorities at both instances did not provide sufficient justification to conclude that the conditions set out in Article 8 of the Law on Assemblies were met'.

### **3.6. Correlations with other laws: administrative bypassing of freedom of assembly?**

In light of the preceding discussion, it is worth considering how judicial rulings assess the issue of whether specific provisions of substantive administrative law may influence the interpretation and application of the Law on Assemblies. The first case of this kind involves the use by local government authorities of a provision prohibiting 'arbitrary occupation of the road lane without the permission of the road manager', according to the Public Roads Act.<sup>48</sup> On the basis of this provision, municipal and administrative authorities have imposed fines on participants in assemblies that block traffic lanes, in cases where the notification of the assembly did not explicitly indicate an intention to occupy the roadway. Courts put an end to this practice by overturning the decision of the President of Warsaw,<sup>49</sup> who imposed a fine of PLN 2,193.60 on the organiser of an assembly for occupying the road lane without the road manager's permit by erecting tents with an area of 54.84 m<sup>2</sup> in the road lane.

The administrative courts of both instances emphasized that the organisation of a public assembly is a right guaranteed under Articles 54 and 57 of the Constitution of the Republic of Poland, as well as under the Law on Assemblies. The court also cited the ECtHR judgment of 7 July 2009 (10659/03), which holds that even a failure to give notification of an assembly does not automatically entitle state authorities to interfere with the right to organise or participate in peaceful gatherings.

Referring to Article 11(1) and (2) of the European Convention on Human Rights and Fundamental Freedoms, alongside Article 31(3) of the Polish Constitution, the courts affirm that this freedom may be subject to certain limitations. Still, such restrictions must have a clear statutory basis, serve a legitimate purpose in a democratic society, and be interpreted narrowly.

<sup>48</sup> Act of 21 March 1985 on public roads (*Journal of Laws* 1985 No. 14, item 60, as amended).

<sup>49</sup> Judgment of the Supreme Administrative Court of 8 September 2022 (II GSK 218/20).

In the case at hand, the court identifies a potential conflict between the constitutional right to assembly and the objectives of public order and prevention of unlawful behaviour on public roads. However, it rules that a pro-constitutional interpretation should prevail, with the protection of fundamental civil liberties taking precedence. The courts underline that permissible limitations on the freedom of assembly are, as a rule, exhaustively set out in the Law on Assemblies. Restrictions stemming from other legal acts may be permitted only exceptionally, and only when their provisions directly relate to the organisation or conduct of assemblies. Since the provision concerning fines for occupying a traffic lane without authorization does not meet this condition, it cannot serve as a legitimate ground for restricting constitutional rights.

In this instance, the assembly had been properly notified in accordance with legal requirements. If the authority believed the event posed a threat to constitutionally protected values under Article 14 of the Law on Assemblies or Article 31(3) of the Constitution, it had the option to prohibit it. Since no such decision was made, the legality of the assembly stood, precluding interference based on unrelated administrative regulations. The authority retained the ability to intervene during the event, but only if the legal conditions for dissolving an assembly were met and proper procedures were followed.

The view expressed in the ruling reflects well-established jurisprudence: occupying a traffic lane for the purpose of a peaceful, lawfully notified public assembly does not require prior authorization from the road authority. Imposing such a requirement or penalizing participants for setting up assembly-related structures would unduly restrict the constitutional freedom to assemble and would distort the essence of this civil right.<sup>50</sup> Punishing individuals for participating in a legal gathering based on administrative regulations that do not explicitly limit this right is categorically unacceptable. Consequently, provisions of the Public Roads Act cannot serve as a basis for imposing sanctions on participants in lawful assemblies. In light of this settled case law, municipal and administrative authorities should by now be fully aware of these legal boundaries.

### **3.7. Assemblies during the COVID-19 pandemic: total prohibition by regulation of the Council of Ministers vs. jurisprudence**

The proposed review would be seriously deficient if we did not at least address the assembly problem during the COVID-19 pandemic. The Polish authorities initially opted for the most restrictive solution, that is, a total ban on assemblies.<sup>51</sup> Several

<sup>50</sup> This was already the case in the Supreme Administrative Court judgment of 20 April 2021 (II GSK 1063/18). The Court also takes a position on this issue in subsequent judgments of 8 September 2022 (II GSK 872/18 and II GSK 751/19); see also the case of 8 September 2022 (II GSK 257/20).

