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# 100 Years of Statehood of Czechoslovakia and Poland. Similarities and Differences<sup>2</sup>

## Abstract

100 years of constitutionalism of two neighbouring European states – Czechoslovakia, later becoming the Czech Republic, and Poland – encourage a reflection on the paths of development of their respective constitutions, on the historical stages and successive political transformations, not just in the context of individual constitutionalisms of each of those states but with an emphasis on the similarities and differences in this domain. And this is what this study focuses on. Starting from the common fate of rebirth of both states after WWI through the inter-war efforts to establish democratic constitutional systems and the obstacles found on the way, followed by the post-WWII period of real socialism ending with the era of transformations and stabilisation as democratic states of law. The text explores all the similarities found in both general aspects – like the references to the European tradition of parliamentary governance – and in certain specific solutions – like the differences in the concept of the two-chamber parliament. But there are also situations occurring in only one of the states, e.g. the federalisation of Czechoslovakia, the emergence of two separate states of the Czechs and Slovaks, or the differences in the course and sequence of events of democratic transformations in each of the states in the 1980s, which brings us to the conclusion that despite all the possible differences, the two constitutional systems have actually been very similar to each other.

**Keywords:** constitutionalism, Velvet Revolution, transformations

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It has been exactly 100 years, a full century, since the reappearance of two sovereign states on the map of Europe: Czechoslovakia and Poland. Not monarchies like before, but republics. And this is the first, initial, very important similarity, especially since the very fact (and process) of the rebirth of both states reveals a range of common elements too. Leaving historical details and evaluations aside, which are best left to historians, it is hard not to refer to the fact that the measures taken to this end were undertaken to a great extent abroad, taking on slightly different forms in both cases, though. To start with, it would be reasonable to quote a common source, being US President Woodrow Wilson's address delivered to the Congress on 8 January 1918, whose point 10 refers to the people of Austria-Hungary, and point 13 to the Polish state. But the justification of the famous 14 points of the Washington Declaration was offered earlier, in Woodrow Wilson's address of 22 January 1917 delivered to the Senate, where he argued that "no peace can last, or ought to last, which does not recognize and accept the principle (...) that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property".<sup>3</sup> As older readers may remember, in the period of real socialism, the political doctrine of the time often tended to "forget" about Wilson's 14 points, promoting a view that it was the Bolsheviks' declaration that supported the sovereignty of particular states instead. As a contemporary historian argues, this support was actually an accession to a declaration made by the Russian Provisional Government of Petrograd (April 1917) – forced to make it, which the Bolsheviks seemed to have forgotten after taking over the reign in Petrograd.<sup>4</sup>

Although Wilson's address concerned the future fate of both nations, nobody offered the Polish or the Czech any 'ready' states. Quite the contrary. The appearance of these states harmed the interest of other European powers – both those who were left with their shields or on them after WWI. Both Polish (Ignacy Jan Paderewski, Roman Dmowski) and Czech and Slovak (Tomáš Garrigue Masaryk, Edvard Beneš, Milan Štefánik) statesmen made tremendous efforts abroad for the rebirth of their countries, and even then there were many different circumstances related to the matter, both in the international arena and within national movements, initiatives, and views: Pittsburgh, Cleveland, Paris, peace treaties, and at the same time the Russian Revolution and the reactions thereto in Slovakia prove the degree of the

<sup>3</sup> Point 13. "Rzeczpospolita" 5.–7.01.2001, p. J8.

<sup>4</sup> N. Davies, *Europa. Rozprawa historyka z historią*, Kraków, 1998, p. 973.

said efforts made not only to proclaim statehood but also to shape the model of the state as such. All the more given the fact that Czechoslovakia was being reborn as a state of Czechs and Slovaks (with a large percentage of other nationalities).<sup>5</sup> Wilson's statement made in point 13 of his 1917 address, much clearer as regards to Poland,<sup>6</sup> made the international situation easier, especially when Józef Piłsudski returned to Poland on 11 November 1918, becoming the country's head of state, holding the position of Chief of State. Poland was yet to engage in a fierce armed conflict (1919–1920) with the Bolsheviks. Its difficulty – and most likely significance to the rest of Europe – is best proven by the fact that the decisive battle of 15–16 August 1920 has come to be known as the “Miracle on the Vistula”.<sup>7</sup> And it was not the only battle fought on the verge of the rebirth of the Polish state.<sup>8</sup>

The multinationalism of the Polish state, although troublesome at times, was of a somewhat different nature than that found in Czechoslovakia, where two nations shaping the state in the presence of German minority in significant numbers, affected the course of the events to come.

This short and brief overview of a history that favoured the rebirth of Czechoslovakia and Poland 100 years ago acts as a stimulus to keep on searching for common elements of this history – now in relation to the constitutional development of both states.

As this overview is of a legal-constitutional nature, the focus is mainly on the earliest constitutions.<sup>9</sup> The Czechoslovak Constitution was passed on 29 February

<sup>5</sup> V. Pavlíček, J. Hřebejk, *Ústava a ústavní řád České republiky*, Vol. 1, Praha 1994, p. 19.

<sup>6</sup> In his speech, Wilson declared clearly and explicitly that e.g.: “An independent Polish state should be erected...”. In Polish literature, especially in texts published in recent time on the occasion of 100 years of Poland's independence, there is a strong emphasis on the role of I.J. Paderewski (appointed Prime Minister in 1919), appealing directly to W. Wilson, who valued Paderewski greatly as a world-class pianist and composer, and made it a condition for the Congress to acknowledge his point 13 if the Treaty of Versailles was to be signed.

<sup>7</sup> N. Davies, op. cit., pp. 972, 994 et seq.

<sup>8</sup> The Battle of Lemberg, also known as the Defense of Lviv, made a strong mark in the history of the Polish-Ukrainian armed conflict (01.11.1918–22.05.1919) resulting from the establishment of the West Ukrainian People's Republic.

<sup>9</sup> Before they were passed in both states, there were provisional quasi-constitutional acts in place. In Czechoslovakia, it was the *Prozatímní ústava* of 1918 (c.37/1918 Sb.) intended to be in force for a short time as an act (*zákon o prozatímní ústavě*), passed on 13 November 1918 by *Národní výbor československý*, transformed into the National Assembly, which established a government headed by T.G. Masaryk, who returned to the country in 1918. In Poland, it was the so-called Small Constitution, which was the Legislative Sejm's ordinance of 20 February 1919, entrusting Józef Piłsudski with the further execution of the office of Chief of State (*Dziennik Praw Państwa Polskiego* Nr 19, poz. 226). See: R. Kraczkowski, *Mała Konstytucja z dnia 20 lutego 1919 r.*; S. Rogowski, *Praktyka konstytucyjna w okresie obowiązywania małej konstytucji z 1919 r.*; M. Pietrzak, *Wpływ rozwiązań małej*

1920,<sup>10</sup> and the Constitution of the Second Polish Republic – over a year later – on 17 March 1921, hence its popular name of the March Constitution.<sup>11</sup> Both of these constitutions are spoken of in the Czech and Polish literature as examples of democratic constitutions of the first generation of fundamental statutes of the interwar Europe. There is also an emphasis on their strong connection with own and European democratic tradition<sup>12</sup> and being in line with the European constitutions respecting the principle of national sovereignty, the republican nature of the state, the separation of powers, parliamentary governance, and the broad range of civil rights, including the five-point electoral law (i.e. introducing proportionality – next to universality, equality, directness, and anonymity of voting).

