

PETER COLLIN  
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Agnieszka Bien-Kaczała and Anna Tarnowska

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## The Constitutional Embedding of Differences, 1921–1997: The Polish Example

### 1 Introduction

Investigating the embedding of differences in Polish constitutional history requires a cross-referencing approach, which is, however, basically limited to the 20th century. In the 19th century, the residents of the Polish territories under Prussian, Austrian and Russian rule were merely bystanders, not subjects and co-creators of the modern constitution-making process. Therefore, the discussion can only be based on the constitutions of 1921,<sup>1</sup> 1935,<sup>2</sup> 1952<sup>3</sup> (the 1952 case is not the result of an effort of the Polish sovereign body – the Nation – as the text was adopted in close agreement with the Soviet authorities by a parliament fully dependent on, and operated by, the Communist Party, PZPR),<sup>4</sup> and, finally, the so-called Constitution of the Third Republic of 1997.<sup>5</sup> The way in which the lawmaker approaches the question of the Nation as well as the social and economic issues in these constitutions seems to be sinusoidal, which also reflects the embedding of diversity in different ways. At the same time, it is worth noting that the Polish interwar constitutions were created in completely different factual circumstances from the post-war ones. The constitutions of 1921 and 1935 were established for a multi-ethnic,<sup>6</sup> multilingual, multidominational and multicultural state,

1 Constitution of the Republic of Poland of 17th March 1921 (Journal of Laws No. 44, item 267) with key amendment of 1926 – Act Amending the Constitution of the Republic of Poland of 17th March 1921 of 2nd August 1926 (Journal of Laws No. 78, item 488).

2 Constitutional Law of 23rd April 1935 (Journal of Laws No. 30, item 227).

3 Constitution of the Polish People's Republic of 22nd July 1952 (Journal of Laws No. 33, item 232) and its fundamental amendment – the act on amending the Constitution of the Polish People's Republic of 29th December 1989 (Journal of Laws No. 75, item 444).

4 Polska Zjednoczona Partia Robotnicza (Polish United Workers' Union; created 1948 and dissolved 1990).

5 Constitution of the Republic of Poland of 2nd April 1997 (Journal of Laws No. 78, item 483).

6 Carrying out the census in those times did not raise such controversy as, for example, under Prussian rule [BELZYŃ (2013) and its polemics], although, of course, the process was

which inherited three key legal orders after the partition and did not fully unify them until the outbreak of the Second World War. The Constitutions of 1952 and 1997 were created in different conditions: as the state shifted geographically (in 1945), the result was the creation of a homogenous state in many respects. Paradoxically, Polish constitutions – with the attitude of their makers towards how to construct and to emphasize diversity, or how to leave some issues unsaid – are arranged into a specific sine wave. The Constitutions of 1921 and 1997 have much in common. They are post-regime, post-transformation acts (after regaining independence in 1918 and sovereignty, and after the fall of Soviet influence in Poland, in 1989), which grant the role of the sovereign body to the Nation, understood as a heterogeneous whole, recognising the message of historical experience, but constructing a democratic-liberal system for the future.<sup>7</sup> Both constitutions contain the key principles of modern constitutionalism (tripartite division of power, limited and responsible government, independence of the judiciary). They are based on the triad of democracy, the rule of law and individual freedom.

also burdened with some errors. The first census conducted in 1921 (with the exception of part of Upper Silesia and the region of Vilnius) was entrusted to individuals deemed competent and respected in their communities, acting as census takers. According to its results, 69% of citizens identified as of Polish nationality, 15.17% as ‘Ruthenian’ [Ukrainian and Rusyn], 7.97% as Jewish, 4.03% as Byelorussian, 2.99% as German, and 0.09% as Lithuanian. Cf. Pierwszy Powszechny Spis Rzeczypospolitej Polskiej [First Common Census of the Republic of Poland] z dnia 30 września 1921. Mieszkania. Ludność. Stosunki zawodowe [Habitation. Population. Professional Issues], Warszawa 1927, Tabl. XI: Ludność według wyznania religijnego i narodowości [Population according to denomination and nationality]. According to the Second Common Census of 1935, Polish was declared as their native/first language by 69% of the then Polish citizens, Ukrainian by 10.1%, ‘Jewish’ [Yiddish] by 7.8%, Rusyn [Ruthene] by 3.82%, Byelorussian by 3.1%, German by 2.32%, Hebrew by 0.76%, Russian by 0.43%, Lithuanian by 0.26%, etc. (the second census did not include the question about nationality). Cf. Drugi Powszechny Spis Ludności z dn. 9 XII 1931: Mieszkania i gospodarstwa domowe. Ludność, Warszawa 1938, Tabl. X.

