European and Polish constitutionalism in the aftermath of WW1

di Angela Di Gregorio

Abstract: The paper analyses the intersections of Polish and European constitutionalism in the inter-war period. Although Poland had followed a unique constitutional path due to its historical background, nevertheless the general constitutional tendencies of that time still influenced the 1921 Constitution, as happened for example with the long and detailed bill of rights (full of both liberal and social rights), the important role of parliamentary system, the republican ideas, the strong democratic stance of the Constitution. The inter-war constitutionalism remains an important reference point for the following constitutional waves in Europe.

Keywords: European constitutionalism, Inter-war period, Polish constitutional history, Foreign Models, 1921 Constitution.

1. The collapse of the Empires and the European constitutionalism at the end of WW1

1.1. The rich constitutional cycle of the first post-war period

The constitutional phase that started in Europe at the end of the First World War represents a phenomenon of great cultural relevance. It consists in a special 'constitutional cycle', well documented in literature[1], which involved the whole of Europe in a common destiny of rebirth and innovation. In this period, the seeds of epochal changes were planted, especially those referring to the form of state. Those seeds would remain embedded in the political and

[1] See, in particular, A. Head, *Democratic Constitutions of Europe. A Comparative Study of Postwar European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, The Kingdom of the Serbs, Croats & Slovenes and the Baltic States*, London, Oxford University Press, 1928; A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, Vol. I (Albania, Bulgaria, Cecoslovacchia, Danzica, Estonia, Finlandia, Grecia) and II (Jugoslavia, Lettonia, Lituania, Memel, Polonia, Romania, Ungheria, Urss), Roma, Istituto per l'Europa orientale, 1929; B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, Paris, Marcel Giard, 1931; A.J. Zurcher, *The Experiment with Democracy in Central Europe. A Comparative Survey of the Operation of Democratic Government in Post-War Germany and in the Russian and Austro-Hungarian Succession States*, New York, Oxford University Press, 1933; G. Burdeau, *Le régime parlamentaire dans les constitutions européennes d'après-guerre*, Paris, F. Alcan, 1934.

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institutional structure of the European countries, despite the following historical fractures.

In post-war democracies, which originated from the ashes of defeated empires and/or from contextual revolutionary phenomena, processes of constitution-building and state-building occurred simultaneously thus revealing the fragility of the new European states. State fragility and constitutional fragility, combined with political and economic fragility, represented a perverse mixture that led to a rapid crisis of these innovative experiments. The difficulties of the context were huge: internal problems – particularly critical in the countries of Central and Eastern Europe, where there was no national cohesion due to the presence of strong minority groups – were added to the international ones, of a geopolitical and ideological nature with the need of opposing nazi-fascism and bolshevism.

The so called 'rationalized democratic constitutions'[2] were adopted equally in new states born from the dissolution of plurinational Empires (Finland 1919, Czechoslovakia 1920, Baltic States 1920-1922, Poland 1921, Kingdom of Serbs, Croats and Slovenes 1921[3]), in defeated states (Germany 1919, Austria 1920, Hungary 1920, Turkey 1924) and in those that won the First World War (Ireland became independent, constitutions of 1922 and 1937, Greece 1927). The Soviet Constitution of the RSFSR of 1918 should also be included in the same historical phase, though its ideological approach distance it from being a product of the development of constitutionalism[4].

These constitutions were characterized both by innovations and by the circulation – with necessary adaptations – of the constitutional models known up to that time. Successful experiences were only a few and not always transferrable (see, for example, the English-style parliamentarism). Existing constitutional patterns were, however, widely used or considered in constituent debates. This also applies to the US Constitution (election of the President by an Electoral College, for example in Finland, instruments of direct democracy at a local level, judicial review of legislation) and to the Swiss one (direct democracy as a corrective to parliamentarism: especially in Baltic countries, Weimar, Austria, Ireland) as well as for the constitutional laws of the French Third Republic, for what concerns the system of government (and the bill of rights of the previous French tradition). Some of the new constitutions, like those of Weimar, Czechoslovakia and Austria, have themselves been perceived as models and have influenced each other.

[2] P. Biscaretti di Ruffia, *Introduzione al diritto costituzionale comparato*, Milano, Giuffré, 1988, pp. 614 et seq.

[3] Many of these states will have republican governments "of radical democracy", according to the definition of P. Biscaretti di Ruffia, *Introduzione al diritto costituzionale comparato*, cit., p. 614. The 1923 Constitution of Romania should also be remembered, although it didn't follow to the conquest of statehood, which took place in 1877.

[4] A. Di Gregorio, *Uno Stato "nuovo" e un diritto "nuovo": la Rivoluzione Bolscevica e la sua eredità giuridica a cent'anni dall'"Ottobre"*, in *Diritto pubblico comparato ed europeo*, n. 4, 2017, pp. 993-1030.

Even the Soviet model was taken into consideration, not only to take distance from it, but also to avoid further revolutionary outbursts, protecting work and other social rights in a pluralistic framework[5].

These innovations mainly derived from the fact that after the war and the consequent revolutionary events, republican-type states were created (although new constitutions were also adopted in the monarchical ones), based on universal suffrage (sometimes even women's suffrage) that allowed the variety of social instances gaining access to citizenship, and therefore to representation, to enter parliaments – the almost omnipotent symbols of the new time and of national rebirth. The inevitable recourse to the proportional electoral system[6], the preponderant role of mass political parties, which was even greater than that of the already powerful assemblies (extra-parliamentary party committees; permanent commissions composed on the basis of party representation), let extreme social, economic and ethnic-national complexity of the time enter into state institutions.

To avoid the mistakes of previous parliamentary experiences, we observe a vast phenomenon of so called 'rationalization of power', which embraced every sphere of constitutional law[7]. At first glance, it referred not only to the relationships between the legislative and the executive (although the incongruities of this relationship, which initially saw an unsustainable weakness of the executive, can be considered the cause of the subsequent degeneration) but also to the introduction of the institutions of direct democracy (the combination of parliamentarianism with direct democracy represented one of the most interesting elements of post-war constitutionalism). In a more general way, the rationalization was "the tendency to provide a legal basis for the social dimensions of life", that is "to make subject to law the life of the whole society"[8].

From a formal standpoint, the 1920's constitutions revealed full compliance with democratic principles, even in the Balkans. All these texts

[5] Also because of the fear generated by the Bolshevik Revolution, the liberal state will be gradually remodeled into a welfare state, taking social rights in their most modern declination from the Soviet model. See C. Mortati, *Lezioni sulle forme di governo*, Padova, Cedam, 1973, pp. 61 et seq.

[6] As stated by S. Ceccanti, *La forma di governo parlamentare in trasformazione*, Bologna, il Mulino, 1997, pp. 59 et seq., the proportional system, often constitutionalized, was what most distanced the new European democracies from the English system. Considering the deep socio-cultural fractures, the proportional electoral systems served as "a national integration strategy" to avoid civil war as the majority representation system would have threatened the very existence of the political system. However, once proportional systems are introduced, they tend to survive the end of the social conditions that made them necessary, thus exercising a conservative role. Furthermore, as C. Mortati recalls in *Le forme di governo nello Stato contemporaneo*, cit., p. 190, in the continent, the extension of suffrage acted on a non-homogeneous political and social structure, which caused the party system to be very different from the English one.

[7] B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, cit., pp. VII-VIII, 1 et seq.

[8] Ibid., pp. VIII and 8.

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proclaimed popular will as the main driving value. Among the relevant content, the principles of pluralism and rule of law, the judicial review of legislation (Ireland, Romania and Greece followed the US model, Czechoslovakia and Austria the Kelsenian one), as well as the protection of minorities and the acknowledgment of general principles of international law (preamble of the Constitution of Czechoslovakia, Article 4 of the Constitution of Estonia). The bills of fundamental rights were rich and included social rights[9]. This happened not only in the Weimar Constitution (socialist forces had an active role in the constituent assembly) but also in Romania and Yugoslavia, that is in monarchic countries, as well as in Poland and Estonia. Social rights were included for different reasons, among which the influence of the labor movement, the fear of bolshevism and the social doctrine of Catholic Church (*Rerum Novarum Enciclycal*)[10]. In addition, there was the inclusion of new rights and duties and the limitation of property rights.

1.2. The different rationalizations of parliamentarism

The forms of government adopted in Europe after the First World War have traditionally been framed as variants of parliamentarism. Mortati, for example, distinguishes three sub-categories by mentioning the cases of Austria, Czechoslovakia and Weimar. More precisely, he distinguishes between three ways of solving the problem of efficiency of parliamentarism, according to the social and political context of the different countries: "pluralistic" rationalization (Weimar), "monistic" rationalization in the wake of the laws of the Third French Republic (extreme, as in Austria or moderate, as in Czechoslovakia), waiving rationalization in favour of spontaneous conventions (Great Britain)[11].

The French model of a parliamentary form of government in an 'assembly-style' version was adopted by most of the new constitutions (in Austria 1920, Czechoslovakia 1920, Estonia 1920, Poland 1921, etc.) for several reasons. The international prestige of France should be mentioned, as well as the good political and cultural relations that Central-Eastern

[9] Special chapters in the constitutions of Weimar, Yugoslavia, Poland. Missing in Latvia. Many constitutions restricted rights by providing limitations by law (Poland, Lithuania, Yugoslavia), which is dangerous in the absence of a constitutional review of legislation. See Poland, for the proclaimed superiority of the constitution over the law, though without a forseen safeguard mechanism. Moreover, there was the protection of national minorities, that was imposed (Poland) or not (Latvia, Estonia) by peace treaties.

[10] Social rights were included, following Mirkine, in the general process of rationalization of public life even if they merely expressed an educational function (as was the case in Romania, Poland, Estonia). Ibid., p. 42. The introduction of social rights was not necessarily related to the greater or lesser democratization of the country (the longer bill of rights was included in the Constitution of the Kingdom of S,C&S): at the time, no political party could ignore the social question anymore.

[11] C. Mortati, *Le forme di governo nello Stato contemporaneo*, cit., pp. 190 et seq.

European countries had, at the time, with this country (France was the only ally against the dangers coming both from the East and West); the stability that – despite the limited duration of governments – those constitutional laws had ensured to the country (owning to a balanced party system, tending to the centre, and to a consolidated bureaucracy); the choice of proportional representation system, which for some countries was a mandatory one[12]. In addition, there were not many other examples of parliamentarism. In fact, the English one, by strengthening the executive, was not attractive to countries that wanted to distance themselves from the previous monarchical executive. Moreover, France had not only contributed to the affirmation of republican ideas, but it had also developed the extremely modern concept of a special constituent assembly.

The assembly-style parliamentarism of the Third Republic was therefore not considered negatively. As a matter of facts, here the parliament had a guaranteed duration and could not be dissolved in advance (see the unfortunate attempt made by Mac Mahon, which was successively repeated without success) hence it represented the body that ensured continuity in the political direction of the state, despite the ministerial instability[13].