<sup>51</sup> Not all European countries opted for this solution; for example, Germany and Israel allowed assemblies where precautions – distances between participants and sanitary security measures – were observed. See also the resolution of the *Bayerischer Verfassungsgerichtshof* of 9 June 2020 (20 CE 20.755), openJur 2020, item 3902.

other personal and civil rights were also restricted. However, the authorities did so by employing government regulation<sup>52</sup> rather than a statute (law), which remains contrary to the provisions of the Polish Constitution regarding the possibility of restricting key civil rights. Later versions of the regulation eased the ban on assemblies somewhat: limits were placed on the number of participants in assemblies, and they were required to keep a distance of at least 1.5 m between each other and to cover their mouths and noses.<sup>53</sup>

It is important to highlight the dynamics of the courts' approach to appeals concerning assemblies during the pandemic. For example, the court in Warsaw in its judgment of August 2020,<sup>54</sup> does not question the legal basis for the ban expressed in the regulation. The case analysed refers to a challenge against the decision of the municipal authorities that prohibited the organisation of an assembly because of a very serious threat to the life and health of all persons participating in it. However, in their appeal, the organiser stresses that the threat must be of a real and actual nature and not based on hypothetical assumptions, conjectures, or unverified media reports (as is clearly articulated in earlier case law). According to the organiser, there was no real threat in this case, as the number of infections at that moment in Poland testified to the low probability of contagion during the gathering and the absence of a real threat. He also indicated that the authority should, in the first instance, call upon the assembly organiser to change the conditions of the notification of the assembly, for example, by setting a limit on the number of persons during the assembly. The notification stated an expected number of up to 1,000 people, but this was only a maximum limit, and it

<sup>52</sup> The provisions of § 14(1)(2) of the Regulation of the Council of Ministers of 10 April 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the outbreak of an epidemic (*Journal of Laws*, item 658). These formally introduced a very broad ban on assemblies, both within the meaning of Article 3 of the Act of 24 July 2015 – Law on Assemblies (*Journal of Laws* 2019, item 631), as well as other assemblies, organised as part of the activities of churches and other religious associations, and events, meetings, and gatherings of any kind, except for meetings of a person with the persons whom he/she was closest to within the meaning of Article 115 § 11 of the Act of 6 June 1997 – Penal Code, or with persons closest to the person with whom he or she is cohabiting (§ 14(1) of the Ordinance of 10 April 2020). The dilemmas related to regulating the freedom of assembly through executive acts issued by the Council of Ministers have been the subject of extensive criticism in legal literature, see especially: M. Florczak-Wątor, *Granice ingerencji państwa w wolność zgromadzeń w czasie epidemii* [The Limits of State Interference in the Freedom of Assembly during an Epidemic] [in:] *Wokół kryzysu praworządności, demokracji i praw człowieka* [On the Crisis of the Rule of Law, Democracy and Human Rights], eds. A. Bodnar, A. Płoszka, Warszawa 2020, pp. 644–663; N. Daško, *Zakaz zgromadzeń w Polsce w okresie stanu epidemii a odpowiedzialność karna* [Prohibition of Assembly in Poland during an Epidemic and Criminal Liability], "Przegląd Prawa Konstytucyjnego" 2021, no. 5(63), pp. 163–173; A. Kustra-Rogatka, *Freedom of Assembly and the Right to Protest in Times of COVID-19 – The Case of Poland* [in:] *Pandemic Poland. Impact of COVID-19 on Polish Law*, eds. M. Löhnig, M. Serowaniec, Z. Witkowski, Vienna 2021, pp. 82–93; M. Wróblewski, *Wolność zgromadzeń w czasie epidemii* [Freedom of Assembly during an Epidemic], LEX/el. 2020.

<sup>53</sup> *Inter alia*, the Regulation of 7 August 2020 on the establishment of certain restrictions, orders, and prohibitions in connection with the occurrence of an epidemic state (*Journal of Laws*, item 697, as amended), Articles 25 and 26.