It is necessary to stress a certain significant difference here. One concerning constitutional judicature. Actually, the difference applies not only to Poland but to a great majority of the inter-war European states. Czechoslovakia, next to Austria, was a notable exception. A conceptual model of such a constitutional court appeared first in the first half of the 19<sup>th</sup> century (the Kremser constitution), followed by the Risski soud established in 1867, which shows that becoming a part of the Austrian monarchy not only triggered aspirations for independence but also shaped a community of legal culture. The Constitutional Court conceptualised in the Constitution of 1920 also drew from the doctrine of Hans Kelsen, and although the court's achievements in the domain of law were not particularly valuable for various reasons, it was a considerable milestone in Czechoslovak constitutionalism,<sup>13</sup> something the Polish Constitution could not pride itself on. Although there were ideas of establishing a Constitutional Tribunal, the Polish legal-constitutional doctrine of the time was not favourably inclined to the solution.

Yet, becoming familiar with many other fragments of both constitutions covered herein can confuse the reader as to which of the two they are dealing with. Which only proves how similar they are. There were two chambers of the legislative branch, which was composed of the Chamber of Deputies and the Senate (in Poland: the

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*konstytucji z dnia 20 lutego 1919 r. na Konstytucję RP z dnia 17 marca 1921 r.*; all in: M. Zubik, R. Jastrzębski, *Małe Konstytucje. Ustawy zasadnicze okresów przejściowych 1919–1947–1992*, Warszawa 2014, pp. 11 et seq., 27 et seq., 49 et seq.

<sup>10</sup> No. 121/1920 Sb. Quotation according to J. Makowski (ed.), *Nowe Konstytucje*, Warszawa 1925, pp. 273–358.

<sup>11</sup> Promulgated as: Act of 17 March 1921: Journal of Laws of 1921 No. 44, item 267.

<sup>12</sup> See e.g.: *Státnost česká a československá, tradice a kontinuita*, [in:] V. Pavlíček, *O české státnosti. Úvahy a polemiky*, Praha 2002, p. 13 et seq.

<sup>13</sup> For a more comprehensive study on the Czechoslovak and Czech constitutional judicature in Polish literature – see: M. Kruk, *Sąd Konstytucyjny Republiki Czeskiej*, [in:] J. Trzciniński (ed.), *Sądy Konstytucyjne w Europie*, Vol. 2, Warszawa 1997, pp. 65–142.

Sejm and the Senate, but the historical notion of the Chamber of Deputies/Envoys was used quite often as well), together forming the National Assembly. In Czechoslovakia, the Chamber of Deputies was elected for a 6-year term of office, the Senate – for an 8-year term of office. In Poland, both chambers were elected for a 5-year term of office, and their respective terms of office ended at the same time. The difference in the duration of the said terms of office – or the lack thereof, which was the case later on – may be of great significance to politics on account of inter-party relationships. The relationships between the chambers do not have a fully equal status under any of the constitutions. “Precedence” is given to the Chamber of Deputies and the Sejm, but the specific regulations of the participation and the role played by the upper chambers in the legislative procedure reveal some differences. The Czechoslovak constitution made it a rule – in principle – that an act needed to be adopted unanimously by both chambers, with some special exceptions. According to the Polish constitution, bills passed by the Sejm had to be submitted to the Senate, who made amendments to each bill, which the Sejm could accept or reject.

Under both constitutional frameworks, members of the lower chambers of parliament were given a representative parliamentary mandate (non-imperative), immunity, which involved a range of *incompatibilitatis* and bans on taking advantage of the mandate for one’s own benefit and in personal matters. In both constitutions the parliament supervised the government and ministers, and the Chamber of Deputies and the Sejm ‘evaluated’ the government by votes of confidence or no confidence.

When it comes to the executive branch of power, the Czechoslovak constitution did consider the nuance of dividing it into the legislative branch and executive branch, but in the case of Poland, such a claim appears only in the doctrine,<sup>14</sup> with the same general principle of a two-component structure applied, i.e. with the government and the president of the republic sharing this power. The president, elected by the National Assembly for a 7-year term of office in both states,<sup>15</sup> also had certain entitlements in their relationship with the government and the parliament – apart from performing the conventional role of the head of state.

As for the March Constitution’s regulations regarding the parliament, the president “convokes, opens, adjourns, and closes the Sejm and Senate”, which also

<sup>14</sup> For example – see: M. Grzybowski, *Władza wykonawcza w Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. i w praktyce jej stosowania (zagadnienia wybrane)*, [in:] J. Jaskiernia, K. Spryszak (eds.), *Dwadzieścia lat obowiązywania Konstytucji RP. Polska myśl konstytucyjna a międzynarodowe standardy demokratyczne*, Toruń 2017, p. 42.

<sup>15</sup> But if the president resigned prematurely, in Poland, they were substituted by the Marshal of the Sejm, whereas in Czechoslovakia – by the government, who could assign this function to its head; in certain specific situations, a deputy president was elected by the National Assembly.

applied to extraordinary sessions. The constitution provided for different conditions for exercising this right, protecting the parliament against the head of state's excessively arbitrary decisions. Under the Czechoslovak constitution – the president convoked two sessions of chambers (two per year) and extraordinary sessions, adjourned (with certain restrictions) and closed such sessions, and convoked, adjourned, and dissolved the National Assembly, having the right to dissolve the said chambers as well. Poland's president could dissolve the Sejm only with the approval of 3/5 of the statutory number of Senate members, which was considered unfeasible, especially since it would mean the end of the Senate's term of office. The March Constitution did not grant the Polish president, who signed and promulgated acts, the power of legislative veto (the right to refuse to sign a bill and to return it to the chamber of its origin) – a right the president of Czechoslovakia did enjoy.

Both constitutions equipped the president with certain rights in dealing with the government: the president of the Czechoslovak Republic appointed and dismissed government members and determined their number, could take part in and chair government sessions, require the government and its members to provide reports on any matter within their area of competence, and invite them to participate in meetings. According to the March Constitution, "the President of the Republic exercises the executive power through ministers responsible to the Sejm and through officials subordinated to the Ministers", "appoints and recalls the President of the Council of Ministers [and] ministers". Bearing the lack of political accountability of the head of state in mind, both constitutions required that all acts of the president be countersigned by the government, meaning the government (ministers) becoming responsible for such acts. Both constitutions made the president bear constitutional accountability only.

It appears that the construct of executive power and the political concept of presidency were quite similar in both constitutions, corresponding, in essence, to the classical formula of a parliamentary system back then.

In the Polish constitution, these principles, especially the parliamentary system idealising parliament as the executive authority to such a degree that it came to be called by some as a system of parliamentary governance, were formed, in fact, against the quite common standpoint of the doctrine of constitutional law of the time, opting for and endorsing – in many statements and in the drafted bills of the constitution – following the model of the American constitution based on a presidential system, or at least a strong presidency. When the March Constitution was

adopted, it was actually criticised exactly from that angle.<sup>16</sup> And perhaps this determined its future.