The French republican system had the overall solidity of a system based on customs and empirical norms and was therefore particularly attractive, becoming, in other countries, "a homogeneous and rigid

[12] However, the form of government of the Third Republic in practice was more complex than a simple assembly-style model. Even after 1877, the President tried to have an active role in the recurring political crises. Moreover, during and after the First World War, there was a strengthening of the government thanks to the use of decree-laws based on parliamentary authorization that could modify existing laws. As S. Ceccanti recalls in *La forma di governo parlamentare in trasformazione*, cit., pp. 30-31 "the twentieth century, therefore, opens with two monist models: the English and the French, which differ in the structure of the parties in parliament and in the country, as well as for the different repercussions that this difference entails in the relations between parliament and government". In the United Kingdom, the government became the steering committee of the parliamentary majority, while in France it depended on parliamentary delegation, – that is, on the alternating political combinations of the assembly. However, the French President managed to have a role to play with parties weaknesses, unlike the English monarch. Therefore it was a different kind of monism. On the Third Republic see also: L. Favoreu, P. Gaïa, R. Ghevontian, J.L. Mestre, O. Pfersmann, A. Roux, G. Scoffoni, *Droit constitutionnel*, Dalloz, Paris, 2013, pp. 549 et seq.

[13] This explains why the period of the Third Republic was so stable in France: the republican institutions and the international position of the country were consolidated, the colonial empire was created, the secularization of the state took place. This stability, however, was not only due to the institutional mechanisms, but also to the distrust that the ruling class had for all forms of personalistic power, including that of the executive (rememberig Napoleon's coups d'état). Furthermore, the bourgeoisie, despite being divided into different parties, had homogeneous interests. C. Mortati, *Le forme di governo nello Stato contemporaneo*, cit., pp. 140-141. However, Mortati evaluates the institutions of the Third Republic in continuity with some political characteristics of the previous regime (conservative and absolutist): "the constitution of '75 had done nothing but replace the ancient monarchical absolutism with the new absolutism of the assembly", pp. 191-192.

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doctrine"[14] by the conveyance of some practices in the constitutional text. However, the evaluation of this circulation is more complex than what it seems. The problem lies in the correct interpretation of that model: it was the monist practice that was imitated, together with the literal text of the constitutional laws of 1875. This happened, for instance, with the procedure for the early dissolution of the lower house, which was a competence of the President, with the assent of the Senate.

Considerations based on practice must be added to this formal classification: the regime established by the Austrian Constitution of 1920 proved to be even more extreme than the French one of 1875, being comparable to the French constitution of 1793 (the principle of the division of powers was jeopardised by the absolute dominance of the political chamber; for what concerns the early dissolution, only self-dissolution was foreseen)[15]. This evolution was mainly defined as "monist with prevalence of the assembly" or "assembly-centred" or even "conventional"[16]. However, there are also contrary opinions[17], especially if we consider that a certain degree of rationalization of the form of government was foreseen even in the original version of the Austrian Constitution (and even more so in the Polish and Czechoslovakian ones)[18]. Anyhow, the assembly-centered monism justified the subsequent evolution, needed to counter the excessive weakness of the executive[19].

Despite the influence of the kelsenian ideas and of the constitutional laws of the French Third Republic, the form of government envisaged by the 1920 Constitution of Czechoslovakia was a more balanced one, since parliament was not the only centre of authority in the system. This, thanks

[14] S. Ceccanti, *La forma di governo parlamentare in trasformazione*, cit., p. 31 (quoting Mirkine).
[15] C. Mortati, *Le forme di governo nello Stato contemporaneo*, cit., p. 196.
[16] With reference to the Swiss form of government, as well as the Jacobin one and that of the Third Republic. C. Mortati, ibid. pp. 191 et seq.
[17] Volpi considers questionable the category of the assembly–style form of government for theoretical and practical reasons (M. Volpi, *La forma di governo parlamentare a prevalenza del Parlamento: la III Repubblica francese*, in G. Morbidelli, L. Pegoraro, A. Rinella, M. Volpi, *Diritto pubblico comparato*, Torino, Giappichelli, 2016, p. 446). On the system of government of the Third Republic, after recalling other important characteristics of that long constitutional phase, such as the scarce discipline of parties, their transformism and the important role of notables, Volpi reports Carré de Malberg's concept of "absolute parliamentarism" (*La classificazione delle forme di governo*, in G. Morbidelli, M. Volpi. G. Cerrina Feroni, *Diritto costituzionale comparato*, Torino, Giappichelli, 2020, p. 266).
[18] Please refer to M. Orlandi, *The system of government in the Polish Constitution of 1921*, in this *issue*. Following S. Ceccanti, *La forma di governo parlamentare in trasformazione*, cit., p. 18, in the Austrian case there was a "zero degree" of rationalization while in Czechoslovakia a "second degree". In both cases, as noted by both Mortati and Ceccanti, the main obstacle to the political stabilization resided not specifically in the constitution but in the new role of mass political parties, within and outside the parliament: party oligarchies decided the fate of governments and of political and legislative activity.
[19] On the centenary of the Austrian Constitution, please refer to the special issue of *Percorsi costituzionali*, n. 3, 2019.

to a series of precautions: bicameralism was almost equal, the head of state had effective powers that allowed them to limit the supremacy of the parliament (legislative veto, dissolution of the chambers, etc.). Moreover, the initiative of legislative referendum was up to the government, there was a constitutional court which also had the task of judging conflicts of attribution between state powers, there was an extreme rationalization of the confidence relationship between government and parliament to ensure stability for the executive[20]. However, the political system of the time was built in a way that favoured frequent extra-parliamentary crises, as the proportional system was provided for by the constitution and there was even a sort of imperative mandate under the protection of the Electoral Tribunal. Nonetheless, Czechoslovak democracy remained intact until 1939, saving itself from the authoritarian degeneration and contextual constitutional revisions of the rest of Europe.

Despite the reasons that led to the initial choice of an assembly–style parliamentarism, it is also important to consider the differences between the constitutions. The introduction of institutions of direct democracy as a tempering of parliamentarism did not take place everywhere (not in Poland, for example) nor did excessively assembly-centred systems of government (Czechoslovakia). The overview is therefore more complex, and the experiences of Central-Eastern Europe enriched the constitutional patterns of the time with a series of important variations. Some countries, such as Poland, simultaneously drew upon their national traditions and the European models that were considered to be most suitable at the time. However, if in the first versions of the post-war forms of government it was the French model that prevailed, in the following evolutions the Weimar model would also be approached. It can be seen, for example, in Austria, Poland and the Baltic countries, especially under two profiles: the emergency powers attributed to the head of state and the extremely polarized party system.

The Weimar Constitution therefore represents the second reference model in the period between the two wars, especially for the dynamics of the form of government. It was technically inspired by the dualist model[21], considered ideal for avoiding both assembly drift and authoritarian concentration. However, complex mechanisms were introduced that went beyond a simple rationalization of the parliamentary system, with the

[20] See, among others, S. Ceccanti, *La forma di governo parlamentare in trasformazione*, cit., pp. 36-39.

[21] In Preuss's conception of parliamentary regime (founded on two centers of authority, the head of state and parliament), borrowed from Redslob. The assembly form was rejected, and there was a misinterpretation of the English experience, where conflicts between legislative and executive were solved through a monistic regime with a prevalence of the executive that however did not lead to a degeneration into an authoritarian system, as the social structure and the party system guaranteed an effective democratic control. See C. Mortati, *Le forme di governo nello Stato contemporaneo*, cit., pp. 200-201.

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introduction of a plurality of organs "mutually placed in a position of equilibrium such as to be able to neutralize each other in the event of abuse and arbitration"[22]. This, nonetheless, meant abandoning the dualistic scheme in favour of a pluralistic one which always ultimately foresaw to appeal to the people. This set of mechanisms and complex reciprocal conditioning became useless if applied to a homogeneous society (as the English experience shows) while it was dangerous and counter-productive in a non-homogeneous society. Some devices such as legislative referendums (of an arbitration nature) that could be activated by the head of state were not compatible with the logic of the parliamentary system. Similarly, the powers of the President to dissolve the Reichstag, the ability of the President to dismiss ministers who enjoyed the confidence of the Reichstag, etc., go beyond the equilibrium of the parliamentary system.

1.3. *Failures and authoritarian involutions*

The legal doctrine on the inter–war constitutionalism focuses on some constitutions and some aspects, such as the more or less rationalized forms of government (noting in some cases their lack of originality)[23] or the so-called 'guardians' of the Constitution. The practical application of these constitutions is generally negatively judged, as often happens to their construction, considered too 'theoretical'[24].

The inter–war constitutional cycle can be divided into two phases. The first is characterized by the adoption of democratic (or ultra-democratic) constitutions. The second, by their degenerations / amendments or replacements with more authoritarian texts[25]. According to some, authoritarian political tendencies were well represented from the outset, not necessarily as an expression of a Nazi-Fascist ideology but of a more empirical authoritarianism that was affected by the old monarchical

[22] C. Mortati, *Le forme di governo nello Stato contemporaneo*, cit., p. 201. On the centenary of the Weimar Constitution, see the different essays published on *Revue francaise de droit constitutionnel*, n. 1/2021, including C. M. Herrera, *Constitution et transformation, de Weimar à nos jour*; C. Grewe, *De l'ambivalence de la démocratie représentative à Weimar et aujourd'hui*; A. Gaillet, *Weimar. Réflexions autour d'une constitution centenaire.*

[23] According to some, there would be a lack of originality exactly because the form of government taken into consideration was that of the French Third Republic. M. Toscano, *Costituenti europee post-belliche (1918-1931)*, Firenze, Sansoni, 1946, p. 270. S. Ceccanti, *La forma di governo parlamentare in trasformazione*, cit., p. 31.

[24] P. Biscaretti di Ruffia, *Introduzione al diritto costituzionale comparato*, cit., p. 615.

[25] The first example were the amendments to the Polish Constitution following the *coup d'état* of 12-14 May 1926. In a similar authoritarian vein, we find a series of amendments or newly adopted constitutions of that time (the new Lithuanian Constitution in 1928, the Estonian Constitution of 1934, the acts for the protection of the state in Finland of 1930, etc). See A. Di Gregorio, *Transition to Democracy in the Countries of Central-Eastern, Baltic and Balkan Europe*, in A. Di Gregorio (Ed.), *The Constitutional Systems of Central-Eastern, Baltic and Balkan Europe*, Eleven International Publishing, The Hague, 2019, pp. 11-12.

principle[26]. In some countries (Kingdom of Yugoslavia, Bulgaria) the constitutions were simply suspended. This was a symptom of the political attitudes of these countries toward the Nazi-fascist powers or a consequence of the imposition of new regimes to the then recently conquered territories by Nazi Germany.

Notwithstanding the complexity and the extent of their content, the constitutions failed on practical grounds. The same constitutional spirit was unrelated to the political conditions of the time. Consequently, they were not properly applied or were significantly amended (in an authoritarian direction), and even ignored in the day-to-day legislation. The main problem was the relationship between the executive and the legislative, generally based on the supremacy of parliament. This happened because the constitutions had been drafted following a revolutionary moment and were willing to distance from the previous monarchic executive. Moreover, the omnipotence of parliament referred to the role of the lower house while the upper house either had a minor role (Poland, Czechoslovakia) or had been completely eliminated (Yugoslavia, Baltic countries). Governments and heads of state were configured as weak (except in monarchies). The people became the main reference for the representative system (Baltic countries) or a corrective of parliamentarism in the event of a short-circuit (Weimar, Austria, Czechoslovakia).