<sup>54</sup> Judgement of the Regional Court in Warsaw of 27 August 2020 (II Ns 26/20).

was most likely that only a few dozen people would participate. The complainant also assessed that the authority's actions against the fundamental freedom guaranteed by Article 57 of the Polish Constitution, which can only be restricted by law enacted by the parliament, not by the executive Regulation of the Council of Ministers of 7 August 2020. In the complainant's view, such a restriction, taking into account the nature and essence of a public assembly, is unconstitutional and, moreover, incompatible with the realities of organising public assemblies. Thus, the reasons indicated by the municipal authority in the contested decision were abstract, without foundation in the current factual circumstances of the case, and were based on presumptions and doubts.

However, the court assessed that the appeal was unfounded, arguing that the President of the City correctly interpreted the provisions of the Government Regulation, particularly considering the role of the Regional Sanitary Inspector. According to the ruling 'The gathering in the open space, in the area delimited by the designated streets, of the number of persons anticipated by the organiser does not give grounds to assume that both the organiser [...] and the public authorities obliged to ensure order will be able to ensure respecting the rules of gathering [...] in the manner specified in § 25(2) of the Government Regulation'. The court ruled that the repeal of the ban would cause a threat to the life and health of a large number of people, 'which is not only apparent from the referenced opinion of the Sanitary Inspector, but is part of a matter of public knowledge'. According to the court, the constitutional freedom of assembly is not absolute, as is clear from the content of Article 57 of the Polish Constitution. 'In this case, the freedom of assembly must give way to the protection of the health and life of citizens, with human life being the most important constitutional value'.

However, the Supreme Court has taken a different view in several subsequent decisions. In July 2021, it upheld the Ombudsman's cassation appeal<sup>55</sup> in connection with a conviction for, *inter alia*, attending a gathering of more than five people and failing to comply with an order to cover one's mouth and nose. In the judgment, the Supreme Court refers more broadly to constructing statutory (legislative) delegation. In the court's view, the provision of the government regulation prohibiting the organisation of assemblies oversteps the boundaries of statutory delegation. The granted authorisation concerns only restrictions, obligations, and orders; therefore, it does not permit the introduction of bans. The court stresses that using executive regulation instead of a statute (law) enacted by a parliament is contrary to Articles 57 and 31 of the Constitution of the Republic of Poland.

Additionally, the Supreme Administrative Court issued several key rulings regarding decisions to impose penalties on citizens for violating the aforementioned prohibitions or restrictions. Among these judgments, we should draw attention to the judgment of October 2021,<sup>56</sup> issued in connection with the decision of the Sanitary Inspector in Warsaw to impose a fine for violating the ban on organising assemblies.

<sup>55</sup> Judgment of the Supreme Court of 1 July 2021 (IV KK 238/21).

<sup>56</sup> Judgment of the Supreme Administrative Court of 28 October 2021 (II GSK 1417/21).



The court annulled the administrative decisions of both sanitary authorities. The court of first instance had already found that the administrative decisions had been issued without a legal basis, as the provisions of the aforementioned 'COVID' regulation of the Council of Ministers of 10 April 2020 could not constitute such a basis. According to the court, the prohibition formulated there violates the constitutional freedoms of an individual, namely personal freedom (Article 41(1) of the Polish Constitution), the freedom to move within the territory of the Republic of Poland (Article 52(1) of the Polish Constitution), and the freedom of assembly, guaranteed by Article 57 of the Polish Constitution and consisting in the freedom to organise peaceful assemblies and to participate in them; the prohibition, thus, encroached on areas reserved to statutory legislation. The court finds no statutory delegation to issue them in the provision of Article 46a in conjunction with Article 46b of the Act of 5 December 2008 on preventing and controlling infections and infectious diseases in humans.<sup>57</sup> The content guidelines of the Act do not address the possibility of restricting organising and participating in peaceful assemblies or restricting movement in the broad sense. Thus, the introduction of prohibitions leads to the conclusion that the provisions of the regulation are inconsistent with Article 57 of the Constitution of the Republic of Poland, as well as with Article 92(1) of the Constitution, because it exceeds the scope of the delegation granted by the Act to issue an executive regulation. In view of the court, the sole statutory delegation was not free of constitutional deficits.