The February constitution of the Czechoslovak Republic included principles that caused certain consequences in the further development of constitutionalism, but they concerned quite different issues. There was a mention of a specific ethnic composition of the society of Czechoslovakia. Two nations and a strong German minority (apart from other ones) were considered one nation in the 1920 constitution, which was emphasised quite strongly. The preamble to the law twice mentions the notion of “the Czechoslovak nation”, and it could theoretically be considered an indication of the legal subject of sovereignty if not for another expression implying that people are the source of all power. Therefore, given the events preceding the establishment of the state, when the national and political identity of Slovakia was manifested many times, the message speaking of one Czechoslovak nation, even in the light of a threat from the populous German minority, especially in contrast to the autonomy of Carpathian Ruthenia, could leave Slovakia feeling disappointed and underappreciated as the weaker partner. Especially on account of the fact that the political interpretation as well (“Czechoslovakism”) suggested a negation of the full national subjectivity of Slovaks.

It did not take long for the consequences of Poland’s weak presidency combined with a multiparty system to surface. 12 May 1926 marked the day of J. Piłsudski’s coup d’état, referred to as the May Coup, which was followed by an amendment of the constitution (2 August 1926) to reinforce the executive power, especially the function of the president. The president gained the right to dissolve the Sejm and the Senate (the Sejm lost the right to self-dissolve at the same time), and to issue legislative ordinances (at the Council of Minister’s request).

The new constitution, adopted in April 1935<sup>17</sup> (hence called the April Constitution), completely changed the political system, and Poland parted ways with Czechoslovakia, which had its 1920 constitution still in force. In Poland, the president, elected in a different way<sup>18</sup> and responsible only “before God and history”,

<sup>16</sup> See: W. Komarnicki, *Polskie prawo polityczne. Geneza i system*, Warszawa 2008, p. 133 et seq. Also: *Ankieta o Konstytucji z 17 marca 1921 r.*, Warszawa 2014, including the said critical opinions.

<sup>17</sup> The Constitutional Act of 23 April 1935, Journal of Laws No. 30, item 227.

<sup>18</sup> One candidate was chosen by the Assembly of Electors, the other by the outgoing president – this was followed by a general election, but if the outgoing president did not put forward a candidate – the Assembly of Electors’ candidate was elected the new president. The Assembly of Electors was composed of: the Speaker (Marshal) of the Senate as chairman, the Speaker (Marshal) of the Sejm as vice-chairman, the Prime Minister, the First-President of the Supreme Court, the Inspector-General of the Armed Forces and 75 electors chosen from among the worthiest citizens by the Sejm (2/3) and the Senate (1/3). The authority of the Sejm, the Senate (the president appointed



became the head of not only the government and the Armed Forces but also of all state bodies including the parliament, courts, and the State Control. This abolished the principle of the separation of powers and introduced the ideology of a strong state, where "it is the duty of the citizens to be loyal to the State and to faithfully discharge obligations imposed upon them by it". The president appointed the Prime Minister "at their own discretion". A countersignature did not apply to all official acts of the president as the constitution equipped the president with so-called prerogatives. The authority of the Sejm, the Senate (the president appointed 1/3 of the senators) and the government was designed in line with the provision on the president's authority.

Although there were no such constitutional amendments made in Czechoslovakia, its democratic state collapsed for different reasons. In the face of Hitler's claims to be handed the Sudetenland, representatives of: England, France, Italy, and Germany made an agreement on 29 September 1938 in Munich, known as the Munich Agreement or as the Munich Betrayal,<sup>19</sup> which let Germany annex the *Sudetenland*.<sup>20</sup> Unfortunately, on 2 October Polish troops also crossed the Olza River. In March of the following year, an independent Czechoslovakia became a thing of the past, forming a part of the Protectorate of Bohemia and Moravia. All this was taking place at the same time in which the Slovak Republic was being established, with a constitution adopted on 21 July 1939. The Czech people were left with an option to form a resistance movement; the Czech government – with an emergency exit in the form of emigration.

Poland faced the same options as well when the country was invaded by Nazi Germany on 1 September 1939. And so the paths of the two countries crossed again.

A similarity in the constitutional domain appeared after WWII. In a divided Europe both countries found themselves in the "people's democracy" bloc, referred to euphemistically as "Central and Eastern Europe". But the obligatory patterning after the constitutional model of the Soviet Union did not come immediately. By 1948, Czechoslovakia was still under the rule of President Beneš and the govern-

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1/3 of the senators) and the government was designed in line with the provision on the president's authority. The constitutional act entered into force on the day of its promulgation.

<sup>19</sup> Likewise: R. Heck, M. Orzechowski, *Historia Czechosłowacji*, Warszawa 1969, p. 365.

<sup>20</sup> It seems reasonable to quote the famous words of Winston Churchill, who said when speaking about Great Britain: "You were given the choice between war and dishonour. You chose dishonour, and you will have war"; as quoted by N., Davies, op. cit., p. 1052, who gives a detailed account of the course of the negotiations conducted in the matter in question, severely criticising the made decisions.



ment (with Jan Masaryk being the Foreign Minister), sharing the power with socialists, and it was only the coup d'état of 20 February 1948 which led to Beneš' resignation,<sup>21</sup> paving the way for communists to seize the power. But even the constitution adopted then (i.e. on 9 May 1948) drew from the democratic model of the Czechoslovak Constitution of 1920.

In Poland, the situation of constitutional continuity after the war was a bit more complicated. The 1935 constitution allowed the activity of the Polish government-in-exile in London, and the main political forces remaining in the country claimed to intend to return to the democratic principles of the March Constitution, any normative acts from that period drew rather from the council system.<sup>22</sup>

The trend to make a greater effort to return to the March Constitution emerged in 1947, when the Legislative Sejm (elected in 1946) passed the Constitutional Act of 19 February 1947 on the system and the scope of activity of the supreme authorities of the Republic of Poland, referred to traditionally as the Small Constitution.<sup>23</sup> It drew broadly from the March Constitution of 1921, introducing the principle of the separation of powers according to the classical formula – with a single-chamber parliament, though<sup>24</sup> – and with a third segment added to the executive domain – the Council of State (composed of: the President as its chair, the Marshal and Vice-marshals of the Sejm, the President of the Supreme Audit Office, and other members if necessary), which appeared to act rather as a power-combining platform. The Constitutional Act also referred to a range of specific provisions of the constitution of 1921.<sup>25</sup>

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<sup>21</sup> In protest against the nomination of communists for certain state functions, twelve ministers submitted a resignation – which President Beneš accepted and, refusing to sign the constitution, resigned his position as well. His position was assumed by Klement Gottwald.

<sup>22</sup> The State National Council [PL: Krajowa Rada Narodowa] was established, issuing the Act of 11 September 1944 on the organisation and the scope of activity of state councils, making a declaration in Art. 1 that “the State National Council is the Nation's body to manage legislation, control the activity of the government, and supervise the activity of state councils until an actual political representation of the Polish nation is established, pursuant to the Constitution of 17 March”.

<sup>23</sup> Journal of Laws No. 18, item 71.