The choice of parliamentarism was essential because it was seen as a symbol of democratization. Nevertheless, it was a 'deviant' form of parliamentarism which – with limited exceptions such as Czechoslovakia and Finland – denied the logic of the parliamentary system (elasticity and balance between powers) and the very separation of powers, as the assembly and the parties dominated everything. Moreover, these were unorganized and undisciplined parties, which, owing to the proportional electoral system, threatened the authority of the parliaments themselves. This is, for example, the opinion of George Burdeau, who does not accept Mirkine's definition of 'rationalized' parliamentarism[27]. Fear of communism, fascism and of the past monarchical absolutism became fear of the executive as such, generating fatal consequences. However, the economic and social problems of the time required resolute decisions. Fascist forces profited from this situation: at the end of this decade the majority of constitutions formally affirmed the political primacy of the executive thus confirming the political practices developed since the first years of their application. In Austria, for instance, an enabling act was passed in 1922, there was a first constitutional reform

[26] G. Burdeau, *Il regime parlamentare nelle costituzioni europee del dopoguerra*, Milano, Edizioni di comunità, 1950, pp. 52-53, for example, does not consider the Weimar constitution to be democratic, arguing that it was the expression of Bismarkian authoritarianism and of the supremacy of the Reich, embodied in the figure of the President.

[27] G. Burdeau, *Il regime parlamentare nelle costituzioni europee del dopoguerra*, cit., p. 92.

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in 1925 and with the 1929 constitutional amendment the Weimarian model was approached.

Although the post-war constitutionalims proved to be unfortunate, it nevertheless remains important for subsequent European constitutional developments. This importance was not denied by the debate of the European resistance and by the founding fathers of the three major legal orders of continental Europe (France, Italy, West Germany)[28]. Mirkine himself, after the Second World War, argued that to understand the parliamentary regimes of France, Germany and Italy it was necessary to refer to "that parliamentary technique that was established and built in the states of Central and Eastern Europe after 1918"[29].

Ultimately, the constitutions of the time between the two world wars represent a common heritage of values and institutions acting as a constant reference and counterpoint – for better or for worse – even in subsequent constitutional cycles, up to the most recent post-Communist one. The influence of the aforementioned pre-socialist traditions on the constitutions adopted after the fall of the socialist regimes is clear throughout the entire area. This is particularly true for the Czech and Slovak Constitutions and for those of the Baltic states (Latvia reintroduced the 1922 Constitution with a series of later amendments; Estonia and Lithuania have utilized many institutions derived from the 1920's and 1930's constitutions). A similar tendency is evident also in Poland, Bulgaria and Romania[30].

2. The Polish constitutional traditions from the Middle Ages to the era of partitions

In the already troubled Central and Eastern European's history of statehood, Poland stands out for its even harsher difficulties. To begin with, it should be remembered that the Polish state (in its Polish-Lithuanian variant)[31] represented an early form of 'national' state in 16th century Europe, unified by religion rather than ethnicity. Even then, it manifested its congenital defect: "a strong cultural awareness, but little institutional strength"[32]. After the end of that glorious experiment, there was the dark page of partitions:

[28] F. Lanchester, *I successori dell'impero: una eredità difficile e una democratizzazione dagli incerti risultati*, in F. Lanchester, M. P. Ragionieri (Ed.), *I successori dell'Impero*, Milano, Giuffré, 1998, p. 7.
[29] B. Mirkine Guetzévitch, *L'échec du parlementarisme "rationalisé"*, in *Revue internationale d'Historie politique constitutionnelle*, 1954, p. 100.
[30] A. Di Gregorio, *Transition to Democracy in the Countries of Central-Eastern, Baltic and Balkan Europe*, cit., p. 12.
[31] Polish-Lithuanian Confederation or First Republic of Poland (1569-1795). It was a multinational micro empire.
[32] G. Lombardi, *Tra continuità e trasformazioni*, in J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi. Le radici istituzionali della svolta polacca*, Rimini, Maggioli, 1992, p. 9. According to Lombardi, this contrast constitutes "one of the most important keys to reading Polish constitutional history".

starting from 1772[33] historical Poland was divided between the Austro-Hungarian, Prussian and Tsarist Empires (the latter being the most consistent part, which included Warsaw) bending to a domain of a different type[34].

The beginning of the Polish constitutional development is quite remote[35]. It refers to a set of acts and documents that the nobility imposed on the monarchs since the twelfth century, limiting their power and creating an extremely advanced system of government for the Europe of the time[36]. The apex of this period of great innovation in terms of rule of law, tolerance, religious pluralism, and broad prerogatives of the nobles was reached towards the end of the sixteenth century. These were therefore medieval pacts, conventions, charters of nobles' rights / privileges preceding the written constitutions, in which – following the English model (sometimes even preceding the analogous English charters) – the sovereign was forced to have limits very soon and to submit to the Diet or Sejm of Nobles (both nationally and in local territories). The tradition of a strong Sejm, which will dominate – as we will see – the 1921 Constitution, directly comes from this remote period[37]. Every law the Sejm enacted which protected religious or civil liberty had its roots in the nobility's struggle to retain their own political rights[38].

[33] First partition; the second took place in 1793 and the third in 1795. Please refer to A. Jobert, *Histoire de la Pologne*, Paris, Presses universitaires de France, 1974.

[34] In the Austro-Hungarian Empire, according to the 1910 census, there were about 4 million Poles (17.4% of the population). However, most of the Poles, about 8 million, were located in the territories incorporated by Russia, while another 3 million in those incorporated by East Prussia. Because of their ancient state heritage, the Poles had developed a strong national consciousness. Furthermore, in the Austrian part, they enjoyed a relatively wide autonomy from the 1860s: the Galician Diet and its executive body handled several economic and cultural matters; the local ruling class was Polish and the language was taught regularly. The Poles even had influence on the politics of Vienna. M. Waldenberg, *Le questioni nazionali nell'Europa centro-orientale*, Milano, il Saggiatore, 1994, p. 50.

[35] On the constitutional history of Poland see B. Mirkine-Guetzévitch, *Pologne*, Paris, Delegrave, 1930; J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi*, cit.; S. Ceccanti, *Il costituzionalismo polacco dal 1791 ad oggi*, in *federalismi.it*, No. 10, 2006; C. Filippini, *Polonia*, Bologna, il Mulino, 2010; J. Sawicki, *La Costituzione della Polonia*, in M. Ganino (Ed.), *Codice delle Costituzioni*, Vol. III, Padova, Cedam, 2013.

[36] For example, the Privilege of Jedlna of 1433, the 1573 Warsaw Confederation, the Acta Henriciana (Pacta Coventa) of 1576, etc.

[37] The supremacy of the Sejm over the crown was established as early as 1501 and sanctioned in 1505 by the Nihil Novi 'constitution' which prohibited the King from enacting new laws without the Sejm's concurrence; the hereditary monarchy was abolished in 1572. The King was elected by the szlachta. This precluded him from possessing any notion of divine right or royal privilege and initiated the principle that national sovereignty belongs to the whole nation, not to one individual.

[38] D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, Maurer School of Law: Indiana University, 1998, pp. 14 et seq., recalls how one of the best-known intellectuals of the time was Goślicki, author of *De optimo senatore* (1568), expressing the most advanced ideas of the Enlightenment, which are believed to anticipate the theories of Thomas Jefferson on the sovereignty of the people and limited government under the

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The culmination of the state reinforcement occurred in the period of the First Republic, i.e. the Polish-Lithuanian Confederation, also known as the Republic of Nobles[39], a powerful and avant-garde state in terms of ethnic, cultural and religious and even social tolerance (the division into classes was not rigid) as well as on a constitutional level. By the seventeenth century the main characteristics of Poland's constitutional tradition were confirmed: parliamentarism, a system of checks and balances including an autonomous judiciary, decentralization, the notion of contractual state through a series of pacts[40].

However, this state model – which did not envision real absolutism (it was an elective monarchy and *liberum veto* was foreseen) – maintained a medieval shape until the times of the great European national monarchies. This prevented the consolidation of the state, which remained divided, consensual and therefore weak. Cultural and constitutional development reached their culmination when the state decline begun, as testified by the constitution of 1791, the greatest example of Polish constitutional ingenuity before the beginning of the long period of partitions. The nobility, a social class that had hitherto had absolute hegemony even with respect to the crown, tried to introduce gradual reforms based on an alliance between its most modern part and the urban bourgeoisie.

The "Governance Act" of May 3, 1791 was the outcome of a long constituent period in the Four-Years Sejm, also known as the Great Sejm, in office from 1788 to 1792[41]. The constitution had the task of modernizing the country's system of government to avoid the loss of independence. The text consisted of 11 articles: the hereditary monarchy replaced the elective one (attributing the throne to the elector of Saxony, Frederick Augustus); the sovereign was assisted by a "Guardianship of the Laws" composed by the

rule of transcendent law. According to M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, in *Virginia Law Review*, Vol. 77, n. 1, 1991, p. 55, "The Seym's increasing power made it an integral part of Poland's constitutional monarchy. Power no longer resided in a single individual nor a particular branch of government; rather, by the end of the sixteenth century an elaborate balance of power had developed, enforced by a sophisticated network of checks and balances". Also local government began to grow in importance and effectivness through the Sejmiki or land diets.

[39] It was made official by the 1569 Treaty of Lublin, though the union between the Kingdom of Poland and the Grand Duchy of Lithuania dates back to the late 14th century.

[40] D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, cit., p. 7, recalls that the government in sixteenth-century Poland was based on the right of resistence, the social contract, the liberty of the individual, the principle of government by consent and the value of self-reliance.

[41] They considered the different constitutional systems and ideas of the time. For example the English political system (division of powers and bicameral parliament), the 1789 draft of the French constitution of 1791 (the will of the people as the source of law, the separation of powers), the Rousseau's social contract. See J. Żurawska (Ed.), *La Costituzione polacca del 3 maggio 1791 e il costituzionalismo europeo del XVIII secolo*, Napoli, Istituto Universitario Orientale, 1995; B.M. Palka, *La Costituzione polacca del 2 maggio 1791: tra tradizione e modernità*, in *Historia constitucional*, n. 6, 2005.

Primate (the chief of the Polish clergy) and 5 ministers appointed by the king every 2 years, who were responding to the chambers; the deputies were elected through a majority representation system; freedom of worship was confirmed, the rights of the bourgeoisie were extended and the peasants were placed under the protection of the law[42]. However, despite the presence of highly progressive elements, influenced by the Enlightenment ideas of the time, some defects of the previous systems persisted, such as the division into classes and the excessive power of the Sejm. A positive element was the abolition of the *liberum veto*, that is to say unanimity, in favour of relative or absolute majority vote. Theoretically, the inheritance of the throne would have strengthened the king's position in the state and therefore the state itself[43]. However, the king's acts had to be countersigned by the competent minister, who assumed the responsibility for them before the Sejm. The king's legislative power was also very limited (Article VII). The model was basically that of the English constitutional monarchy[44]. The constitution also lacked a declaration of citizens' rights[45] and some retrograde elements were reintroduced, with respect to the previous constitutional phases, on religious freedom[46]. Among other things, the constitution was adopted by violating the parliamentary procedures (otherwise, because of the existence of the *liberum veto*, it would have been impossible to adopt it), during a national holiday, when two thirds of the Sejm's members were not present.