The Supreme Administrative Court shared the view of the judicature of the Supreme Court, already mentioned above, that the state of epidemiological emergency introduced by the government and the subsequent state of epidemics are not states of emergency within the meaning of Article 228(1) of the Polish Constitution. Restrictions that lead to the infringement of fundamental rights and freedoms cannot be introduced on this basis.<sup>58</sup> Thus, like the court of first instance, the Supreme Administrative Court found that the disputed administrative decisions, which imposed sanitary penalties for organising an assembly, lack a legal basis. The essence of the legal dispute involved answering the question regarding the possibility and permissibility of interfering, in the manner, on the scale, and especially in the form imposed by the regulation, with constitutionally guaranteed general personal freedom, including personal freedom of movement within the territory of the Republic of Poland and with the freedom of assembly. The Court expressly emphasises the principle of absolute exclusivity of the statute (law, statutory matters) in criminal law, or more broadly in the provisions of a repressive (sanctioning and disciplining) nature, as well as in the field concerning freedom and human rights. According to the court, it is also necessary to bear in mind the consequences arising from the obvious fact that the state of epidemics is not a state of emergency within the meaning of the Polish Constitution. Simplifying, it is not possible to restrict the right to assembly by employing a government regulation.

<sup>57</sup> *Journal of Laws* 2019, item 1239 as amended.

<sup>58</sup> In addition to the aforementioned ruling, see Supreme Court judgment of 16 March 2021 (II KK 64/21), OSNK – 18/4/2021, judgment of 11 June 2021 (II KK 202/21).

A state of epidemic, preceded by a state of epidemiological emergency, is not a state of emergency within the meaning of Article 228(1) of the Constitution of the Republic of Poland. Thus, it is inadmissible to introduce restrictions on constitutional freedoms through an executive regulation implementing statutes.

## Concluding remarks

We have analysed the case law developed under two statutes governing assemblies: the 1990 Act and its 2015 successor, amended in 2016 to include cyclical assemblies. The judgments of various courts, including the ECtHR and the Constitutional Tribunal, have set a high standard for understanding the democratic essence of assemblies.

However, our review reveals that the practical implementation of the freedom of assembly is shaped by a different dynamic – one that unfolds between the organiser (as the notifying party) and the municipal authority (mayor or city president) responsible for processing the notification.

In this context, the courts play a key role, formerly administrative courts and now increasingly common courts, in correcting misinterpretations of assembly law found in decisions banning assemblies or alleging improper conduct. Courts regularly tasked with safeguarding the freedom of assembly appear to draw on ECtHR case law, often through the Constitutional Tribunal's rulings, which incorporate international legal standards.

We have identified well-established lines of jurisprudence that have effectively curtailed the misapplication of legal provisions such as in cases involving the occupation of roadways without road authority consent. A similar trend is evident in rulings clarifying how the statutory prerequisites for banning assemblies, danger to life, health, or significant property, should be interpreted. These judgments stress that authorities invoking such grounds must provide credible, fact-based justification.

As we have sought to demonstrate, the courts have sent a clear message to local authorities: persistent over-interpretation of these legal grounds may indicate their instrumental use for purposes unrelated to legitimate public safety concerns.

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## Summary

***Agnieszka Bień-Kacała, Tomasz Brzezicki, Tomasz Kucharski, Anna Tarnowska, Wojciech Włoch***

### **Freedom of Assembly before the Courts: A Case Law Overview from the European Court of Human Rights and Polish Courts**

In this text, the authors present an overview of the jurisprudence of the European Court of Human Rights and Polish courts – including the Constitutional Tribunal as well as ordinary and administrative courts – concerning freedom of assembly. The review covers the legal framework under both the initial, highly liberal statute adopted during the democratic transition in 1990 and the more extensive regulation introduced in 2015, together with its 2016 amendment concerning cyclical assemblies. The authors conduct a selective review, focusing on the constitutional and administrative dimensions of the law on assembly. In particular, they examine issues such as the definition of an assembly, notification requirements, grounds for prohibition, and conflicts between assembly law and other areas of administrative law, including the Public Roads Act and regulations enacted during the COVID-19 pandemic. The analysis demonstrates the key role that courts have played in shaping the proper interpretation of this fundamental civil liberty.