<sup>24</sup> As a result of the referendum of 1946 (believed to be manipulated after 1989) the Senate was abolished.

<sup>25</sup> It was adopted e.g. that appropriate articles of the 1921 Constitution applied to the status of MPs (Art. 11) and to exercising the function of the president (Art. 12). Even before the Small Constitution, in the period of the State National Council, there were cases of drawing from certain procedures of the 1921 Constitution. For instance, there was a principle that a ‘vacant’ office of the president was assumed by the Marshal of the Sejm, acknowledging that since the position was actually vacant (the authority of governments-in-exile was disregarded), the chair of the State National Council, performing a similar function to that of the Sejm Marshal, could assume the position, and thus Bolesław Bierut became the president of the State National Council.

But in the long run all that was much more of a political illusion because the reality of the people's rule paved the way for a new social and political order. The same goes for Czechoslovakia.

In Poland, the constitution adopted on 22 July 1952 by the Legislative Sejm was of a quite different nature. It renamed the state to the Polish People's Republic (which made it the PPR Constitution [PL: Konstytucja PRL]), changed the axiological system, and completely transformed the traditional constitutional order in the scope of organisation of power and its authorities. Therefore, it abolished the separation of powers, established a single-chamber parliament offering a collective head of state instead (the State Council elected by the Sejm from among the MPs), transformed the representative mandate into an imperative mandate, granting electors the right to dismiss MPs who disappointed them (but the legislator "forgot" to pass a law on the procedure of such a dismissal, so it was actually impossible for voters to dismiss an MP; and it was not the only case of dissonance between declarations and the reality), made the working people of cities, towns, and countryside 'a sovereign ruler', and the Sejm - a superior and supreme body of a uniform state authority; local governments were substituted with a system of (national) councils. All this occurred with some remains of the Polish traditions retained, e.g. not naming the Sejm the Supreme Council and maintaining a couple of traditional parliamentary imponderables in its rules of procedure. But the worst thing that happened to the constitutional system was the lack of political pluralism. In Poland several political parties were still active, but they found themselves in a position where the Polish United Workers' Party<sup>26</sup> enjoyed a hegemonic status and acted as a governing institution in the state's system. The slogan speaking of "the leading role of the party" was not decreed constitutionally,<sup>27</sup> but it was grounded in the doctrine so strongly and turned into action so diligently that the Sejm was considered to be a mere facade, just like civil rights, and the government perhaps not as much only because its majority were members of the Politburo of the Central Committee of the Polish United Workers' Party. But still, every significant act or a state authority's decision was preceded by a resolution made at a plenary session of the Central Committee of the Polish United Workers' Party.

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<sup>26</sup> The Polish United Workers' Party emerged as a result of the 1948 fusion of the Polish Workers' Party and the Polish Socialist Party, becoming a communist party (there was no other communist party in the Polish People's Republic).

<sup>27</sup> Only the 1976 amendment of the PPR Constitution (Journal of Laws of 1976 No. 7, item 36) adopted a principle that the PUWP was "a leading national force" in building socialism (Art. 3).

A similar system was common to all states of “people’s democracy”, even if their constitutions or practices differed in details: Czechoslovakia did not have a collective head of state, but retained a president,<sup>28</sup> who was, however, responsible before the parliament. The latter was composed of one chamber and called the National Assembly. Ministers were appointed and dismissed following the procedure of the vote of confidence and no confidence to some extent. The alliance of workers and peasantry included intellectuals as well. Since a new constitution was adopted in Czechoslovakia only in 1960,<sup>29</sup> when the socialist system became more established, it was expressed in the state’s new name. Such and other small differences did not change the fact that the system was essentially all the same. And this makes it necessary to emphasise similarities rather than differences.

Differences were visible elsewhere. Post-war Poland was a quite homogeneous state whereas Czechoslovakia was still a country of two nations because Slovaks did not get used to the idea that they were (slightly different) Czechs – which the 1960 constitution declared and thus Slovakia was offered autonomy as a result. And so the state remained unitary but with a certain asymmetry in the system of state authorities because Slovakia had its own Slovak National Council acting as a legislative and executive body at the same time. But it is impossible to say for certain if this autonomy was not yet another facade – like everything else in socialism.

But there were periods of decline in the real socialism system too. They were caused either by some authority crisis or by social resistance. The former, originating in the 20<sup>th</sup> Congress of the Communist Party of the Soviet Union and in the fall of the worship of personality, resounded across the Polish society, translating into the so-called thaw first, and then into the events of October 1956 (similarly, and even more severely, in Hungary). The change of the political power (the return of W. Gomułka, removed from power for his revisionist activity) gave the society a hope for democratic changes, which actually did take place to some extent; for example, the PPR Constitution restored the Supreme Audit Office,<sup>30</sup> “revived” the Sejm, which had regular sessions and could pass laws again,<sup>31</sup> and softened censorship. Every-

<sup>28</sup> Yugoslavia is passed over here since it pursued an own path to socialism.

<sup>29</sup> The Constitution of the Czechoslovak Socialist Republic of 11 July 1960 (no. 40/100 Sb.).

<sup>30</sup> The Supreme Audit Office as an independent body of state supervision, subordinate to the Sejm, had existed since 1919, was reactivated in 1949 and abolished in the 1952 Constitution and substituted by the Ministry of State Control, and restored in 1957.

<sup>31</sup> In 1952–1955 the Sejm had such short and irregular sessions that the legislative activity was taken over by the Council of State, which could issue legislative decrees in the meantime between the Sejm’s sessions. In 1957 the Sejm’s rules of procedure were substantially modified and – for the circumstances of the time – made much more democratic, including e.g. arranging fixed dates of

thing soon returned to normal, although not to the state of such ossification as before 1956.

The episodes of rebellion in Czechoslovakia took place at the turn of 1967 and 1968 and in spring 1968, which came to be known as the Prague Spring. Dubček, Svoboda, Smrkovský, and Černík opened the door to political reforms, but in August 1968 an armed intervention of the member states of the Warsaw Pact directed their efforts towards “normalisation”. The acts adopted in the Prague Spring period, e.g. one on the Constitutional Court, or the drafts of a new constitution, drawing from the pre-war tradition, wound up in the drawer. The most significant one was the Constitutional Act on the Czechoslovak Federation, adopted in autumn 1968, becoming evidence to the idea instilled as early as in the times of the Cleveland Agreement.

The Constitutional Act on the Czechoslovak Federation modified the 1960 Constitution substantially, but only in the domain of federalisation. First – it changed the state’s structure, which transformed into two sovereign and equal entities – the Czech Republic and the Slovak Republic (both socialist republics); second – it established an original model of a two-element federation; third – it introduced mechanisms to even out the position of Slovakia, a partner with a smaller population, and, traditionally, a bit weaker economically and politically; these mechanisms included e.g. national parity in the composition of federal authorities or staffing (e.g. in the case of ministers, which did not necessarily work), two chambers of the federal parliament, a ban on majoritarianism in the legislative procedure in certain matters, a clear division of competence between a federation and republics – with an equally clear indication of the principles of uniformity applied across the entire state, etc. This interesting model, in practice, became more of a structural than a functional federation, especially in the light of being a real socialist state.