In addition to adapting the Western models of the time to the Polish context, the constitution of May 3 was also innovative. For example, it

[42] See A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., vol. 2, p. 451.
[43] The power of the King was enhanced, with the crown having both the power of legislative initiative and the right to call the Seym into session. The King regained effective control over the military but the Sejm retained the power to declare war. The division of powers was stressed (Article 5) but the allocation of power among the branches incorporated an elaborate system of checks and balances. The king shared the executive power with the Council of Inspection and his decrees had to be signed by the relevant minister. The ministers were appointed by the king but were accountable to the Sejm. Within the bicameral Sejm for the first time to the lower house (chamber of deputies) were conferred more powers and a higher role (it was the only elected house, even though with a restricted suffrage).
[44] See J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi*, cit., p. 58.
[45] Despite this, the evaluations of the legal doctrine are almost unanimously positive. M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, p. 68, reports that even Edmund Burke heralded the new Polish constitution as one of the most magnificient achievements in the modern world "being built on the same principles which make our British constitution so excellent". Yet, despite its short time application "the 1791 constitution became a symbol of Poland's national identity – an identity based on values of constitutionalism and enlightened government" (p. 69). An important part of this identity was Catholicism, whose supremacy has been considered in the constitution.
[46] This is the position of D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, cit., p. 16: "the 1791 constitution was, indeed, a remarkable document for its time – the first written constitution in modern European history and the second in modern world history. But it also marked a retreat from many of the civil and religious libertarian principles that had characterized sixtheen-century Poland".

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provided for the political responsibility of the ministers before the parliament, therefore giving written form to the principles of the parliamentary form of government, which had evolved customarily in Great Britain. The constitution of 3 May remained in force only until July 1793 but became a legend, especially in the century of slavery: for the right-wing forces, given its moderation, it was an incomparable model, for the left-wing ones (which saw its weaknesses) it was a symbol of national aspirations[47]. Immediately after the recovery of independence, the Constituent Sejm, with the Act of 29 April 1919 established the national holiday of 3 May, which was resumed after communism in 1990.

Following France's defeat of Prussia in 1807, Napoleon set up a puppet Polish state in that part of Prussia previously belonging to Poland and drew up a constitution for this territory called Grand Duchy of Warsaw. This code, with its emphasis on egalitarianism, had relevant repercussions in later Poland's constitutionalism, as it incorporated the progressive trends of the time. All citizens were declared equal before law, the serf class was declared free, putting an end to serfdom as a legal institution[48]. Also, a uniform and effective court system came into existence and efforts were made to introduce a religious tolerance.

Napoleon's defeat in Moscow in 1812 placed Poland back in Russian hands, but the egalitarian principles inherent in the Napoleonic system remained an important part of Polish constitutional thought. The Polish Kingdom was bound to Russia through an imposed constitution, framed at the Vienna Congress of 1815. This document, despite being non-authoritarian on paper, unlike the Napoleonic constitution played no contributory role in Poland's constitutional history. Also, this 'liberal' imposed constitution was not applied since Russian regime followed a very repressive model of state power. It remained in force until the failure of the insurrection of November 1831.

It is worth mentioning also other political documents with a constitutional relevance. These are the Polaniec Manifesto of May 7, 1794 drafted by Thadeus Kosciuszko (adopted to motivate the peasantry in the fight for the freedom of Poland[49]) and the Manifesto of the National Central Committee issued on January 22, 1863, called to mobilize the lower classes to support the rebellion against the occupants.

[47] J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi*, cit., p. 63.
[48] As stated by M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, cit., p. 72, "certainly the szlachta never would have made such offers to the peasantry absent the partition and subsequent occupation… but the public pronouncement of these ideas to all Poles in the context of national struggle…elevated them to the level of constitutional expectations…these expectations of inclusion – of the contracxtual state for all the people – became the legacy of the years of partition".
[49] For the first time constitutional principles would apply regardless of social class as the Manifesto freed peasants from slavery, thus practically amending the 1791 constitution.

3. The 1921 Constitution: national traditions, foreign models and authoritarian degenerations

3.1 State weakness and political context in 1920s' Poland

The 1921 Constitution cannot be analysed without taking into account the political events of the time and the previous history of the country. The background was that of the rebirth of the state (the second Polish Republic) with the extremely difficult task of unifying a very divided country. The Polish state was born particularly fragile, even more so than other states built on the ashes of the Empires defeated by war or revolution[50], because in addition to the uneven ethnic composition – there were strong autochthonous minorities and the Poles were less than two thirds of the population[51] – and the problem of consolidating borders (both East and West), it had to face the difficult task of unifying territories which for 123 years had been subject to different legal systems[52]. The differences were so profound that they had persisted for a long time, occasionally resurfacing, even nowadays[53]. To this we must add the enormous geo-political fragility: the new-born state was confronting two totalitarian regimes at its borders and its independence was far from being guaranteed also because of the turbulent military context and the lack of a real post-war pacification. The new born state had new identity, territory and population.

Another decisive element in interwar Poland was the strong imprint of Marshal Piłsudski, the 'father' of the homeland[54], the charismatic hero of the miracle on the Vistula (the 1920 victory over the Soviets), the head of provisional government. It was under his influence or to counter his will that political and constitutional events evolved. It should be remembered that in the period of national liberation two main political conceptions had arisen, one referring to Piłsudski (who was originally close to the anti-Russian socialist left wing and later closer to conservative positions) and the

[50] J-M. Le Breton, *Una storia infausta. L'Europa centrale e orientale dal 1917 al 1990*, Bologna, il Mulino, 1997, p. 18.
[51] In the 1921 Poland, 69.2% of the population was Polish, 7.8% Jewish, 3.9% German, 14.3% Ukrainian / Ruthenian, 4.1% Russian and Belarusian, 0.3% Lithuanian and 0.1% Czech. See P. Grilli di Cortona, *Stati, nazioni e nazionalismi in Europa*, Bologna, il Mulino, p. 135.
[52] Indeed, the legal orders were even more, if we add to the Austrian, Prussian and Russian ones the legislation introduced by Napoleon and the Hungarian law in some areas of the south. In the newly born second Polish Republic there were even 6 different coins. For references on constitutional documents in force in the three parts see A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., vol. 2, pp. 451-452.
[53] If we consider the different political orientation that emerged during the 2021 presidential elections. See A. Di Gregorio, J. Sawicki, *La riconferma scontata (ma non plebiscitaria) di Duda alle elezioni presidenziali polacche: un ulteriore vulnus per lo stato di salute della democrazia in Europa?* Editoriale, in *federalismi.it*, n. 22, 2020, pp. III-XVII.
[54] "The main political figure of the resurgent Poland, considered by most of the population to be the father of independence", J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi*, cit., p. 66.

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other to Dmowski (a conservative and catholic right-wing exponent, anti-semitic, hostile to germanism). The two political orientations were inspired by different institutional visions: the right preferred a parliamentary system in which conservative forces – which appeared to be the majority – could defend the social order and religion (with a nationalist imprint, hostile to minorities) while the socialists were mostly in favour of presidential system and centralization, to guarantee the cohesion of the country, which was made fragile by the presence of strong minorities[55]. Furthermore, while Piłsudski was inspired by a civic and inclusive nationalism (a nation intended in a spiritual sense whose cornerstones were the army and foreign policy), Dmowski was the expression of an ethnic and clerical nationalism. In both views, a liberal-democratic system was considered an obstacle to the modernization of the nation, and this will mark the fate of the second Polish Republic. It was, among other reasons, the fear of Piłsudski's strengthening his position that pushed the authors of the 1921 Constitution to formulate an unbalanced system favouring the legislative power. The Marshal, whom political parties could not avoid electing as President, refused to fill a role that he considered too weak, initially contenting himself with the military high command[56].

3.2. The small constitution of 1919 and the constituent debate

The Constitution of 1921 is thus framed into a complex constitutional 'environment' considering both the constitutional cycle of the first post-war period and the traditions of the country. Furthermore, the text must be seen in the light of its closer constitutional framework including both the provisional constitution of 1919 and the constitutional law of 1926, which limited the liberal-democratic and parliamentary spirit of 1921 Constitution without however eliminating it. The 1935 Constitution deviates more profoundly from this path even though it had to be evaluated in the historical context in which it was adopted, which justified the process of concentration of power in the hands of the executive because of the irresponsible behaviour of the quarrelsome political parties of the Second Republic[57].

The March Constitution was born following a long constituent period in which numerous projects were elaborated and examined. Some were the expression of post-war constitutional engineering, others the imitation of consolidated foreign experiences, or of the previous constitutional culture of the country. It was a very in-depth debate that witnessed the participation

[55] See J-M. Le Breton, *Una storia infausta. L'Europa centrale e orientale dal 1917 al 1990*, cit., pp. 209-210.
[56] Up to its death Piłsudski dominated the political scene directly or behind the scenes: he has been sometimes prime minister, almost ever minister of war and he always kept the control on the army.
[57] Following H. Roos, *A History of Modern Poland*, 1966, pp. 140-141, De Gaulle had drawn some aspects of this Constitution in the Constitution of the V Republic.

of large social circles and represented an important element of civic education for Poles.

The first steps for the elaboration of the constitution had been taken by the government chaired by Moraczewski in the first half of January 1919, thus even before the elections of the constituent Sejm (foreseen by a decree of November 22, 1918, which was considered a kind of provisional constitution)[58]. The Moraczewski government was replaced before the elections by an executive headed by a more moderate personality appreciated by the right-wing parties, the world-famous pianist Paderewski (this was a clear sign of the defeat of the Lublin program, considered excessively left-winged)[59]. The elections for the constituent assembly took place on January 26, 1919 and produced a fragmented Sejm, characterized by transformism, in which the parties of the national democratic right wing had a limited prevalence[60]. Anyhow, the party system acquired a rather definite structure with the distinction between a nationalist right-wing, a moderate left-wing (non- communist) and several ethnic minority parties, the main one being that of the Jews[61]. With the convocation of the constituent Sejm on February

[58] The election of a constituent Sejm had already been foreseen by a decree contained in the Manifesto of the Lublin government of November 7, 1918. The decree, in addition to proclaiming the birth of the People's Republic of Poland, announced the convocation for the end of 1918 of a constituent Sejm to be elected on the basis of universal, equal, direct, secret and proportional suffrage. The decree also contained the proclamation of civil liberties and social rights but did not enter into force, although it was the basis of other decisions of the time. The decision to elect a constituent Sejm was relaunched by Piłsudski in the following days and carried out by the Moraczewski government. The decree of November 22, 1918 assigned to Piłsudski the position of provisional head of state ("highest authority of the Polish Republic") until the election of the Sejm. The head of state had very broad powers. He convened the government that was accountable to him. He approved the draft of governamental legislative acts, which, however, would not enter into force if not approved at the first session of the Sejm. On November 22, 1918, the decrees on the elections of the Sejm or single-chamber constituent assembly were also adopted. Considering the large number of parties of the time, the proportional representation system was chosen and the presentation of the lists was made very easy (50 citizens signatures were enough to have them registered).

[59] Paderewski had managed to mediate between the two governments in exile of Piłsudski and Dmowski, allowing for the joint participation of Poland in the Peace Conference.

[60] Right-wing parties had about 50% of the seats, left-wing about 30% and Jewish parties the 10%.