**Keywords:** assemblies, constitutional freedom, prohibition of assembly/gatherings, rulings on the freedom of assembly.

## Streszczenie

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### **Nowe spojrzenia na klasyczną wolność – prawo o zgromadzeniach w orzeczeniach Europejskiego Trybunału Praw Człowieka i sądów polskich**

Przedłożony tekst stanowi przegląd orzecznictwa Europejskiego Trybunału Praw Człowieka oraz sądów polskich – Trybunału Konstytucyjnego, sądów administracyjnych i powszechnych – dotyczącego wolności zgromadzeń. Przegląd obejmuje ramy prawne zarówno pierwotnej, liberalnej ustawy przyjętej podczas transformacji demokratycznej w 1990 r., jak i bardziej rozbudowanych przepisów wprowadzonych w 2015 r., wraz z nowelizacją z 2016 r. dotyczącą zgromadzeń cyklicznych. Autorzy w szczególności koncentrują się na konstytucyjnych i administracyjnych aspektach prawa zgromadzeń. Analizują głównie takie kwestie, jak definicja zgromadzenia, wymogi dotyczące notyfikacji, przesłanki zakazu oraz kolizje między prawem zgromadzeń a innymi aktami prawa administracyjnego, w tym ustawą o drogach publicznych i przepisami wprowadzonymi podczas pandemii COVID-19. Analiza uwypukla kluczową rolę, jaką sądy odegrały w kształtowaniu właściwej interpretacji tej podstawowej wolności obywatelskiej.

**Słowa kluczowe:** zgromadzenia, wolność konstytucyjna, zakaz zgromadzeń/zgromadzeń publicznych, orzeczenia dotyczące wolności zgromadzeń.

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## Review

**Agnieszka Bień-Kacała, *Konstytucjonalizm nieliberalny w Polsce po 2015 roku* (Illiberal Constitutionalism in Poland after 2015), Warsaw 2024, pp. 236**

Agnieszka Bień-Kacała's book *Konstytucjonalizm nieliberalny w Polsce po 2015 roku* (Illiberal Constitutionalism in Poland after 2015) addresses key issues of Poland's systemic transformation, analysing the phenomena of illiberal democracy, populist systemic correction, the hierarchisation of public-legal relations, the role of the judiciary, informal constitutional change, reinterpretation of constitutional provisions, and the functioning of the Constitutional Tribunal as a tool in the hands of the executive. The book is based on sound theoretical foundations and empirical data, making it an essential voice in discussing contemporary challenges facing the Polish legal system and democratic institutions.

The analysis conducted by the author is clearly critical in nature. In the subsequent parts of the study Bień-Kacała points out numerous irregularities in the systemic phenomena under discussion. First, she formulates accusations against illiberal democracy, claiming that it leads to the erosion of the rule of law. The author is also critical of the hierarchisation of public-private relations, pointing to the strengthening of the executive at the expense of other branches of power, violating the principle of the tripartite separation of powers. The politicisation of public institutions makes them tools in the hands of those in power, undermining their independence and authority. The author emphasises that in the case of institutions such as the Constitutional Tribunal and the National Council of the Judiciary, decisions are often taken based on political interests rather than objective legal criteria. As a result of these processes, the independence of the judiciary is seriously jeopardised, which leads to decrease in citizens' trust in the judiciary. Another serious allegation is that international standards for the protection of human rights and democratic principles are ignored, leading to the rejection of recommendations by European institutions and the marginalisation of democratic values. Bień-Kacała also draws attention to the manipulation of legal provisions and legislative procedures in order to legitimise the government's actions,



which is contrary to democratic principles and violates citizens' rights. It is difficult to disagree with this, especially considering the events that took place in Poland after 2015. The phenomena described by the author not only have a theoretical dimension, but also translate into political and social practice, which to a large extent shapes the contemporary life of citizens.