Notwithstanding the evaluation of the practice in this scope, it needs to be stressed that the Czechoslovak political experience differed here from that of Poland; the latter was a unitary state, not plagued by any major issues of ethnic background, and its experience gained in this domain – the Polish–Lithuanian Commonwealth<sup>32</sup> – was historical and incomparable. Which did not mean that the year 1968 did not leave any visible mark. On the one hand, it was a period of student strikes and of

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commencement of spring and autumn sessions, the sessions became longer, and decrees became a rarity.

<sup>32</sup> It was established based on the so-called Union of Lublin, merging Poland and Lithuania, which had been working together under various forms of unification since 1385 (Polish-Lithuanian Union). It lasted until 1795 – until the Third Partition of Poland.

the birth of opposition,<sup>33</sup> and on the other, it was a time of disgraceful anti-Semitic activity – including a considerable ‘contribution’ by W. Gomułka.

The year 1989 initiated a period of transformation, which was again a process common not only to Poland and Czechoslovakia but also to all of Central and Eastern Europe – including the USSR. But the course and sequence of events taking place in Poland and Czechoslovakia differ.

In Poland, the change had been seen coming since the 1980s. The protests of workers of the Gdańsk Shipyard spawned the resistance movement of Solidarity, aimed at establishing a new trade union. The authorities’ reaction to strikes involved the institution of martial law<sup>34</sup> and the imposition of sanctions against the opposition affiliated with Solidarity. 40 people were killed and over 10,000 were interned – including Lech Wałęsa. So it was far from the Velvet Revolution.

But the 1980s were also a time of positive political change as well. 1980 was the year of the establishment of the Supreme Administrative Court (there was no administrative judicature in the PPR Constitution), 1982 – of the State Tribunal (constitutional accountability) and the Constitutional Tribunal at the same time, with the latter commencing its activity only a couple of years later.<sup>35</sup> In 1987 an act was adopted establishing the institution of the Polish Ombudsman [literally translated as the Advocate for Citizens’ Rights] (the institution was constitutionalised only in 1989). Acts of international law were included in the legal circulation (it was impossible to quote them earlier even in the decisions of the CT). In the end, February-March of 1989 saw the beginning of the so-called Polish Round Table, where Solidarity came to an agreement with the government (especially with the party), which led to a draft of amendments to the constitution: the institution of the president was to substitute the Council of State (the National Assembly took

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<sup>33</sup> The tinderbox was the banning of the performance of Adam Mickiewicz’s play *Dziady* at the National Theatre in Warsaw as it was considered anti-Soviet by the authorities (it was actually an anti-tsar epic from the partition era), which led to a resistant against censorship and, consequently, resulted in demonstrations and rebellion called the March events.

<sup>34</sup> The constitution did not provide for situations of a state of emergency because it was decided in 1952 that such a state was typical of a bourgeois state, and as such it did not apply to a state of workers and peasants. This was also why there was no law regulating the legal order in states of emergency. Martial law could be instituted by the Council of State if there was a threat to the state’s security (which it did), and the necessary legal act was passed on 12 December 1981 in the form of a legislative decree even though the Sejm was still in session (decrees could not be passed during parliament sessions). Martial law was suspended on 31 December 1982 and abolished on 22 July 1983. In 2011, the Constitutional Tribunal (K35/08) declared the issuance of the decree a violation of the principle of legalism, considering it unconstitutional.

<sup>35</sup> The authorities delayed adopting the Act on the CT, which was drawn up only in 1985, and the Tribunal issued its first decision in 1986.

pains to elect W. Jaruzelski to assume this function) and a 100-member Senate was established; the Solidarity-affiliated opposition was given access to the parliament;<sup>36</sup> the National Council of the Judiciary was formed as a body controlling the independence of the judiciary. The first round election was held on 4 June 1989, and the second-round on 18 June of the same year. To the ruling party's amazement, Solidarity candidates won all the seats in the Sejm and 99 seats in the Senate, and a famous Polish actress made a TV announcement recalled till this day: "Ladies and Gentlemen, on 4 June 1989, communism in Poland ended". The declaration was a bit exaggerated, but the events that followed proved this half-forecast to be true. After the election, General Kiszczak (PUWP), "the architect of the Round Table", appointed the Prime Minister, did not manage to form a government (nobody was willing to take part in it), so Adam Michnik suggested: "your president, our prime minister", and the government was assembled by Tadeusz Mazowiecki (Solidarity opposition), forming a government composed of representatives of all parties present in the parliament. In December 1989, another amendment to the 1952 Constitution introduced the principle of the democratic legal state, Poland changed its name back to the Republic of Poland, the nation was declared sovereign, the leadership of the party was abolished, and a range of regulations reforming the domestic economy was implemented. In 1992 another Small Constitution was passed.<sup>37</sup>

And although there was still no new constitution, and the country became a battleground for political parties (appearing, disappearing, and changing dynamically<sup>38</sup>) and their programmes. Sometimes "the new" won, sometimes "the old" returned,<sup>39</sup> but all that was taking place within the framework of a temporary constitution, amended for the purpose of further political transformations. It can be thus said that the revolution was becoming more and more velvet.

<sup>36</sup> In the nearest election 35% of seats in the Sejm and 100% of seats in the Senate was to be vied for by way of free competition.

<sup>37</sup> The Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government (Journal of Laws No. 84, item 426). In Polish literature – see e.g.: R. Chruściak, *Treść małej konstytucji z 1992 r.*; M. Kruk, *Praktyka konstytucyjna pod rządami małej konstytucji z 1992 r.*; J. Trzeciński, M. Wiącek, *Mała konstytucja z 1992 r. na drodze do uchwalenia Konstytucji RP z 1997 r. – próba uogólnień*. All texts featured in: *Małe Konstytucje...*, pp. 97 et seq., 119 et seq., 149 et seq.

<sup>38</sup> This was how e.g. the Polish Beer-Lovers' Party was established, formed by a satirist. It won quite a large number of seats in the 1991 elections, but it split into factions in the Sejm; the Polish called these factions Large Beer and Small Beer.

<sup>39</sup> In e.g. 1993, when President Wałęsa dissolved the Sejm with a coalition government of H. Suchocka, the Democratic Left Alliance (social democrats) won the elections, considered a continuation of the communist movement.

The mention of the “Velvet Revolution”, a notion never used in Poland when speaking of the Polish transformation, is a conscious reference to the Czechoslovak transformation (and very well-known and popular in this context). Democratic aspirations started in exile, where Václav Havel, Miloš Forman, Milan Kundera, and others were developing a cultural opposition, which bred a movement known as Charter 77. While the celebrations of 17 November 1989, held in honour of Jan Opletal ended with a clash with the police, they initiated everyday manifestations, and the general strike of 27 November underpinned the victory of the Civic Forum established by Václav Havel. Everything went quickly from then on: the following December elections resulted in a government dominated by the Civic Forum, and in July the next year V. Havel was elected president (for 2 years). The transformation of this nature was called the Velvet Revolution, with an emphasis on its civic spirit. As one chronicler documenting its course noted, “it was not hunger or poverty that pushed people out to the streets to demand pay rises. It was the desire to return to freedom and democracy which they had not forgotten since 1968 despite an apparent peace”.<sup>40</sup> The Velvet Revolution sparked further quick political changes and a reorganisation of the legal framework,<sup>41</sup> and November 1989 already saw preparations to drawing up a new constitution with a focus on human rights. 9 January 1991 saw the passing of the Charter of Fundamental Human Rights and Freedoms in the form of a constitutional act, and the adoption of new laws on courts and on the Constitutional Court. This was happening simultaneously with the reorganisation of the economy and processes of restitution. Eventually, the year 1992 marked the beginning of an era of a new constitution.