- 7 As expressed in the Preamble of the Constitution of 1997: “We, the Polish Nation – all citizens of the Republic, 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, Equal in rights and obligations towards the common good – Poland, Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, Recalling the best traditions of the First and the Second Republic, Obligated to bequeath to future generations all that is valuable from our

In turn, the authoritarian Constitution of 1935 and the Communist one of 1952 both created undemocratic systems, also by distinguishing certain groups from others, building new political elites based on undemocratic criteria, and prioritizing certain legal institutions supporting the system. Their authors, who used the Constitution as a *programme*,<sup>8</sup> merely applied various ideological principles to its framing.

In conclusion, these last 100 years of Polish history, as a laboratory of constitutionalism, clearly seem to offer an outstanding – but captious as well<sup>9</sup> possibility to apply a comparative approach in research on diversity (e. g. democratic / undemocratic system cross-referenced with heterogeneity / homogeneity of ethnicity / dominant culture / religion). Despite similarities, the constitution-makers of each period adopted distinct attitudes to diversity and offered alternative blueprints on how to “manage the controversy”.<sup>10</sup> Obviously, our reflection must be limited to the selected question and cannot aspire to be a comprehensive study. Issues selected for further consideration refer back to Manuel Bastias Saavedra’s essay.

## 2 Constitutions on the nation, nationality, and equal citizens

The term *Nation* is deeply rooted in Polish constitutionalism, insofar as the deputies of the Great Sejm (1788–1792) adopted the so-called 3rd May Constitution (formally entitled “Government Statute” to differentiate this Act from the ordinary legislative acts, simply called “constitutions”) in 1791

heritage of more than a thousand years, Bound in community with our compatriots dispersed throughout the world, Aware of the need for cooperation with all countries for the good of the Human Family, Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies, Recognizing our responsibility before God or our own consciences, Hereby establish this Constitution of the Republic of Poland as the basic law for the state based on respect for freedom and justice, cooperation between the public bodies, social dialogue as well as on the principle of subsidiarity in strengthening the powers of citizens and their communities. We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakable foundation of the Republic of Poland.”

8 FRANKENBERG (2006) 453.

9 See FRANKENBERG (2006).

10 GEERTZ (1983) 184.

and applied this bold term to the constitutional text. It was intended to be a crucial step in Polish modernity and a kind of internal insurance policy against powerful neighbours interfering in Polish affairs for decades. The Constitution survived for only one year until it was repealed under the pressure of Russian troops, after the lost war of 1792. The Constitution, still preserving the social status quo of noblemen, townsmen and peasants with some political and economic concessions, reflected also some Enlightenment ideas in an exceptional melting-pot of the old and the new. So far, attempts to use the word ‘Nation’ had been blocked by the conservative members of the Great Sejm, but, in the “Government Statute”, the term appeared, in a bold initiative. However, its precise meaning is still a question for debate: is it more than, merely, the political noblemen’s Nation? If “all authority in human society takes its origin in the will of the people” (Article V), did the people still have to be represented exclusively by the noblemen sitting in the Great Sejm? Quite the reverse, commentators agreed that the notion of *Nation* used in Article XI referred to a more universal understanding of the term.<sup>11</sup>

The Constitution of 1921 belongs to the family of similar fundamental acts created for the liberal, democratic, republican systems of those European countries new-born or reborn after the First World War. The reference point for the Polish Constitution was the French system of government of the Third Republic. ‘The Nation’ is a basic construct, repeated in the preamble (“We, the Polish Nation”), in the constitutional principles (as a declaration of sovereignty expressed by the universal formula: “the supreme power in the Republic of Poland belongs to the Nation”), and several other times: the public bodies are “bodies of the Nation” (Polish: “organy Narodu”), and parliamentarians are “representatives of the whole Nation”. Even when “the Polish Nation” appears only in the preamble and in the text of the presidential oath, it raises the question of the inclusion mechanism: no other concrete nationalities appear.<sup>12</sup> The constitutional provisions concerning

11 Article 11: “The Nation bears a duty to its own defence from attack and for the safeguarding of its integrity. Therefore, all citizens are defenders of national integrity and liberties. [...]” Cf. TARNOWSKA (2016).