[61] The strongest party in the Sejm was that of Dmowski, the National Democrats (*Endowcy*). It represented middle class, with highly nationalistic attitudes, very conservative, catholic and anti-semite. Its electoral base was established in particular in the western part of the country, the former Prussian part. They distrusted Piłsudski because of his collaboration with Germany and Austria. The socialist movement was split in 2 wings. The first one was anti-Russian and headed by Pisułdski, while the second one was more close to Russia and its revolutionary aims. The peasant movement was also split in two parties, *Piast* (moderate) and *Wyzwolenie* (radical and revolutionary). The leader of the Piast was Witos, who had many followers in Galicia (he was prime minister before the 1926 coup d'etat). The agrarian issue was among the more sensitive of the time. Piast and Wyzwolenie joined in on people's party

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10, the decree of 22 November 1918 ceased to be applied. Piłsudski, who had assumed the position of head of state, granted to him by the Council of Regency on November 14, 1918, resigned on February 20, 1919. The constituent Sejm passed a Resolution which formed, from that date and until the entry into force of the constitution to be, the basis of the Polish constitutional system, called the 'small constitution'. With this Resolution (which was nothing less than a provisional constitution) the further exercise of the functions of head of state was entrusted to Piłsudski (who refused) on the basis of 5 principles expressing the superiority of the Sejm itself[62]. The small constitution remained in effect until December 1922.

As regards the preparatory work for the new constitution, in the first half of 1919 the Moraczewski government had created the Office for the Constitution, at the Presidency of the Council of Ministers, which elaborated three projects. The first, whose author was prof. Josep Buzek of the University of Lviv, was modelled after the US Constitution. The second (authored by the socialist Niedziałkowski) defined the state as the People's Republic of Poland. The third, submitted by the parliamentary secretary of state to the presidency of the Council of Ministers, Wróblewski, was called 'the French project' and configured a mixed model between a presidential republic and an English type parliamentary government. Although none of these proposals gained government approval, the last project had a greater influence on the Constitution of March 1921. The Sejm was then presented with numerous projects drawn up by the main political forces and by individual personalities. A special constitutional commission was set up, chaired by Dubanowicz, which did not use any of these projects as the basis of its work but elaborated its own project drawing from all these documents[63].

All the parties agreed that the new constitution should reflect Poland's traditional democratic and parliamentary themes. The different projects, though, had common elements, among which the republican form of state and the parliamentary form of government. Regarding the considerations made on which form to give to the future constitution, the right wing especially wished to limit the powers of the head of state.

The constitutional commission ended its work on June 12, 1920. Regarding the form of government, the framers abandoned the search for original solutions and adopted a system modelled after the constitutional

(*Stromnictwo Ludowe*) in 1930. The parties of ethnic minorities also had a very relevant role, especially the Jewish and Ukrainian ones.

[62] In particular, both the head of state and the government were accountable to the Sejm, every act of the President had to be signed by the competent minister, the Sejm exercised sovereign and legislative power in the state, the head of state was the representative of the state and the executor of the Sejm's deliberations in civil and military matters, he formed the government after consultation with the Sejm. See the full text in A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., pp. 454-455.

[63] Details in A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., pp. 455-457.

laws of the Third French Republic, which they believed represented the ideal format for a benevolent and effective system of government, that had to be weak in normal circumstances, while strong in the face of national crisis[64]. In fact, the Polish parliamentarism resulted in a moderate rationalization, intermediate between the Austrian and the Czekoslovakian one[65]. The French inspiration was essential also for its republican ideals. The plenary debate began on July 8, 1920 took place in a harsh atmosphere, full of conflicts. The mood of the population, the international events and the news coming from the Polish-Soviet front influenced the attitude of the deputies. Among the most debated issues were the composition and powers of the houses, the power of dissolution of the Sejm, the role of the economic and social councils and in general of corporate representation, the method of election of the head of state, and the obligation for him to be Catholic, etc. The final content of the constitution ended being a compromise between the wishes of the various political forces. As an example, bicameralism was a victory for the deputies of the right wing, while the long catalogue of rights was a conquest of the left wing[66].

The Constitution was approved on March 17 but published on June 1, together with the transitional act of May 18. As established by the constituent Sejm, this organ would have exercised its functions on the base of the small constitution of 1919, until the establishment of the Sejm and the Senate of the first legislature. The same was true for the head of state. The elections could only occur once the electoral laws and the regulations of the National Assembly (Sejm and Senate in joint session) had been approved. This happened only in July 1922. The elections of the Sejm and the Senate took place in November and the new President of the Republic took office in December. Only then could the provisions of the March Constitution on the supreme organs of the state come into force.

3.3 The 1921 Constitution: general characteristics

The Constitution consisted of 126 articles, divided into 7 chapters and opened with a solemn introduction inspired by the preamble of the

[64] M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, cit., p. 73.
[65] We see this from the provisions concerning the confidence relations between government and parliament, the role of the upper house, the dissolution of the lower house. In fact, while the Austrian Constitution of 1920 only provided for the self-dissolution of the lower house, both in Czechoslovakia and Poland the lower house could be dissolved by the President (in Poland with the consent of the qualified majority of the Senate). The role of the upper house and of the head of state in Poland was more significant than in Austria even if less than in Czechoslovakia. However, only in Austria and Czechoslovakia the Constitutional Tribunal was provided for as a form of rationalization of the constitutional system.
[66] J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi*, cit., p. 74. It should also be considered the imprint of the Austro-Hungarian constitutional system (especially the constitution of 1867), both on the bill of right and on the judicial system.

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constitution of May 3, which includes the invocation to God ("In the name of Almighty God"). The reference to the constitution of May 3, 1791 was then made explicit ("Taking up the glorious tradition of the memorable Constitution of the Third of May"). The two articles of the first chapter "Rzczpospolita" (Republic) articulate the principles of the republican form of government, the sovereignty of the nation and the tripartite division of powers[67]. The second chapter (Articles 3-38) was devoted to legislative power, followed by the chapters on executive (39-73) and judicial powers (74-86), general duties and civic rights (87-124), general provisions (125: it regulated the constitutional amendments), transitional provisions (126).

The Constitution left no doubt on the fact that the first place in the system of state organs belonged to the Diet or Sejm. The choice of bicameralism, with the reintroduction of the Senate, was intensely debated, as mentioned. Even if the existence of the Senate was justified both in the Polish tradition and in the bicameralism present in most of the European states of the time, the parties of the left wing and even some centrist ones were against the introduction of a second house, seen as an impediment on progressive reforms. In the end, a compromise solution was chosen with an upper house with limited competences (essentially playing a restraining role) and a potentially more conservative composition[68].

The right of legislative initiative belonged to the Sejm and the government (Article 10), not to the Senate nor to the President of the Republic: "There can be no statute without the consent of the Sejm" (Article 3, para. 2) and "Ordinances by public authorities, from which result rights or duties of citizens, have binding force only if issued by the authority of a statute, and with a specific reference to the same" (Article 3, paragraph 5: it referred to territorial autonomies). In the context of the legislative procedure, the prevalence of the Sejm was also highlighted by the fact that the Senate's veto was easily overcome (Article 35: The Sejm could accept the amendments of the Senate or reject them by a majority of 11 twentieths). The proposal to invest the President with arbitral powers in such a situation, with the possibility of opposing his own veto, was rejected. However, it was established that "no statute may be in opposition to the Constitution or violate its provisions" (Article 38) but in addition to not providing for a specific body of constitutional review of legislation, it was specified that "the courts have not the right to inquire into the validity of duly promulgated statutes" (Article 81).

[67] "Sovereignty in the Republic of Poland belongs to the nation. The organs of the nation are: in the domain of legislation, the Sejm and the Senate; in the domain of executive power, the President of the Republic, jointly with the responsible ministers; in the domain of the administration of justice, independent courts".

[68] The right of active electorate to the Sejm belonged to citizens who had turned 21, the passive right to those who had turned 25; for the Senate, the limits were respectively 30 and 40 years. The Senate's control over the government was limited to the right to submit interpellations.

As for the early dissolution of the houses (with no specific reference to the circumstances), pursuant to Article 26, para. 1 the Sejm might be dissolved by its own vote, passed by a majority of two-thirds of those voting. Alternatively, the Sejm might be dissolved by the President of the Republic, with the consent of three-fifths of the statutory number of members of the Senate, in the presence of at least one-half of the total membership. In both cases the Senate was automatically dissolved. These provisions, too, were much debated. While no one contested the possibility of the Sejm to decide its own self-dissolution (following the Austrian model), there were conflicting opinions on the presidential dissolution: the constitutional commission had followed the French model, but not everyone wanted to grant this faculty to the President. Some of those in favour still asked for the introduction of conditions for the President to exercise it, as the request of the Council of Ministers, supported by one third of the total number of deputies, or the request of half a million voters[69]. Even the method of election and the composition of the Senate were much debated (a composition of a corporative type was harshly opposed by the left wing).

In addition to the competences mentioned, the Sejm was responsible for other important issues: enforcing the parliamentary responsibility of the ministers (Article 58: by simple majority), bringing to trial the President and the ministers before the Court of State (Articles 51, 59), declaring the office of President vacant (Article 42), confirming or refusing the state of siege (Article 124).

Regarding the status of deputies, the Constitution provided for a series of very advanced provisions on immunity (Article 21), incompatibility (Articles 16-17), conflicts of interest (Article 15)[70]. The prohibition of imperative mandate was foreseen (Article 20).

Executive power was exercised by the President of the Republic and the Council of Ministers (chapter III). The President was elected by the National Assembly, by absolute majority, for 7 years (Article 39). The President exercised the executive power through ministers accountable to the Sejm and through officials subordinated to the ministers (Article 43, para. 1). Pursuant to Article 51, para. 1 "The President of the Republic is not accountable either to Parliament or at civil law". For betraying the country, violating the Constitution, or for criminal offenses, the President only responded to the Sejm (by a vote of a majority of three-fifths in the presence of at least one-half of the statutory number of deputies) and could be suspended from office (Article 51, paras. 2-3). The cause was heard and the

[69] See A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., p. 462.
[70] "Administrative, revenue, and judicial officials of the state may not be elected in the districts in which they are performing their official duties". Regarding the incompatibilities of deputies, see Articles 22, 23.

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sentence given by the Court of State[71] (a similar procedure is provided for by the 1997 Constitution).

The President had representative functions in both internal and foreign relations (Article 48) and various prerogatives such as the right of pardon (Article 47: "The right to reprieve and to mitigate punishment, and to destroy the consequences of criminal conviction in individual cases"). On paper, the powers of the President were not few: he could convene, adjourn and close the sessions of the houses and dissolve the Sejm (Articles 25-26), he appointed the judges (on the proposal of the minister of justice: Article 76). Nonetheless, every governmental act of the President to be valid required the signature of the president of the Council of Ministers and of the competent minister. By countersigning, the latter assumed the responsibility for the act (Article 44, para. 4). Another clear sign of the fear of the constituent Sejm against Marshal Piłsudski can be found in Article 46, which regulates the powers of the President in the event of a state of war. Although the President was the supreme head of the armed forces, he might not exercise the chief command in time of war. The Commander-in-Chief of the armed forces, in case of war, was to be appointed by the President of the Republic, on the motion of the Council of Ministers, presented by the minister of military affairs, who was accountable to the Sejm for the acts connected with the command in time of war, as well as for all affairs of military direction.

The President appointed and recalled the President of the Council of Ministers; on the latter's motion he appointed and recalled ministers (Article 45). The Council of Ministers was accountable to the Sejm, but not to the Senate (Article 58). There was no explicit provision for an initial vote of confidence, nonetheless this usually occurred after the declarations of the prime minister and the discussion that followed. The constitutional responsibility of the ministers was similar to that envisaged for the President of the Republic with the impeachment by the parliament and the judgment by the Court of State (Article 59: derived from the constitution of May 3). The Sejm could perform parliamentary supervision on the government, through the system of interpellations to the government or individual ministers (Article 33) or through the establishment of extraordinary commissions of inquiry, whose participants were chosen among its members or externally (Article 34).