The political and system transformations taking place in both states – in Czechoslovakia and Poland – took different forms. Looking at the chronology of events and the effectiveness of passing new fundamental constitutional acts, Czechoslovakia certainly deserves to be called the leader: in 1991 Czechoslovakia already had its Fundamental Human Rights and Freedoms whereas Poland had to still to do with a chapter on the fundamental rights and duties of citizens under the 1952 Constitution<sup>42</sup>: yet, the principle of the state of law introduced in 1989 made it possible – especially for the Constitutional Tribunal and courts – to interpret rights and

<sup>40</sup> Y. Barelli, *La révolution de velours*. Paris 1990, pp. 11–12.

<sup>41</sup> P. Rychetský, *Vývoj právního řádu po 17. listopadu 1989 a výhled dalších systémových změn právního řádu*, “Právník” 1992, 3–4; in Polish literature – see: M. Kruk, *Konstytucja Republiki Czeskiej*, Warszawa 1994, p. 15 et seq.

<sup>42</sup> As a provision kept in force under the Small Constitution of 1992, which repealed the 1952 Constitution but kept valid those of its provisions which were not in conflict with the constitutional act, basically regulating only the system of governance and the basis for the activity of self-governments.



freedoms as a category of human rights in a new way. While the Constitution of the Czech Republic was passed in 1992, Poland had still to wait five more years for its own.<sup>43</sup>

Exactly... the Constitution of the Czech Republic! A resurfacing of the issue that had made the two states different since 1919, concerning the differences in the ethnic composition of each of them. The common state of Czechs and Slovaks was initially governed by the concept of unitarism and national uniformity, then by a pretended autonomy of Slovakia, and later by federalism, but it seemed that none of those solutions satisfied Slovaks. Maybe it was about the already mentioned superficiality of institutions, typical of the early period of real socialism (the establishment of a federation in 1968 did not translate into at least adopting republican constitutions). Declarative autonomy, bogus federation?

The effect was a final decision on separating and making both states independent of each other. Without going into details of the course of the decision-making process leading to the said result, well-covered in a number of publications (e.g. a dilemma: a referendum or a constitutional procedure?), it needs to be said that the decision was made by the Federal Assembly on 25 November 1992 by adopting a constitutional act "on the dissolution of federation", which made it clear that starting 1 January 1993, it would be replaced by the Czech Republic and the Slovak Republic.

Looking at the various ethnic-motivated conflicts happening in the world, like the recent conflict between Spain and Catalonia, the legal and political culture of the process of emergence of sovereign states in the former Czechoslovakia is truly admirable. It is all the more impressive for three main reasons: because of Slovakia's persistence in striving for the achieved goal – even if some traces of nationalism could be identified there; because of Czechs' moral maturity expressed in yielding to Slovakia's aspirations – even if those aspirations were not fully understood and considered right; and, finally, because of Czechoslovakia's law-abidingness in dealing with the problem – despite the criticism of the lack of a referendum as the best form of direct participation of its citizens in the decision-making process. And for the respect of the shared past, manifested even in formal aspects, such as in acknowledging the Charter of Rights (adopted by a Czechoslovak parliament) as an act binding in the Czech Republic.

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<sup>43</sup> The Sejm and Senate elected in 1989 drew up their drafts (separately), but it was only on 23 April 1992 when the Constitutional Act on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland was adopted, handing this function over to the National Assembly (both chambers combined) and eventually – approval in a referendum.

The new period of constitutionalism of the Czech Republic commenced with the said 1992 Constitution; in Poland, it started with the 1997 Constitution of the Republic of Poland. What makes the two constitutions differ in formal terms, apart from the dates of enactment, is their structure and volume.<sup>44</sup> While the Constitution of the Czech Republic is composed of two acts (the Constitution and the Charter), with other constitutional acts acceptable and featured as well, the Constitution of the Republic of Poland is a uniform act; what is more, – against the tradition and custom – it does not accept constitutional acts that could regulate certain matters “apart from” the constitution.<sup>45</sup> Therefore, any constitution-rank regulation must be a permanent amendment to the Constitution of the Republic Poland, made in the form of “an act on amendment of the Constitution”, incorporated into the content of the Constitution.

While the formal differences between the two can be considered of lesser importance, the question about the substantive similarities and differences seems to be of greater significance. And here we can speak of two domains as well: specific differences and similarities in the formation of particular principles, procedures or institutions, and – on the other hand – in the model of the system of governance. It is clear it is not possible to discuss all the details,<sup>46</sup> hence just several remarks regarding selected aspects.

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<sup>44</sup> The Constitution of the Republic of Poland consists of 243 articles, which has been occasionally considered too voluminous, but there have also been arguments that many important matters are not regulated in sufficient detail and precisely enough.

<sup>45</sup> Traditionally, the Polish constitutionalism has provided for two types of acts capable of amending the constitution: acts on the amendment of the constitution and constitutional acts. The former are to implement permanent changes, incorporated into the text of the constitution. The latter are to institute incidental changes (e.g. a one-off change of the term of office of e.g. the Sejm, meaning a form of dissolution of the chamber if there has been no other option) or to regulate constitutional matter in periods of constitutional vacancy (Small Constitution of 1947) or to regulate constitutional matter “additionally”, as was the case with the said Constitutional Act of April 1992. The Small Constitution of 1992 was quite special. It abolished the 1952 Constitution, but its interim provisions maintained a great majority of the provisions of the abolished act in force (the argument behind it was the intention to get rid of the constitution of Stalinist origin). The 1997 Constitution defined a finite catalogue of sources of generally applicable law (mainly in Art. 87), not mentioning the constitutional act therein (or the legislative ordinance, whose regulation was left to the provisions on emergency states).

<sup>46</sup> Polish-Czech legal seminars have been organised since 2007. The first took place in Toruń, and its theme was “the constitutionalism of the Czech Republic and Poland 15 and 11 years after the adoption of the constitutions of both states” (see Z. Witkowski, V. Jirásková, K. Witkowska-Chrzczołowicz (eds.), *Konstytucjonalizm czeski i polski 15 i 11 lat po uchwaleniu Konstytucji obu państw*, Toruń 2009), and the last was held in Łódź, organised by K. Skotnicki, discussing 25 years of the Constitution of the Czech Republic, taking place in December 2017 (publication in progress). The constitutional problems of Poland and the Czech Republic have been covered extensively.