12 It happened only at the level of the ordinary legislation. It may be illustrated by the Law on the Principle of the Voivodeship Self-government of 1922 (Journal of Laws No. 90, item 829), which also referred to the national question in a very restrained way: in the south-eastern provinces, provincial Dietines divided in two *curias* were to be established,

ethnic groups refer to the “*national minorities*”, “equal life, freedom and property protection regardless of *origin, nationality, language*, race or religion” or “the right [of each citizen] to preserve their *nationality and to care for their language or national characteristics*” (Article 109).

The crucial constitutional category determining the legal status of the individuals is citizenship, understood universally as belonging to the state as a consequence of birthplace or secondary processes such as marriage or naturalization. A relatively broad catalogue of rights and freedoms was granted to “all citizens”. The Constitution of 1921 guaranteed their equality before the law, and public offices were to be equally accessible to all on terms and conditions prescribed by law. With the same constitutional provision, family and state privileges, coats of arms, and family and other titles were abolished, except for scientific, official and professional ones (Article 96). Article 110 refers exactly to the equal rights of “Polish citizens belonging to national, religious or linguistic minorities”. The full political and social participation of the individuals is constitutionally connected with citizenship, not nationality. The constitutional limitations of this participation are based on objective prerequisites: age and conviction for certain crimes, the latter resulting in a permanent or temporary deprivation of citizenship rights. This allows us to formulate the thesis that a ‘Polish Nation’ may already be understood in the March Constitution as it is in the current constitutional regulation (of 1997): as a political, non-ethnic category – as a community of equal citizens.<sup>13</sup>

The Constitution of 1935 dealt with the issue of the multinationalism of the state in a surprisingly simple way: it included not a single reference to ‘the Nation’ or ‘Polish Nation’. The Constitution created the fundamentals for an authoritarian (or ‘Bonapartist’) state, but unlike many other European constitutions of the 1930s, it did not formulate a nationalistic programme. As an opus originating in Marshall Piłsudski’s political camp, the constitution rather expressed the idea of cooperation of the nations within the framework of the Polish Republic (the ‘Jagiellonian concept’) and avoided

one of which should be a Ukrainian one (“*kuria ruska*” / “*Ruthenian curia*”). The provincial executive body was to consist of “two national sections”. Furthermore, a Ukrainian University was to be set up. The Law never came into force.

13 Cf. also the Rulings of the Constitutional Tribunal of 31 May 2004, K 15/04 and of 12 January 2005, K 24/04; SAFJAN/BOSEK (2016), commentary to Art. 4.

the category of ‘Polish Nation’, which could easily have been misused and narrowed down to a purely ethnic category by the right-wing parties, such as National Democracy, a key opponent of Piłsudski’s political block. Therefore, the 1935 Constitution operated exclusively with references to the term ‘citizens’ (e. g., in the formula, “the state is a common good of all citizens”). It should be pointed out that this broad civic platform did not correlate with equally broad representation: as said already, the Constitution established an authoritarian system of government and did not involve all citizens in public life in equal manner, which will be analysed below.

The Constitution of 1952 also belongs to a specific constitutional wave – to the Eastern European and Central European fundamental acts imparted and accepted by the Soviet authorities, with the only formal approval of the existence of national constituent bodies. This Constitution is framed by the term ‘Polish Nation’ multiple times, combined with the concept of a ‘people’s state’. Surprisingly, in this Communist state – associated in principle with the concept of ideological and political internationality – everything could be ‘national’, from local councils appointed by the Communist Party to culture, as well as economic planning and the liberation struggle. The use of the very term ‘Nation’ is equally varied, with references to the “wealth of the Nation”, the “respect for the Nation”, the “sovereign rights of the Nation”, the “service to the Nation”, the “needs and aspiration of the Nation”, alongside the “enemies of the Nation”. Obviously, the legal language employed to construct this new monolithic identity became one of the most important tools to falsify reality. Nationality appeared in the context of “national belonging” which, equally to race, denomination, education, length of residence, social origin, occupation and financial status, is listed as a circumstance which cannot impact voting rights. ‘Citizens’ had equal rights regardless of their nationality, race and denomination. Moreover, violating this rule by privileging or limiting the citizens in their rights – due to a mentioned characteristic – was punished, as well as spreading hatred or humiliating a person based on those “differences” (Article 69). The category of “the citizen” also became a part of this huge deception: it was used multiple times in the constitutional text despite the ongoing process of objectification of these ‘citizens’ and their deprivation of rights. The irony of this situation may be emphasized by the fact that the term, “the citizen”, was used on a large scale in everyday communication between the authorities and the inhabitants of the country, in official writings as well as, for instance, in police

warnings for a violation of the rules of the road. ‘Citizen’ was an object, not a subject of power, in the Communist state.