A potential constraint on the prerogatives of the Sejm was found in the large decentralization, that was also deriving from the French Third Republic, although at the same time it recalled the strong local autonomies of the First Noble's Republic: the administrative organization of the state was based upon the principle of decentralization (Articles 65-67). There

[71] Composed of the First President of the Supreme Court as chairman, and of twelve members, eight of whom were elected by the Sejm and four by the Senate from outside their own membership: Article 64.

were 17 provinces administered by a governor, divided into districts, each administered by a territorial sub-prefect. Acts conferring special forms of autonomy were adopted for the territories of Silesia (act of July 15, 1920), Eastern Galicia (act of September 26, 1922), Vilnius (act of February 20, 1922), for the former Hungarian territories of Spiz and Ostrava (act of October 26, 1921). Moreover, it was allowed to create, through special statutes, economic self-government for the individual fields of economic life (chambers of agriculture, commerce, industry, arts and crafts, hired labor and others, Article 68). This was a concession to the forces of the left wing, that, however, had put forward even more radical proposals. Articles 70 to 73 provided for the administrative and judicial control of territorial and non-territorial self-government entities, giving the possibility to establish a special administrative jurisdiction headed by the Administrative Court ("For the purpose of passing upon the legality of administrative acts in the field of state, as well as of self-government administration": Article 73). The Constitution was significantly innovative in the part concerning the fundamental principles of administration, inspired by the maximum autonomy for self-government entities and with the provision for justice in the administration[72]. For what concerns the judiciary, the autonomy of judges was strongly protected. They were granted the same broad guarantees of deputies (Articles 77-80) even if formally the judges were appointed by the President of the Republic (the socialist party wanted at least those of first instance to be elected by the people). The fact that the courts had not the right to inquire into the validity of duly promulgated statutes (Article 81) was a principle included in those constitutions that had deprived the head of state of the possibility to participate in the legislative function (such as the Constitution of Czechoslovakia; taking this stand, they shifted from the Third Republic, where the President had the right of legislative initiative and promulgated the laws).

The section on "General duties and rights of citizens" (chapter V) was also innovative and extremely modern. It consisted in a catalogue that went beyond the classic vision of the liberal state, with the recognition of social rights (unfortunately, not implemented due to the economic situation of the time). However, there were several referrals to the implementing legislation (with the general formulation "The exercise of this/these right/rights is/are defined by statutes") thus revealing the centrality of the law, also due to the absence of procedures to guarantee the superiority of the Constitution, which was only emphatically proclaimed. First of all, it is to be noted that duties preceded rights (coming immediately after the two articles on citizenship, 87-88). They were provided for in Articles from 89 to 94 (civic duties). This can be a sign of the necessity to create a strong national cohesion but at the same time it reveals a state-centered approach far from the classical liberal understanding of the bill of rights. Among the duties, the

[72] See A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., p. 472.

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one to give an education to children in order to make them "righteous citizens of the mother country" stood out (Article 94). The proposal to include the duty to work was not approved. Articles 95 and 96 stated the principle of equality of citizens, forbidding privileges of birth, class, noble titles (to oppose the ancient division into classes and noble privileges). Guarantees of freedom and justice followed (97-98). Then, there was the right to property. Its social profile was recognized, and special precautions for the private ownership of the land were foreseen ("The land, as one of the most important factors of the existence of the nation and the state, may not be the subject of stricted transfer", Article 99, para. 2). Subsequently we find the inviolability and freedom of domicile (Articles 100-101), the freedom of work (102), the protection of childhood (103), the freedom of expression and of the press (104-105), the secrecy of correspondence (106), the right of petition (107), the right of meeting, and forming associations (108), the protection of ethnic minorities (109-110: this seemed at odds with the necessity to strenghten the statehood), the freedom of conscience and worship (Articles 111-116). Regarding the latter, even if "all inhabitants of the Polish State have the right of freely professing their religion in public as well as in private, and of performing the commands of their religion or rite" this should not be contrary to public order or public morality (Article 111, para. 2). Furthermore, "Religious freedom may not be used in a way contrary to statutes. No one may evade the performance of public duties by reason of his religious beliefs" (112). Similarly, religious communities recognized by the state were free to self-regulate on the condition of not being in opposition to the statutes of the state (113). Regarding the relationship between state and religions, while emphasizing the importance of religious freedom, the Constitution also highlighted the primacy of the Roman Catholic religion in Polish socio-political culture (Article 114). Being the religion of the preponderant majority of the nation, it was granted the chief position among enfranchised religions.

Particularly delicate was the part of the Constitution concerning "a temporary suspension of citizen's rights" (Article 124), which Giannini considers one of the most carefully drafted, often missing – or not equally well developed – in other older or newer constitutions[73]. It was specified that only some rights could be temporarily suspended (personal liberty, inviolability of home and hearth, freedom of the press, secrecy of correspondence, the right of combining, meeting, and forming associations). Such suspension might be directed only by the Council of Ministers, with permission of the President of the Republic, during a war or when an outbreak of war threatened, as well as in case of internal disturbances or of widespread conspiracies which had the character of high treason and threatened the constitution of the state or the safety of the citizens. The decision was to be submitted to the Sejm for approval as soon as possible. If

[73] A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., p. 481.

the latter did not approve it, the state of siege immediately ceased to be in force. These provisions were included with difficulty, because of the conflicting orientations of those who wanted to assign the relative power to the Sejm or vice versa to the President.

Lastly, for what concerns constitutional changes, different procedures were envisaged, an ordinary one and a more extensive one to be considered every 25 years, following a pattern taken from the 1791 constitution (Article 25).

3.4 The 1921 Constitution: reference models and implementation dynamics

According to Amedeo Giannini, the 1921 Constitution is not inspired by any pre-established model since "it tried to save, in names and institutions, what it has found good in its old systems. Especially in names, it was able to preserve a purely national allure"[74]. Furthermore, the text let the compromises of the constituent period emerge: due to the political negotiations that had marked its genesis, it has even assumed "an ultra-democratic guise, or even a demagogic framework".

Others underline that even if the model of the form of government had been drawn mainly by the French Third Republic – which for the members of the constitutional commission embodied "the essence of democracy, popular will represented in a directly elected Parliament which stands at the head of the state"[75] – the idea of combining a strong, directly-elected parliament with a relatively weak executive certainly was not a new one in Polish constitutional thought or practice. What was new was the broader democratic focus of the Constitution: "the 1921 Constitution was the first in Poland's history to reject monarchy altogether and establish participatory democracy based on proportional representation regardless of social class"[76].

The 1921 Constitution confirms the positive and negative aspects of previous constitutional experiences. Among the former, the division of powers horizontally and vertically, the culture of rights and freedoms, the constitution seen as a pact between rulers and people / nation. Among the latter, the excessive power of the Sejm, the political splitting (once cetual) and unanimism, the cross vetoes, the difficulty of compromise and the lack of unity, the libertarian tendencies, becoming sometimes anarchic, as in the first Republic of Nobles. Owing to the regional and political differences deriving from the period of partitions, local government entities pursuing their own interests contributed to the acute fragmentation of the Polish state. In short, "apparently not learning from its past, Poland once again developed an inefficient and ineffective system of government whereby

[74] A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale*, cit., pp. 483-484.
[75] D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, cit., p. 21.
[76] Ibid.

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every element of the executive and judiciary depended to a certain extent upon the will of the lower chamber of the legislative branch; the resulting inefficiency led some to label Poland 'an almost decapitated state'"[77]. This power structure, defined as 'an impotent Sejmocracy', destabilized the country at the very moment it most required stability.

The entry into force of the Constitution closed the first stage in the formation of the reborn Polish state, when the struggle for state borders also ended. It had been a long and complex process. The second Poland Republic comprised over more than half of the territory that belonged to the ancient state territory, prior to the partitions. Of the 25 million Poles of the time, 18 and a half million were in the new state, which however had 27 million inhabitants. This means that about 30% of the population was made up of minorities, of which the most important was the Ukrainian one (followed by Jews, Belarusians, Germans, Lithuanians and others). The presence of such strong minorities did not favour the process of social and political integration. On the other hand, significant ethnically Polish territories continued to be located outside the state (for example in Germany and Czechoslovakia). Hence, the birth of this new state was certainly not easy. The inherited difficulties were perceivable not only in the early years, but throughout the years between the two world wars.

Lastly, despite the fact that interim constitutional provisions applied in the period 1918-1922 – before the formal entry into force of the new constitution – were already in line with the constitutional and democratic values of the time, the temporary nature of those institutional solutions had not favoured the stabilization of political and social life. It is for this reason that the 1921 Constitution, although it remained in force for a very short period in its original version, played an important symbolic role in the 'rebirth' of Poland.

3.5 The constitutional amendment of 1926 and the 1935 Constitution

In the early years of the Republic, political instability was endemic also because the proportional representation system was constitutionalized (Article 11). From November 1918 to May 1926, 14 governments followed one another, and there were also a series of ministerial reshuffles. By 1925 Poland had 92 recognized political parties (many of which represented national minorities). 32 of them had seats in the Sejm. The Polish penchant for sympathizing with the opposition, developed during the extended foreign occupation, further obstructed efforts toward political cohesiveness.

Although the political structure provided for by the Constitution – reminiscent of pre-1791 Poland – planted the seeds for an ineffective government, the main responsibility for this was up to other elements, of

[77] M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, cit., pp. 73-74.

economic, social, international and even cultural nature: "Poland was attempting to rebuild (more accurately, to build for the first time) a modern state and economy after a century and-a-quarter of foreign rule, in post-war circumstances of massive geographic and ethnic dislocation and differentiation, high inflation, internal ethnic strife, as well as military hostility from Russia, Ukraine, and Lithuania. That Poland managed to reconstitute itself at all is remarkable enough"[78]. The political climate of nationalism and radicalism, along with awful economic conditions, made the situation even worse that it will be in post-1989 time.

The great political fragmentation resulted in the lack of a parliamentary majority supporting the government, as was already showing immediately after the constituent Sejm's elections. The same happened after the November 1922 elections: no political force clearly prevailed. Moreover, despite the limited powers of the office, even the first parliamentary elections of the President were bitterly fought. At the end of 1922, the National Assembly elected Gabriel Narutowicz, a candidate supported by the forces of the left wing, the centre and national minorities. Two days later the newly elected President was assassinated by a right-wing nationalist. This event was a shock to the country.

After the initial euphoria given by the regaining of independence, social and economic conditions worsened. The government could not deal with the rampant inflation and unemployment that took place in Poland during the early 1920s, caused by war-time destruction and the efforts to unify the nation into one economic unit. All these difficulties led to social unrest, as did the conflicts occurring in the Eastern part of the country, caused by the opposition of the Lithuanian and Ukrainian nationals. All these developments favoured Piłsudski's coup d'état of May 12, 1926.

