The judiciary in the March Constitution of 1921

di Miroslaw Granat

Abstract: The structure of the judiciary in the March Constitution, with a view to the principle of the separation of powers, is the subject of this paper. Attention is paid to the status of the judge and to the court system, including with regard to specialized jurisdictions. The question of judicial control of constitutionality, which has remained unresolved, is also analysed.

Keywords: March Constitution, judicial system, judge status, special jurisdictions, judicial review of legislation.

This year marks the 100th anniversary of the adoption of the March Constitution of 17 March 1921. This Constitution was in force for a relatively short period of time. Nonetheless, it was and still remains an act of a great importance for the Polish constitutionalism.

Unfortunately, the current Polish government does not celebrate the centenary of the adoption of the March Constitution. It is difficult to explain why this is the case. I think one of the reasons is – in general – the fact that the role of the constitution and the law is diminished.

First, I would like to revisit the principle of the separation of powers in the March Constitution. In my view, this principle is the starting point for the discussion of Polish judiciary of the interwar period.

1. The principle of the separation of powers in the March Constitution

Let me begin with the observation that the March Constitution distinguished between "legislative power", "executive power" and "judiciary" (Article 2).

Why did the March Constitution establish "judiciary" and not "judicial power"?

The lack of "judicial power" was not accidental. It resulted from the influence of French republican ideas. Their influence was expressed in at least two aspects:

a) Article 2, which introduced the principle of national sovereignty, was heavily influenced by Rousseau's ideas. The nation was

DPCE online
ISSN: 2037-6677

seen here as a "person" with its own organs. At the same time, the Constitution did not provide for a referendum.

b) According to French ideas, the judiciary was a function or "a branch" of the executive power, and not an independent power. Perhaps, in order to explain this feature of French political thought, one would have to go back to Montesquieu (which is beyond the scope of my paper). It is well known, for example, that French administrative courts, headed by the Council of State, function within the executive power. The situation was the same under the March Constitution: the Supreme Administrative Court was established in Article 73, in the chapter on the executive power (Chapter III).

The influence of French ideas determined the regulation of the judiciary in the March Constitution.

2. The status of judges

The March Constitution regulated the status of judges in a very succinct manner. Nonetheless, these provisions were of great significance to the constitutional system of the state.

Judges were appointed by the President of the Republic (Article 76).

The March Constitution explicitly expressed the principle of judicial independence. Judges were subject only to statutes.

The Constitution guaranteed that judicial decisions could not be changed either by the legislative power or by the executive power (Article 77).

3. The issue of the constitutional review of the law

Only now we can turn to the question of constitutional review of law under the March Constitution, or in fact, during the interwar period in Poland.

In interwar Poland, there was no judicial review of the constitutionality of the law either under the March Constitution or the April Constitution. Under the March Constitution (1921-1935), it was theoretically possible, as the Constitution introduced the principle of constitutionalism. I mean the principle that the constitution is the supreme legal act. In this situation, the problem usually arises concerning the bodies protecting the Constitution.

The March Constitution established its supremacy in a somewhat "bottom-up" manner. It proclaimed that "no statute may be in opposition to this constitution or violate its provisions" (Article 38).

However, the Constitution did not specify the mode of blocking unconstitutional statutes. It did not indicate the body that would rule in this matter either. Nor was there any "automatic invalidity" of the statutes that violated the Constitution.

The problem of the constitutionality of the law was "solved" by the introduction of a formal ban on adopting laws which were contrary to the Constitution.

- it was expressed in the abovementioned Article 38,

- it was assumed that if the statute was inconsistent with the Constitution, it could enter into force only after amending the Constitution,

- the March Constitution (as well as the April Constitution) forbade courts to examine "the validity of duly promulgated statutes" (Article 81 of the March Constitution).

To sum up, the March Constitution guaranteed the supremacy of the Constitution, but it was not the basis for the establishment of a constitutional court. Why judicial review could not be introduced is clear. The direct reasons were as follows: a) the superiority of the legislative power over other powers, b) the dogma of the inviolability of statutes.

However, the situation in the science of law in interwar Poland was different. There was a good understanding of the value of the constitutional review of the law exercised by courts. Immediately after the adoption of the March Constitution, such a proposal was put forward almost simultaneously by well-known Cracow conservatives – professors W.L. Jaworski and S. Starzyński. The former even presented a draft law on the Constitutional Tribunal in 1928.

The question of establishment of the judicial review of the constitutionality of the law was important in doctrinal discussions, nonetheless, it was not the key issue of the Polish legal thought of the interwar period. Such a key issue was in fact the parliamentary-cabinet system, including the second chamber of the parliament (the Senate). The debates on the position of the Senate were more characteristic for the period in question, as compared to the constitutional review.

In addition, the question of constitutional judiciary was linked to the relationship between the legislator and the principle of sovereignty of the nation. In contrast, it was not linked to the character of the binding force of law, as per Kelsen's theory of normativism.

4. Other courts

As mentioned above, the March Constitution established administrative judiciary (judicial review of the legality of administrative decisions). The Supreme Administrative Court was located within the executive branch (Article 73). Before World War II, administrative judiciary was not formed in the whole country. For example, administrative courts were established in the territory of the former Prussian partition.

The March Constitution established two more courts.

It was the Court of State (cf. Article 64) and the Tribunal of Conflicts. The former was established in order to hold certain persons (e.g. the

DPCE online
ISSN: 2037-6677

President, high officials) constitutionally liable. In practice, there were two attempts to hold ministers liable.

The other one was the Tribunal of Conflicts (Article 86). In fact, it was not a court. It settled disputes between the administrative bodies and the courts. It functioned until the outbreak of the war in 1939.

5. To sum up:

Given the circumstances, the March Constitution was a modern legal act. This also applied to the judiciary. In principle, the only important function that we did not know – in terms of the judiciary – was the constitutional review of law. In my view, the discussion on the causes of the absence of such a review is important not only from a historical perspective, but in fact remains significant also for the present day.

Its provisions were not fully implemented. It was in force for a relatively short time. In 1926 it was amended, and in 1935 it was replaced by a completely different constitution (the April Constitution).

Prof. Miroslaw Granat
Warsaw II University
Former Judge of the Constitutional Tribunal

Bibliography

1. M. Granat, *Problem kontroli konstytucyjności prawa w Polsce Międzywojennej. Nauka i instytucje* [w:] Prawo konstytucyjne II Rzeczypospolitej, Wyd. Uniwersytetu Jagiellońskiego, red. P. Sarnecki, Kraków 2006,
2. M. Granat, *Prawo konstytucyjne. Pytania odpowiedzi*, Wolters Kluwer, Warszawa 2021,
3. M. Granat, K. Granat, *The Constitution of Poland. A Contextual Analysis*, Hart Publishing, London 2019.