At the same time, this Communist Constitution was the first to introduce the term ‘women’ into the equality context, “in all spheres of state, political, economic, social and cultural life”. Moreover, the equality of women was to be constitutionally secured by several supportive provisions and institutions, such as equal pay for equal occupation; the right to social security, to education, to motherhood care and to paid leave; and the expansion of the network of maternity facilities, nurseries and kindergartens, etc. Even when the Constitution of 1952 cannot be treated as the real supreme act of the land in the legal hierarchy, its emancipatory potential cannot be underestimated.

In 1997, constitution-makers restored the basic meanings of the concepts already discussed. The constitutional term of ‘Nation’ is to be identified only with the political heterogeneous community of citizens being the source of power. The references to the ‘Nation’ are focused on constructing this community despite differences.<sup>14</sup> As a matter of fact, ‘Nation’ has been replaced in the text by the general and more abstract term of “Republic of Poland”, which is, however, a key decisive subject (“the Republic guarantees”, “protects”). The guaranties afforded to the “Polish citizens belonging to the national minorities” are formulated broadly, but some of the phrases may raise questions. If the minorities “shall have rights to participate in the resolution of matters connected with their cultural identity”, does it create a particular form of participation in public affairs, or does it just recall the universal (i. e., for all citizens) right of self-determination?

Article 32 asserts that: “All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in [...] the economic life [of the country] for any reason whatsoever.” Article 33 (1) stands out among the equality provisions: it is a direct declaration on the equality of women and men “in the family, political, social and economic life”.<sup>15</sup> There was a vivid dis-

14 As observed more particularly in the Preamble: “We, the Polish Nation – all citizens of the Republic, 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, Equal in rights and obligations towards the common good – Poland [...]”

15 With its extension in Article 33 (2): “Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal



cussion over this provision in the Constitutional Commission of the National Assembly as to whether such an emphasis on women's status was necessary in the context of the equality of "all persons" and the general prohibition of discrimination "in the political, social or economic life for any reason whatsoever", as expressed in Article 32.<sup>16</sup> It was justified by "social needs" or "social regards", to which "legal and linguistic considerations must give way".<sup>17</sup> It was also pointed out that the Constitution of 1952 had already included an analogical provision. Passing it over might have been understood as, somehow, a step back. Besides, special constitutional provisions have been made for disabled people, veterans and Poles abroad.<sup>18</sup> According to the constitutional standard established in the jurisprudence of the Constitutional Tribunal, it is, therefore, possible to differentiate between groups of citizens, provided that it is proportionate, legal, equitable and justified.<sup>19</sup>

### 3 Who are those in power: how to distinguish and how to conceal (1935 and 1952 constitutions)

The Constitutions of 1935 and 1952 depart from the egalitarian framework. They define a society composed of groups and attribute to them, more or less directly, characteristics that impose a legal status on them. In both cases, the point of departure is a proclamation of solidarity and collectivism, even if they have been inspired by different ideological and political platforms.

The April Constitution of 1935 develops the concept of solidarity, which entitles selected groups of citizens to specific competencies. This Constitution puts the collective interest above the individual; the life of society is to be shaped "within and on the basis of the state"; and the state is to ensure "the free development of society", and "give it direction". The "common

compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations."

- 16 Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego (1995) No. 17, 65–76; No. 18, 5–10.
- 17 Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego (1995) No. 37, 90–91 (statements of senator Jerzy Madej and deputy Andrzej Gwiżdż).
- 18 Article 6 (2): "The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage."
- 19 Ruling of the Constitutional Tribunal P 14/10 from 5th July 2011, OTK-A 2011 No. 6, Pos. 49.

good”, a category which may be understood fully arbitrarily, becomes the boundary of civil liberties. The clause that prioritizes the group over the individual is contained in Article 7 (1): “The citizen’s entitlement to influence public affairs shall be measured by the value of his/her effort and contribution to the common good.” Although the continuation of the article indicates that “neither origin, nor gender, nor nationality shall be the reason for limiting these rights”, the exclusive assumptions of the concept of solidarity became apparent in the Electoral Law, in particular in the 1935 Electoral Law for the Senate. Under this Act, only groups of citizens with a certain title or qualification were granted the right to stand for election as assessed by merit: as bachelors of decorations; by education: higher or secondary vocational education, or officer’s patent; and on trust, e. g., persons holding elected office in self-government.<sup>20</sup> It should be stressed, however, that this differentiation, unlike in many parallel European constitutions aiming at authoritarianism, was not based on an ethnic criterion. Moreover, as already mentioned, the leader of the ruling camp after the May Coup of 1926, Marshal Józef Piłsudski, decided that the new Constitution would not use the term ‘Nation’, but only ‘citizens’ and ‘state’, for fear that the nationalist opposition would interpret this term as referring exclusively to the Polish Nation.