The prestige of the Marshal and the relevance of his role in the rebirth of the country were so high that the regime change was favourably accepted by the population, especially as the parliamentary system was discredited. Moreover, Piłsudski did not intend to be a dictator. While he kept the control over the army, still he seemed to respect the rights of the opposition[79]. After refusing to assume the office of the President (preferring to have one of his own elected), he waited for the end of the legislature to organize general elections, in which the Non-partisan Bloc for Cooperation with the Government (BBWR), created by Piłsudski himself, took part obtaining about 30% of votes. Although the first years after the coup d'état the authoritarian involution was evident, nevertheless the institutions continued to play a role and the parliament retained the power to block

[78] D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, cit., p. 23.
[79] He had two main targets: a 'moral sanation' and a strong executive. These goals were proclaimed in his key speech at a cabinet meeting on the 29th May 1926 where all the parliamentary parties were represented. G. M. Kowalski, *The Amendment of August 1926 to the first Polish Constitution of the Second Republic*, in *Krakowskie Studia z Historii Państwa i Prawa*, vol. 7, n. 2, 2014, p. 317.

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governmental action[80]. The coup d'état seemed an antidote to the defects of the constitutional regime that daily practice had exposed. Similar trends were widespread in most of the European countries of the time.

As for the constitutional level, some provisions of the 1921 Constitution were modified, through the so-called August novel (a constitutional amendment of August 2, 1926) which strengthened the executive, in the person of the President, and at the same time reduced the powers of the parliament. The novel was made up of 8 articles that amended or supplemented the 6 articles of the Constitution that concerned the budget, the adoption of decree-laws, the early dissolution of the houses, the no-confidence vote procedure, the loss of parliamentary mandate.

To protect the national budget from the continuing quagmire in the Sejm, the amendments provided for the parliament to adopt the draft within 5 months since the submission. Alternatively, if the legislature did not agree on the budget before adjourning, the government was allowed to spend at the same rate as the previous year (Article 25). In the name of inhibiting corruption, the August novel amended Article 22 by providing for the automatic dismissal of MPs who were found by the Supreme Court to have used their office to earn income or benefits outside of their regular salary. The additional powers conferred to the President (to dissolve the parliament without the consent of the houses[81], to issue statutory decrees when the legislature was not in session) allowed the executive to govern unhindered by the legislature. Nonetheless, the parliament could confirm or reject these decrees, which needed to be endorsed by the ministers of government[82]. Furthermore, in order to avoid random votes of no confidence, this kind of

[80] J-M. Le Breton, *Una storia infausta. L'Europa centrale e orientale dal 1917 al 1990*, cit., p. 216. The Non-partisan Bloc was directed by Piłsudski's comrades, and included also technicians and other personalities. The movement, which after years of corruption and political scandals should have promoted the moralization of political life (the so called 'sanation'), was not able, however, to fulfill this task.

[81] Article 26 on the dissolution of the houses provided that "The President of the Republic may dissolve the Sejm and the Senate before the term for which they were elected, on the proposal of the Council of Ministers, motivated by a message to the houses, nevertheless only once for the same reason". So the right of early self-dissolution of the Sejm had disappeared.

[82] Article 44, as amended. The right to issue statutory decrees was submitted to two conditions: they could be adopted when both houses were dissolved to remedy "an emergency that affected the state" and a law adopted by the parliament could authorize the President to issue decrees "over a period and within a scope indicated by that law". The latter condition was met immediately since a law authorizing the President to produce decrees was adopted alongside the same August amendments. The decrees were excluded in a series of cases (constitutional amendments, budget, financial and political obligations of Poland before other states, local government, etc.) and they had to be approved by the Sejm at the first following session. As underlined by G. M. Kowalski, *The Amendment of August 1926 to the first Polish Constitution of the Second Republic*, cit., p. 320, "this construction was intended to increase the effectiveness of the state apparatus without depriving the legislature of its key decision-making role in matters of paramount importance to the state".

motion, directed either to the government or to individual ministers, could not be voted within the same session in which it was presented (Article 58, as amended). Anyway, a semblance of parliamentarism was retained, even if Piłsudski warned the legislators, in August 1926, that he was ready to confront them again "if they wanted to return to their former habits"[83].

In short, the novel was the result of a series of compromises and tactics: while remaining within the limits of parliamentary system, it attributed to the Piłsudski group (the 'sanacja', from the advocated political moralization of the regime) the possibility of carrying out political transformations leading to an authoritarian regime. From the constitutional point of view, it deviated towards the Weimarian model, e.g., by attributing to the head of state the adoption of the 'necessity rules' (a residue of the monarchical principle[84]). The provisions of the novel regarding the restrictions of budgetary rights of the parliament could recall the German pseudo-constitutionalism in the first half of the nineteenth century or that of Russia in 1906[85]. However, the post-1926 system did not turn interwar Poland into an authoritarian state[86].

The litigiousness between the parties did not cease after the coup of 1926. There were conflicts between the parliament and the government especially concerning budgetary issues. This led to the creation, in practice, of an 'extra-constitutional' regime. For example, if a government resigned after a vote of no confidence in the Sejm, the President appointed another one with the same political composition. This unconstitutional practice allowed the strengthening of the ruling group and the creation of a strong and centralized state. After the 1928 elections, the Sejm became even more ineffectual and factionalized, while the general economic decline contributed to the radicalization of politics. According to Piłsudski, the ideal form of government was a state "governed by a man of the highest moral authority…who should stand above all the parties and state authorities and be able to intervene when it is necessary for the public good"[87]. To get closer to this system, a new constitution was planned, whose first draft was submitted in 1931. This was also a consequence of the fact that the 1930 elections, partially manipulated by Piłsudski's supporters, created a wide parliamentary majority that was favourable to the strengthening of the executive. Again in this occasion it was necessary to force parliamentary procedures and to take advantage of the absence of opposition, given that Piłsudski's supporters had only a simple majority[88].

[83] M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, cit., p. 80.
[84] B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, cit., p. 185.
[85] Ibid.
[86] G. M. Kowalski, *The Amendment of August 1926 to the first Polish Constitution of the Second Republic*, cit., p. 321.
[87] M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, cit., p. 81.
[88] The procedure is described in J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi*, cit., pp. 94-95. The exponents of *Sanacija* were in a hurry: Piłsudski's health

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The Constitution of April 1935 was characterized by two fundamental aspects. The first one was the clear strengthening of the presidential office, with a simultaneous further reduction (but not a zeroing) of the other institutional counterweights. The second consisted in a particular philosophy deriving from the ideas of the 'sanacija', expressed in the first 10 articles of the text. The two aspects were linked by the role attributed to the President and must be seen within the framework of actions taken in order to consolidate the state. The first chapter ("The Republic of Poland"), which preceded the part dedicated to the President, already highlighted the attributes that made this organ the personification of the state. Pursuant to Article 2 point 2, "The responsibility before God and history for the destinies of the State" fell on the President, while point 4 established that "The one and indivisible authority of the State is united in his person". Article 3 placed under the authority of the President "the Government, the Sejm, the Senate, the Armed Forces, the Courts of Justice, the State Control". All these organs had the main task of serving the Republic. Furthermore, the President "as a superordinate factor of the State, coordinates the activities of the supreme organs of State" (Article 11). The President was not legally responsible for his actions, being his role closer to that of a monarch. In addition, the conformation of the executive was inspired by the Prussian and Austrian practices and doctrines of the years 1860-1914. The powers of the President listed in Articles 11 to 24 were extensive. Just to mention the most important ones, pursuant to Article 12, the President appointed at his own discretion the prime minister and on this latter's recommendation the other ministers; convened and dissolved the Sejm and the Senate (even with early dissolution), decided war and peace, was the supreme head of the armed forces. According to Article 13 he had the right to appoint the members of the judiciary, to issue decrees with the force of law, if the minister who supervised that area of government consented to the decree. He also appointed a third of the members of the Senate. The President, elected by an electoral assembly composed of high government officials and senior members of the Sejm and Senate, could be re-elected without limits. The complex procedure of election and re-election, provided for by Articles 16-18, even contemplated the possibility for the President to indicate which one of the candidates was to succeed him (Article 16). Presidential decrees no longer needed the approval of the prime minister and the judicial branch could not rule on their constitutionality.

The responsibility of the government was established mainly towards the President with a limited involvement of the Sejm: according to Article 28 "The Prime Minister and the Ministers are politically accountable to the President of the Republic and may be dismissed by him at any time". Article 29 stated that the Sejm, in exercising its right of parliamentary control over

conditions were worsening and there were no other leaders with the same charisma. For this reason, they wanted at least an authoritarian constitutional 'corset'.

the activities of the government, might demand the resignation of the cabinet or of a minister[89].

The role of the parliament was mostly reduced. This is especially true of the Sejm, as the Senate was, on the contrary, reinforced. Furthermore, since the President appointed one third of the members of the senate this house had an attitude highly deferential towards him. Parliamentary immunity was drastically limited. The President was also granted the legislative veto. However, he could not amend the Constitution. Certain elements of the parliamentary system and the division of powers remained untouched: in addition to the (mild) control over the government, the Sejm continued to share the right of legislative initiative with the executive (Article 50). In contrast to the system of checks and balances established by the 1921 Constitution, the 1935 one delegated most state power to the President in the event of governmental conflicts, to remove frictions and to restore the proper balance within the state.

As for the ideological profiles of the constitutional text, the concept of the people as holder of political power was abandoned, emphasizing the integrative function of the state. The state seemed to be given supremacy over citizens: "The life of the community rests upon and forms itself within the framework of the State" (Article 4). In fact, although the Constitution maintained some civil liberties and individual rights (freedom of religion, of conscience, the inviolability of domicile: Article 5) the stance toward individual rights was based on the idea of social solidarity, meaning that the individual and the state were linked in common values. Contrary to classic liberalism, it was supposed that the state's interests did not conflict with those of the individual, but that the interests of the individual and the state coincided. For that purpose, Article 1 stated that the Polish state was a common value for all citizens and Articles 4 to 10 defined the basic relations between the individual and the state. Article 7 provided for balancing the political rights of citizens against their merits and efforts for the benefit of the common good. This model has been defined as "guided democracy"[90] or "authoritarianism pluralism"[91].

The 1935 Constitution was tailor-made for Piłsudski, who died 3 weeks after its enactment. He was replaced by a group of colonels who ruled

[89] However, "It is only during an ordinary session that such a motion can be made; it cannot be voted upon during the same sitting during which it was proposed. Should the motion pass in the Seym by an ordinary majority vote, and the President of the Republic does not in three days dismiss the Cabinet or the Minister, nor dissolve the Legislative Chambers, the motion shall be examined by the Senate during its nearest session. Should the Senate vote for the motion which has been passed by the Seym, the President of the Republic shall dismiss the Cabinet or the Minister, unless he dissolves the Seym and the Senate".

[90] A. Polonsky, *Politics in independent Poland 1921-1939*, Oxford, Clarendon Press, 1972, p. 512.

[91] J. Wawrzyniak, *La Polonia e le sue Costituzioni dal 1791 ad oggi. Le radici istituzionali della svolta polacca*, cit., p. 104.

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the country. Unfortunately, within the 'sanacija' no personality was able to manage that amount of constitutional powers and a political splitting soon showed up (some groups favoured the return to a constitutional system, others preferred an open authoritarianism[92]). The 1935 Constitution culminated the backlash against the numerous post-World War I political parties that had severely hampered the functioning of government. As for its application, even if the written text had an authoritarian character, its practical application was not. Hence a certain paradox: while Piłsudski became accustomed to a constitution designed to make an authoritarian government impossible, his successors had a constitution that legitimized an authoritarian evolution, yet Poland remained a dictatorship without a dictator[93]. This explains why the assessment of the 1935 Constitution cannot be entirely negative: it was the necessary result of the times. Furthermore, the centralization it envisaged favoured national unification. Additionally, in the period of the so-called IV partition (1939-1945), the application of that Constitution allowed the existence of governments in exile.