In her study, Bień-Kacała also formulates critical comments on the populist correction of the political system in Poland. The author observes that those in power use a populist narrative to legitimise their actions, presenting themselves as defenders of 'ordinary people' in opposition to elites. This type of rhetoric is aimed at social mobilisation and to divert attention from the real threats to the rule of law. Bień-Kacała also points to the consequences of populist reforms that lead to the curtailment of civil rights and fundamental freedoms. New regulations on public assemblies and restrictions on non-governmental organisations can have the effect of undermining civic activism and limiting freedom of expression.

The author also formulates serious objections to changes in the functioning of the judiciary. She criticises the processes leading to the loss of judicial independence, which resulted from legislative and personnel changes. These changes allowed politicians to gain significant control over judicial appointments and also to influence the composition of the Constitutional Court and the National Council of the Judiciary. Bień-Kacała argues that such actions were aimed at subordinating the judiciary to the executive, constituting a serious violation of the principle of the tripartite separation of powers. Furthermore, the author is critical of the politicisation of the jurisprudence of the Constitutional Tribunal, which, in her view, has become a tool for legitimising governmental actions, instead of fulfilling its fundamental role as a defender of the rule of law and individual rights. In the context of this politicisation, Bień-Kacała also draws attention to serious problems related to the non-publication of judgments of the Tribunal and the limitation of access to information on its activities, which has contributed to the weakening of transparency in this area.

Bień-Kacała also devotes attention to the phenomenon of informal change of the constitution in Poland, defining this as a process which occurs without a formal change to the text of the constitution, but through a reinterpretation of its provisions and a modification of legislative and judicial practice. The author points to the key problem of the reinterpretation of constitutional provisions by state bodies, which leads to the application of legal norms in a manner that deviates from the original intentions of the system's legislator. She argues that those in power use such an approach to legitimise actions contrary to the foundations of democracy. In particular, she stresses that the changes in the composition of the National Judicial Council and the Constitutional Tribunal have led to a weakening of their independence, which poses a serious threat to the rule of law in Poland.

Analysing the changes concerning the National Council of the Judiciary, which contributed to its politicisation and loss of independence, the author points out that the new regulations enabled politicians to exercise considerable control over the composition of the Council, which directly affected courts' independence.

Bień-Kacała assesses these regulations critically, pointing to a violation of the principle of the independence of the judiciary and an attempt to subordinate judges to the political interests of those in power. In the context of the Constitutional Court, she draws attention to the dismissal of judges before the end of their terms of office, which violates the principle of stability and continuity of judicial institutions. Such actions can be seen as a form of political pressure to gain control over the Court's jurisprudence. The author also sees a serious problem in the practice of non-publication of judgments of the Constitutional Tribunal, which leads to a limitation of the transparency of its activities. Additionally, Bień-Kacała points to the use of extra-constitutional states of emergency as a method of restricting civil rights under the pretext of protecting national security or public health.

In the context of constitutional reinterpretation, the author analyses the processes that took place after 2015 aimed at changing the meaning of key constitutional provisions. One of the main criticisms of these has been that state bodies have been adapting the interpretation of constitutional provisions to the current political needs of those in power, which destabilises the legal system and undermines the foundations of democracy. The author notes that values enshrined in the constitution, such as the rule of law or the protection of human rights, are being reinterpreted, favouring illiberal tendencies, leading to their marginalisation in the face of dominant political narratives.

An essential element of the study is the chapter devoted to the role of the Constitutional Court in the political system in the context of its functioning 'in the service of the system'. In addition to her attention to the importance of the Constitutional Court in the process of shaping and protecting the illiberal system (although perhaps this should have been given a little more prominence), Bień-Kacała also refers to the distinctive features of the illiberal constitutional court as a key element of the problem at hand. She points to several characteristic features of the illiberal model of the functioning of the Constitutional Court. First, she points to the political control over the composition of the Court by the executive and parliament, which leads to a lack of objectivity and independence of its judges. Second, she highlights that the illiberal constitutional court often plays a legitimising role for government actions instead of upholding the rule of law and protecting individual rights. Third, she points out that complicated procedures and the lack of publication of judgments can hinder citizens' access to justice. Fourth, she notes the disappearance of the role of the Constitutional Court as a guardian of the constitution; instead, it starts to act according to the political interests of the current ruling group.