The situation changed after the Second World War. The Constitution of 1952 introduced a system called a “people’s democracy” (Article 1). It was based on “an alliance between the workers’ class and working farmers” (also described as “working people of towns and villages” or “masses of the people”), who exercised state authority through their representatives (Article 2). From this categorisation, one may already deduce the basis for sub-dividing the general category of the Nation into the category of the working people of cities and villages, and those who will not be included in such a group. Supposedly, those who were excluded could be viewed as “the enemies of the Nation” (also referred to as “hostile forces”); indeed, under Article 79 (1), each citizen was obligated to “exercise vigilance” against these enemies. Obviously, among “the enemies”, “the capitalists” had to be identified (also referred to, in a more sophisticated way, as “the castaways of the old capital-

20 Article 2 of the Act of 8th July 1935 (the Electoral Law to the Senate, *Journal of Laws* No. 47, item 320). Cf. AJNENKIEL (1989) 193–194. One third of the senators were directly nominated by the President of the Republic of Poland (Article 1 (2)).

ist-landowner regime”), together with the “rich landowners” (Polish: “obszarnik”), whose “power was overthrown”. The category of “the enemies” was a deliberate understatement, liquid and capacious. Consequently, those in power could adapt it flexibly to changing policy objectives. In 1976, a constitutional amendment was adopted, introducing the phrase “the leading political force of society in the building of Socialism”, which was, of course, the Communist Party.<sup>21</sup> The amendment was the cause of protests (known as the “Letter of the 59”), which contributed to the creation of opposition structures a few years later.

The understanding of the collective model was reflected in the provisions concerning economic issues. The economy in the Communist state was based on the idea of socialising the means of production (Article 7) and the widely described category of national property (e. g., mines, banks, state-owned industrial plants, and state-owned farms, in Article 8). According to Article 10, privately owned farms remained under state protection, but special support was nevertheless granted to agricultural cooperatives based on teamwork. While Articles 12 and 13 introduced protections for individual and personal property, these protections must be viewed as illusory or, at the very least, secondary, in the context of the broader legal framework. According to Article 48, courts were to protect, *inter alia*, “the people’s rule of law, social property and citizens’ rights” (in that order). Similarly, the protection of social property was a priority for the prosecutor’s office (Article 54), and even an obligation for citizens (Article 77).<sup>22</sup>

The Amendment of December 1989 introduced fundamental changes to the system described above by introducing the categories of a democratic state of law that implements the principles of social justice (Article 1), and an open concept of the Nation exercising power through its representatives (Article 2). In the new wording of Article 7, on the other hand, the state “protected ownership and right of succession”. Moreover, it was emphasised that the Republic “provides full protection of personal property”, which

21 Ustawa z dnia 10 lutego 1976 r. o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej (Journal of Laws No. 5, item 29).

22 Article 77: “Each citizen of the People’s Republic of Poland is obliged to protect social property and to strengthen it as the uncompromised basis for the development of the state, the source of wealth and strength of the Homeland.”

must be interpreted as a strong rejection of the constitutional rules of the Communist regime.

#### 4 Constitutional provisions on religion

Among the generally egalitarian principles of the Constitution of 1921, the specific wording of the provisions devoted to the situation of religious associations is particularly noteworthy:

“The Roman Catholic religion, being the religion of the preponderant majority of the Nation, occupies in the state the chief position among recognized religions. The Roman Catholic Church governs itself under its own laws. The relation of the state to the church will be determined on the basis of an agreement with the Apostolic See, which is subject to ratification by the Sejm” (Article 114).