Firstly, the fundamental principles. I will start with a discussion on the principle of the democratic state of law and on the principle of the separation of powers. Both these principles are present in both constitutions, but the content of each reveals some differences. The principle of the separation of powers featured in the Polish constitution is expressed on the one hand by a literal, very traditional and conventional formula included in Art. 10, naming its essence (separation of and balance between the three types of power) and the bodies in charge of each type of power. This has labelled the principle as one of “tripartite separation of powers”. There have even been arguments pointing to the necessity for each power to supervise and be supervised by one another – also the judiciary to be controlled by the other types of power.<sup>47</sup> Such a formula, defining this principle *expressis verbis*, is not found in the Czech constitution. This stems partially from the definitions of particular types of power in the titles of the chapters of the Polish constitution (legislative power, executive power, judicial power) and from the provisions concerning the relationships between the said powers, which offers a broader and perhaps more modern view of the separation of powers, especially preventing the legal accumulation or political concentration of powers. On the other hand, the Polish formula provided in the said Art. 10 does not make it possible to deny the constitutional declaration of the principle in question even if the interpretation thereof is streaked with ill will.

The second principle concerns the democratic state of law. The Polish constitution (Art. 2) states that it involves the implementation (“materialisation”) of the principles of social justice, while the Czech constitution (Art. 1) associates it with the respect for the rights and freedoms of man and of citizens. It is hard not to notice additional elements of constitutional regulation of the principle in question in the Czech Republic. First, any changes in the essential requirements for a democratic state governed by the rule of law are impermissible (Art. 9). The significance of this restriction can be appreciated fully only when any constitutional changes are actually made. The Polish parliamentary opposition accuses the current government of pushing such changes through by way of ordinary acts in the light of not having the required constitutional majority, with occasional statements like “you’ll change the constitution as you like only if have the required majority” being made. The Czech constitution says clearly: if such changes were to violate the principle of the state of law, they may not be implemented.

Another value that should be stressed here is the principle expressed in Art. 6 of the Czech constitution: political decisions emerge from the will of the majority

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<sup>47</sup> This is one of the arguments regarding providing the Sejm and the Minister of Justice (i.e. the Public Prosecutor General) with a range of entitlements violating the independence of the courts.

manifested in free voting; the decision-making of the majority shall take into consideration the interests of minorities. This is a principle absent from the Polish constitution, and the absence thereof has been felt in some political eras. The majority is sometimes convinced to be the sole and exclusive representative of the nation on the local political scene.<sup>48</sup>

Another issue concerns the treatment of international law and European integration in the constitutions of both states. Both constitutions position international law in the domestic legal framework. But while in the Czech constitution the ratified and promulgated international agreements on the rights and freedoms of man come first before domestic acts, the Polish constitution deals with the issue in a more complex way. There is a general principle that the Republic of Poland abides by the international law binding upon it, but the special provisions state that when a ratification requires prior consent granted by statute (Art. 89 and 90), and only agreements so ratified are explicitly named to take precedence over domestic acts (secondary EU law is also given precedence in the event of a conflict with some act).

This leads to the issue of taking the phenomenon of EU integration and of its consequences for a given EU member state into account in the constitutions in question. What makes both states highly similar, i.e. their membership in the EU (a range of its aspects and consequences), was not reflected in the Czech constitution to the same extent as in the case of e.g. the constitution of France, West Germany and other states, for the obvious reason of its "early birth",<sup>49</sup> and only the 2001 amendment changed the situation.

The situation of Poland was different. The constitution enacted later was ready and 'able' to deal with the matter of integration, and the prospect of accessing the EU was closer (the association agreement was already concluded), so the references to such issues were not completely absent. Since the very beginning, the Polish constitution had provided for e.g. a procedure of ratification of the accession agreement, requiring the ratification to come after consent is expressed in an act passed

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<sup>48</sup> The author of this text has offered some more extensive remarks on the issues in question in the paper entitled "Zasada demokratycznego państwa prawa w Konstytucji Republiki Czeskiej" ["The Principle of a Democratic State of Law in the Constitution of the Czech Republic"], presented at the Polish-Czech seminar in Łódź referred to earlier.

<sup>49</sup> The Czech Republic's problems with even the association agreement, concluded back in the federation era, and with the necessity to conclude a new agreement are brought up by J. Malíř. See J. Malíř et al., *Česká republika v Evropské unii (2004–2009)*, Plzeň 2009, p. 8. Moreover, the book offers a range of analysis in the field of the adaptation of the Czech Republic's institutions to EU integration.

by way of a special procedure<sup>50</sup> or in a referendum. And such referendums were organised both in Poland and in the Czech Republic (announced by an amendment of the constitution, discussed further). But the 1997 Polish Constitution was never supplemented in addressing the EU-related matters since then.<sup>51</sup> The Czech constitution, in turn, – as already mentioned – was amended in connection with EU integration: Art. 10a and 62 were added to regulate the procedure of ratification and the competence of the president in ordering referendums, and to define certain duties of the government and the parliament in the area of making decisions and provision of information (Art. 10b). Also, Art. 87 and 89 were updated with new content, demanding that international agreements be examined by the Constitutional Court before they are signed and prohibiting the ratification of agreements not compliant with the Czech legal framework.<sup>52</sup> In this situation, the Czech constitution seems to be slightly richer in provisions concerning EU membership; no other constitution features the proper name of the EU. Literature points to the important role of interpretation of constitutions in conditions of integration, and this is actually the case in both states. The vast body of both Polish and Czech literature<sup>53</sup> on the issue of the functioning of states in conditions of EU integration proves the said matters to remain topical. Even when – or perhaps all the more since – sceptical opinions appear now and then.

As for the institutional domain, it seems reasonable to raise only several issues. The first would be the structure of the legislative power, with both constitutions adopting a dual-chamber model, with the Senate being, traditionally, the upper chamber in both cases. In the Czech Republic, it is elected for 6 years, one third of its members every two years, which makes the term of office for each chamber different (the term of office of the lower chamber is 4 years). This may thus differentiate the political composition of the two chambers. Also – the Senate, not dissolved

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<sup>50</sup> A resolution passed by a 2/3 majority vote in both chambers, which makes it different even from the procedure of amending the constitution, where only an absolute majority vote is required of the Senate.

<sup>51</sup> Such an attempt was made when working on an amendment to the Polish constitution, an idea put forward by B. Komorowski, first as the Marshal of the Sejm and later as the President of the Republic of Poland. The outcome of those works was given a provisional title of “rozdział europejski” [“the European chapter”], but since there was no consensus in the parliament, the amendment was not passed (see: *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu*, Warszawa 2010).

<sup>52</sup> The Constitutional Act of 18.10.2001 (no. 395/2001 Sb.).