The Polish case testifies to the crisis that the 'new' Europe went through in the 1930s: the replacement of the previous legislative supremacy with the strengthening of the executive towards a system of personal and 'sovereign' power of the head of the executive that recalls the monarchical principle. This return to the past finds its explanation in the fact that parliamentarism introduced in the new constitutions did not find a cultural and social basis. The struggle between parties became personalized. This has undermined the democratic ideology, leading to the political and non-constitutional primacy of the executive. As Ceccanti points out, the Polish authoritarian involution is very similar to the Austrian one: a text modelled on the laws of the Third French Republic in 1920, a Weimarian correction in 1929, an authoritarian state since 1934 and the loss of independence in 1938[94].

4. The Polish constitutional traditions and the post-1989 constitutional framework

The troubled path of the conquest and re-conquest of independence and political self-determination is reflected in the constitutional history of Poland, in which ancient traditions permeate the constitutional and cultural identity of the country. In particular, three elements have dominated

[92] It should also be considered that while Piłsudski, despite his authoritarian tendencies, was undoubtedly a patriot and sincerely devoted to the Polish cause, his former comrades in arms gave birth to a corrupt and patronizing regime. See H. Seton-Watson, *Le democrazie impossibili*, cit., p. 215.
[93] J-M. Le Breton, *Una storia infausta. L'Europa centrale e orientale dal 1917 al 1990*, cit., p. 218.
[94] S. Ceccanti, *Il costituzionalismo polacco dal 1791 ad oggi*, cit.

Poland's rich, autochthonous constitutional tradition: a decentralized political structure (accompanied by a *de facto* separation of powers and a complex network of checks and balances), the notion of 'contractual state' – in which state power derives from the will of the people –, strong principles of individual liberties[95]. These elements have been kept even during the most difficult times of Polish history.

Another aspect to underline is the fact that Poland is part of a common European constitutional development, which from time to time was even anticipated, as it happened with the 1791 and 1921 constitutions. In the first case, the precursory element was the verbalization of certain confidence dynamics deriving (also) from the English model, and in the second one it was the introduction of universal male and female suffrage and social rights. This constitutional richness, which is not only composed of texts and practices but mostly of culture, ideals, and sense of sharing (at least in the intellectual debate) is little known in the rest of Europe, where, in the light of the current constitutional crises, Central and Eastern Europe constitutionalism is exclusively linked to the concepts of impossible, illiberal, failed or apparent democracy. Nevertheless, historical evolution reveals a more complex path, made up of lights and shadows.

Another significant element for Central-Eastern Europe in general is a certain similarity between the birth of the states in 1918, and the period following the transition from communism. Here the keywords seem to be the same: state birth or rebirth (after the collapse of the socialist federations or the end of the forty years of limited sovereignty), ethnic and minority inhomogeneity, political party weakness, constraints of international law and aspiration to be admitted to the main international organizations, poorly rationalized parliamentarism, reference to Western constitutional models (again France and Germany), distancing from the past, difficult relations with some neighbouring countries. To this, we must add the dynamics of democratic degeneration, that seem to echo similar paths experienced in the period between the two world wars. And this is precisely the wounds, mutilations, social and political fractures inherited from that historical period that are still present today and fuel strong nationalist political tendencies[96]. The doctrine has stressed the similarities existing between today's paths of democratic degeneration and, for instance, the dynamics of the Weimar Republic in the 1930s[97].

[95] M. F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, cit., p. 50.
[96] See D. Stasi, *Le origini del nazionalismo in Polonia*, Milano, FrancoAngeli, 2018; J. Sawicki, *L'erosione 'democratica' del costituzionalismo liberale. Esperienze contrastanti nell'Europa centro-orientale*, Milano, FrancoAngeli, 2020.
[97] See G. Allegri, *Pluralismo solidale, innovazione sociale e processi federali per un nuovo garantismo costituzionale*, in G. Allegri, A. Sterpa, N. Viceconte (Eds.), *Questioni costituzionali al tempo del populismo e del sovranismo*, Napoli, 2019, Editoriale scientifica, p. 53. See also A. Di Gregorio, *La degenerazione delle democrazie contemporanee e il*

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In the 1920s Europe, constitutional ideas and experiences were a common heritage shared both in the East and the West, with geographical distinctions much less relevant than those of today. The communist 'parenthesis' did not destroy this culture. The constitutional experiences of the period between the two world wars must therefore be re-evaluated, even those following the concentration of power in the hands of the executive. As aforementioned, the Polish Constitution of 1935 allowed the continuity of the management of the state in exile, during the Nazi occupation, and was a source of inspiration even for the authors of the French Constitution of the Fifth Republic.

The Constitution of 1921 does not have in Poland the same symbolic role in the collective imaginary as that of May 5, 1791. Nevertheless, it is considered an important document, that was taken into account in the drafting of the constitutional documents adopted after 1989 (amendments of the 1952 socialist Constitution, the so called 'small' constitution of 1992, the 1997 Constitution) in particular for what concerns the form of government and the powers and structure of the houses, but also for territorial decentralization[98]. The strengthening of the executive of the 1926 novel and 1935 Constitution also had some influence, but the spirit of poorly rationalized parliamentarism eventually prevailed[99]. Generally speaking, it can be said that democratization tends to coincide with parliamentarism both in the period after the First World War and in that after 1989, even if in the latter case various mechanisms of rationalization of the form of government were introduced, thanks to the richer comparative panorama available.

At the time of the parliamentary adoption and subsequent popular approval of the 1997 Constitution, various political forces, that included some members of Solidarność (i.e. Wałesa) and (other) Catholic forces (i.e. former Prime Minister Olszewski) expressed some criticism about the text because it drifted from the national and Christian traditions of the country. Indeed, the text, in the preamble, in addition to the reference to God, also referred to those who do not share Catholic faith[100]. Moreover, it listed social

pluralismo semantico dei termini "democrazia" e "costituzionalismo", in *Diritto pubblico comparato ed europeo*, n. 3/2020.

[98] On this topic see A. Angeli, *La circolazione del sistema francese di decentramento regionale nell'Europa centro-orientale*, Milano, FrancoAngeli, 2018.

[99] See for instance M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti nei Paesi dell'Europa orientale (Polonia, Lituania, Ungheria, Repubblica Ceca): l'equilibrio innanzitutto*, in A. Di Giovine, A. Mastromarino (Eds.), *La presidenzializzazione degli esecutivi nelle democrazie contemporanee*, Torino, Giappichelli, 2007.

[100] "Both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources". On the other hand, both the constitution of 1791 and that of 1921 refer only to God and also grant Catholic religion a privileged role. The 1935 Constitution did not have a preamble but the President was held accountable to God and to history. Obviously, there were no references to God in the 1952 Constitution.

rights, which were seen as a legacy of the 1952 Constitution. Nonetheless, from an historical perspective, the legitimacy of Poland's new Constitution can hardly be doubted. As stated by Cole "Virtually all of its structural features – the institutions and organizations it establishes, the way it balances power among the various units of national government, its provisions regarding civil and religious – have roots in constitutional documents of Poland's past, both recent and distant. This is true even for the most controversial aspects of the new Constitution, including its preamble and the method by which it was enacted and ratified. From top to bottom, the new Constitution fits comfortably into Poland's history of constitutionalism"[101].

Again, to remain on the 1997 Constitution, in addition to the fact that it is the first constitution to be approved by referendum (even if the relatively low voters' turnout has been disputed before the Supreme Court, which however validated the outcome of the vote), it is important to say that it is full of ideal as well as textual references to the country's constitutional traditions. Among these, the pluralism and religious tolerance of the sixteenth century, the traditions of the 1791 constitution, the social rights already provided for in the 1921 Constitution. The relationship between citizenship and nation seems more complex. The preamble of the 1997 text ("We, the Polish Nation – all citizens of the Republic") seems to equate citizenship with belonging to the nation. The one of the 1921 Constitution stated that "sovereignty in the Republic of Poland belongs to the nation" and enumerated the rights of citizens but never indicated whether all citizens composed the Polish nation[102]. On the contrary, in the old Republic prior to 1795, this concept was much broader, as Polish nationality could be defined in terms of loyalty to the state. It was only later that the word 'nation' increasingly assumed its modern cultural and ethnical overtones.

With regard to the form of government, the 1997 Constitution treasures the errors and merits of the 1921 text, all in all structuring a balanced form of government, after the corrections of the first variants (amendments of the 1952 Constitution and small constitution)[103].

Lastly, the 1997 Constitution is full of references to the country's constitutional traditions, despite criticism from some political forces.

[101] D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, cit., p. 37.
[102] Article 110 referred to "Polish citizens belonging to national minorities", implying that citizenship is not equivalent to membership in the Polish nation. Following D.H. Cole, *Poland's 1997 Constitution in Its Historical Context*, cit., p. 39 "the distinction between citizenship and membership in the Polish nation in the 1921 Constitution is consistent with modern conceptions of Polish nationalism (dating from the nineteenth and twentieth centuries)".
[103] Please refer to A. Rinella, *La forma di governo semi-presidenziale. Profili metodologici e circolazione del modello francese in Europa centro orientale*, Torino, Giappichelli, 1997; M.A. Orlandi, *Quando il semipresidenzialismo passa all'Est*, Torino, Giappichelli, 2002; J. Sawicki, *Polonia*, in M. Ganino (Ed.), *Codice delle Costituzioni*, Vol. III, Padova, Cedam, 2013.

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However, such criticism is significant, as it reflects the dissatisfaction of those who did not agree in the past with the 'constituent pact' and reiterate their dissent up to today, while not being able to amend the Constitution. The parties of the conservative majority in government, which have their roots in the forces that in the 1990s challenged the 1989-1990 transition pact even before the Constitution, are more inspired by the 1791 constitution, that was enlightened but also nationalist, than by that of 1921, the centenary of which seems to have passed in the Homeland without any major official celebrations.

As noted by G. Lombardi[104], Polish history represents "a singular frontier model both on the level of political concepts, and on that of constitutional models". According to the well-known Italian constitutional and comparative law scholar, the sore point of all Polish history has been that of state's sovereignty, hence of its political weakness and institutional inability. All factors that have prevented the consolidation of constitutional experiments, albeit valuable – and at times very advanced – among which certainly figures the Constitution of 1921[105].

Poland has often been at the forefront of political and constitutional innovations and therefore a laboratory, although its constitutional history is not very well-known in Europe with the exception for the most recent developments that have placed this country in an unfavourable light. Nonetheless, it is imperative to do justice to an interesting and little-known constitutional history especially at a time like this. To repeat Lombardi's words, still very up to date, "the political dilemmas of contemporary Poland can be more understandable if illustrated against a broad historical background"[106].

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[104] G. Lombardi, *Tra continuità e trasformazioni*, cit., p. 7.
[105] According to G. Lombardi in *Tra continuità e trasformazioni*, cit., p. 8 "being at the crossroads of different ethnic groups, forms of government, cultural and religious aspects, it represents one of the typical places where new and old, tradition and innovation collide, and where all constitutional experiences are present in the newborn state then withering before becoming ripe".
[106] Ibid., p. 13.