Bień-Kacała also discusses lawmaking in the context of illiberal constitutionalism, pointing out several key problems related to this process. She points out that under an illiberal democracy, there is a reduction in the participation of civil society in the law-making process. Decisions made by the executive often take place without adequate public consultation or dialogue with citizens. Bień-Kacała also highlights the manipulation of legislative procedures by those in power, which leads to laws being passed in a manner inconsistent with basic democratic standards. Examples of

such actions include fast-tracking legislative procedures and passing important laws without proper consideration by parliamentary committees. The author considers the fact that the lawmaking process is becoming less and less transparent, which is one of the central characteristics of legislation in an illiberal system. Restricted access to information about legislative work and the lack of adequate publications make it difficult for citizens to monitor the government's actions and influence the shape of the law. Furthermore, Bień-Kacała points out that legislation in this system becomes a political tool, used in the interests of the ruling party, instead of serving as an instrument for the protection of citizens' rights and the realisation of democratic values.

Bień-Kacała also draws attention to the role of Poland's relations with the European Union in the context of illiberalism and the erosion of democracy. She stresses that the Polish government's actions aimed at weakening the independence of democratic institutions have been criticised by European institutions and international human rights organisations. She recalls that Poland has been subject to proceedings by the European Commission for violating the rule of law and for judicial reforms deemed to be contrary to European values. The author notes that such actions may lead to Poland's isolation in the international arena and negatively affect the legal situation of its citizens. She also aptly diagnoses the conflict between the values promoted by the EU and the actions of the Polish government, which often ignore the principles of democracy and the rule of law. These tensions may deepen the democratic crisis and erode social trust, both within the country and abroad.

The author's detailed analysis of the key problems associated with illiberal constitutionalism is particularly valuable in the context of concerns about the state of democracy in Poland. This monograph brings an innovative perspective on the phenomenon of illiberalism, combining theory and practice. Bień-Kacała not only defines illiberal constitutionalism but also analyses its concrete manifestations in the Polish context, making this book a unique contribution to the literature on the subject. The author relies on an extensive bibliography, including both Polish and foreign sources, including works by renowned scholars and international documents, which increases the academic value of the publication. At the same time, it should be noted that the author assumes a specific initial knowledge of the issues by her readers, often referring to theoretical findings previously made in the legal studies.

One wonders, however, about the issue of a limited comparative perspective. Although the author refers to international contexts, some analyses could gain depth through broader comparisons with other countries experiencing similar processes. Applying a broader perspective could enrich the argumentation by showing the differences as well as similarities between Poland and other countries. However, it is difficult to formulate a serious accusation out of this, as this scope of research and not any other is a result of the author's methodological assumptions. Attention may also be drawn to the eminently academic style of the discussion. The language of the study is typical of academic works and may be difficult to assimilate for those outside an academic environment. Although it is standard for this type of publication, greater

accessibility could have attracted a wider audience. Some insufficiency may also be felt in terms of practical recommendations. Although the book provides a comprehensive theoretical analysis, it lacks recommendations for reform or remedial action in the face of the rule of law crisis. Pointing out concrete solutions could have added practical value to the theoretical analysis. Nevertheless, this leaves an open space for further research on illiberal democracy.

In conclusion, it should be pointed out that *Konstytucjonalizm nieliberalny w Polsce po 2015 roku* (Illiberal Constitutionalism in Poland after 2015) by Agnieszka Bień-Kacała is a vital publication combining in-depth analysis with a discussion of current legal and political issues. Thanks to its wide range of research and analysis of governmental practices, the book provides valuable information for both legal scholars and those interested in the state of democracy and the rule of law in Poland. The study will prompt further research on illiberal constitutionalism and its impact on democracy in Poland. The author exhaustively discusses the issue in the book's title and its consequences for individual rights and the functioning of democratic institutions. The author's charges concerning illiberal democracy, populist correction of the system, hierarchisation of public-legal relations, erosion of judicial power, and informal amendment of the constitution point to serious threats to the democratic system and the rule of law. The analysis is based on solid theoretical and empirical foundations, which makes this book an essential reference for future research and discussion on the state of democracy in Poland.