<sup>53</sup> The issue was raised as part of combined Polish-Czech efforts in the form a joint publication by V. Jirásková, Z. Witkowski (ed.), *Ústavní systém České republiky a Polské republiky po přistoupení k EU*, Praha 2011. The publication includes materials from the 2<sup>nd</sup> Polish-Czech seminar, with the seminars referred to above.

with the expiry of the term of office of the Chamber of Deputies, may perform different parliamentary functions at that time, i.e. issue legislative decrees to address matters that cannot be delayed (Art. 33).<sup>54</sup> Such a dual-chamber solution makes more sense that the same-length terms of office of the Sejm and Senate in Poland (4 years) with simultaneous elections<sup>55</sup> and potential dissolution of both, even when the Sejm itself decides to shorten its term of office. This favours repeating party structures (the same political majority) and it cannot be averted even by the fact that senators are elected in single-member constituencies. In such a situation, if the majority of a party is disciplined (like now), the Senate is not even a chamber of reflection because it backs all Sejm bills quickly and apparently without thinking. As for the legislative procedure, the final decision in both states (if the Senate amends or rejects a bill) is made by lower chambers – the Chamber of Deputies and the Sejm. However, in Poland, in two cases the chambers have equal rights, i.e. both have to pass a bill in the same wording.<sup>56</sup>

Since the history of the Polish constitutionalism shows that the way in which the constitution has shaped the model of the presidency has been a frequent problem, which has been mentioned earlier herein, it seems reasonable to take a closer look at this institution – especially in comparison to the Czech constitution. As both states have a tradition of cultivating the parliamentary system of governance (the term used usually in Poland is the parliamentary-cabinet system), presidents are one segment of the dual executive power. In terms of the procedure of presidential elections, the Czech Republic remained faithful until quite recently to its conventional model of the system in which the head of state – if not a monarch – had been elected by the National Assembly. Since 1990 this has been what made the system of the Czech Republic and the common election concept adopted in Poland (and in many other European states which resigned from parliamentary presidential election) different. This is how President Lech Wałęsa was elected. In the Czech Republic, the change

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<sup>54</sup> In Poland there is no such need because the term of office of the chambers expires on the day before the assembly of the newly elected Sejm for its first session; the chambers work in accordance with the principle of permanence, as in the Czech Republic. Legislative decrees can be issued only by the president at the request of the Council of Ministers and in limited matters, only during martial law, when the Sejm is unable to assemble in session.

<sup>55</sup> Both the Chamber of Deputies and the Sejm are elected in five-point elections (i.e. proportionally), and the Senates of both states – by majority vote.

<sup>56</sup> This applies to a bill to amend the Constitution (Art. 235, section 2) and the specific act pursuant to which “the Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters” (Art. 90). Instead of passing such a bill, the consent for ratification may be granted by way of a referendum, as in the case of the agreement on Poland’s accession to the EU.

took place in 2012.<sup>57</sup> A president elected “by the Nation”, meaning by way of public vote, caused a problem in the Polish doctrine because of the imbalance between the significance of legitimacy (“elected by the Nation”) and the significance and scope of competence (“guarding the chandelier” in the Presidential Palace<sup>58</sup>), when the entire real governing power was granted to the Council of Ministers. The 1997 Polish Constitution is quite strict on this matter because the concession made to the president in the Small Constitution of 1992 (the right to interfere with the state policy implemented by the government) was taken advantage of extensively at times by the president of the time, L. Wałęsa, known to be in favour of strong presidency.<sup>59</sup> But an in-depth analysis of the competence of the President of the Republic of Poland, both in terms of matters subject to countersignature and the prerogatives granted (the constitution lists 30 such prerogatives in Art. 30, section 3) does not lead to such “pessimistic” conclusions, proving that in certain situation, the president – especially when they want and are able to – may have a significant impact on the course of state affairs and on the decisions made in the domain of governance. It seems that the Czech history did feature cases of the country’s president fighting for a stronger position. The Czech constitution “allows” the Czech president to participate in government sessions; in Poland, this possibility was customarily excluded (even in the case of the president’s representative) and the 1997 Constitution does not provide for such an option. The Polish constitution – unlike its Czech equivalent – does not allow the president to require ministers to provide them with reports and analyse matters within each minister’s area of responsibility together with the president. It does, however, let the president assemble the Cabinet Council (the Council of Ministers chaired by the president), which is not granted the competence of the government. In practice, the institution appears rarely and is not very effective.

Both constitutions grant presidents the right to refuse to sign bills and submit them back for re-examination<sup>60</sup> (adoption), referred to commonly as the power of

<sup>57</sup> The Constitutional Act no. 71/2012 Sb and the Act on the Election of the President of the Republic no. 275/2012 Sb. In Polish literature – see: M. Kruk, *O trybie wyboru prezydenta Republiki Czeskiej*, [in:] *Ustroje. Tradycje i porównania. Księga jubileuszowa prof. Mariana Grzybowskiego*, Warszawa 2015, p. 453, where there is also a mention of the previous procedure of election and the arguments for the change.

<sup>58</sup> This is how Donald Tusk referred to the role of the president some time ago, explaining why he would not run for the office. Today it is believed he might change his mind, but this is only media speculation.

<sup>59</sup> See: M. Kruk, *Praktyka konstytucyjna...*, p. 138 et seq.

<sup>60</sup> Polish presidents take advantage of the power of veto quite often when the ruling party is a party being in opposition to that where a given president comes from (a sort of cohabitation); it happens quite rarely when the party a given president originates from is in power, though. That is why



veto.<sup>61</sup> The presidents of both states may dissolve the chamber (in Poland, the constitution speaks of shortening the term of office and, as already mentioned, this applies to both chambers). Neither the Czech nor the Polish constitution grant the president freedom, but the reasons both give are slightly different.<sup>62</sup>

Without going into details of both political systems, which feature, obviously, a range of both similarities and differences, it can be generally said that both constitutions – the Czech and the Polish – ‘materialise’ a vision of a democratic state of law, grounded in the tradition of the European model of parliamentary governance, with a significant attachment to their ‘native’ political traditions. As written in the introduction of the quoted book published as an outcome of the said Polish-Czech seminar, both constitutions “...tread with confidence although not without difficulties...” towards modern democracy.<sup>63</sup>

And such difficulties may be identified in the Polish constitutional law. They started from changes concerning the Constitutional Tribunal.<sup>64</sup> Only time will tell if their occurrence continues to make both states increasingly different, or if the Polish political problems will soon be solved in the spirit of a democratic state of law. But this is a subject that should be discussed separately.

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in 2017, the Law and Justice party being in power found it quite a surprise to see President Andrzej Duda vetoing two bills (one on the Supreme Court, the other on the National Council of the Judiciary). The outcome, however, is that the new acts based on those bills, passed on the initiative of the president, are considered unconstitutional by the opposition and by a significant part of the legal environment alike.

<sup>61</sup> But cases of refraining from signing bills but not submitting them back to the Chamber of Deputies – by e.g. President Václav Klaus and other presidents – are quite well remembered. Viz R. Suchánek, V. Jirásková et al., *Ústava České republiky w praxi. 15 let platnosti základního zákona*, Praha 2009, p. 165, note 50.

<sup>62</sup> In Poland, this is obligatory only when the Sejm exhausts all possible options to appoint a government without granting any potential government a vote of confidence, and it is optional – as decided by the president – when the budget is not passed within a constitutionally defined deadline.

<sup>63</sup> *Konstytucjonalizm...*, p. 8.

<sup>64</sup> See: P. Radziejewicz, P. Tuleja, *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego, czerwiec 2015–marzec 2016*, Warszawa 2017. Also: M. Kruk, *La Pologne: la Constitution, la cour constitutionnelle et les inquiétudes de l'opinion internationale*, “Krytyka prawa” 2017, 9(1), pp. 32–63.