The Constitution also stated the right of the churches to govern themselves by their own laws, which the state may not refuse to recognize unless they contained rules contrary to the law. Instruction in religion was compulsory for all pupils in every educational institution. Also, the presidential oath included confessional elements (appeal to God in the Trinity). Some commentators interpreted this provision as an exclusion of non-Christians and atheists from the presidential office.<sup>23</sup> The Catholic Church was one of the most important political actors in the Second Polish Republic, being able to block progressive legislative bills, as in the case of the unified Marriage Law draft of 1929, which would have introduced civil marriages, divorces and full state jurisdiction over matrimonial issues in all Polish provinces.<sup>24</sup>

The Communist Constitution remained almost silent about religion. Provisions were limited to the slogan of “freedom of conscience and the right to fulfil religious functions” attributed to the churches and religious associations. Paradoxically, it was prohibited to force the citizens *not* to participate in religious activities or religious rites. Finally, “the Church was separated from the state”. The hostile attitude of Communist leaders to the

23 The first Polish President elected in the interwar period, Gabriel Narutowicz, was probably an atheist. The confessional oath was also taken in 1947 by Bolesław Bierut, leader of the Communist Party. The wording of the oath referred to the 1921 version. BALEA (2010) 164.

24 KRASOWSKI (1994).

Catholic Church and other religious organizations was to be spelt out at the level of ordinary legislation and, in particular, in administrative practice.

The 1997 Constitution's provisions, in Article 25, refer to the neutrality of the state and equality of rights of churches and other religious organizations. According to Article 25 (2), the authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life. The relationship between the state and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere (Article 25 (3)). Further provisions are devoted directly to the relations with the Roman Catholic Church, which shall be determined by the Concordat (concluded already in 1993),<sup>25</sup> and by statute (Article 25 (4)). Meanwhile, other churches and religious organizations are regulated by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers (Article 25 (5)). The provisions make the Roman Catholic Church of special importance and distinctive in relation to other churches and religious organizations.

The practice of the last decades proves that the position of the Catholic Church is privileged (e.g. the existence of the Property Commission, restoring Church property taken over by the Communist state, whose decisions were made on a one-instance basis and, in practice, were excluded from judicial control; the right to purchase agricultural property without meeting the requirements for natural persons; and, even, some elements of the jurisprudence of the Constitutional Tribunal).<sup>26</sup> In the political narrative, there are also postulates to anchor the special position of the Catholic Church in the Constitution itself. These developments may be interpreted in the context of current populist tendencies, as an element for building a homogeneous Nation based on the notion of a "conservative Catholic Pole", which, at the same time, differs from the inclusive concept of a heterogeneous nation, as included in the Constitution.<sup>27</sup> It is worth recalling the provision on the

25 Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską, podpisany w Warszawie dnia 28 lipca 1993 r. (Journal of Laws 1998 No. 51, item 318).

26 Ruling of the Constitutional Tribunal K 17/93 from 7th June 1994; K 11/90 from 30th January 1991, OTK 1991 No.1, Pos. 2. Cf. BORECKI (2012).

27 BIEŃ-KACAŁA et al. (2019).

protection of marriage (“being a union of a man and a woman”) as well as the family, motherhood and, more generally, parenthood.<sup>28</sup> This provision is often referred to in the discussion on legalizing same-sex unions as a decision of the legislator that excludes this possibility, but there are also different interpretations emphasising the fact that the Constitution formulates special protection only for traditional marriages. The presidential draft of the constitutional amendment, which directly prohibits single-sex couples from adopting children, is also determined at least partly by religious reasons.<sup>29</sup>

## 5 On the regulations of land ownership. What constitutions leave unsaid and what ordinary legislation says in the supra-constitutional reality

The protection of property was introduced already in the Constitution of 1921. Under Article 99, the Republic of Poland recognized all property, whether personal, collective or state-owned.<sup>30</sup> This provision provided that only a statute had the power to determine what goods could be considered

28 Article 18: “Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.”

29 This idea may be treated as playing politics as long as the draft was signed during the presidential campaign. Also, the amendment has been drafted in an ambiguous manner (it concerns, *expressis verbis*, “the person who remains in the same-sex relationship”) and was criticized for this reason.

30 “The Republic of Poland recognizes all property, whether belonging personally to individual citizens or collectively to associations of citizens, institutions, self-government, or the state itself, as one of the most important bases of social organization and the legal order, and guarantees to all citizens, institutions, and associations, the protection of their property, permitting only in cases provided by a statute the abolition or limitation of property, whether personal or collective, for reasons of higher utility, against compensation. Only a statute may determine to what extent property, for reasons of public utility, shall form the exclusive property of the state, and how far the rights of citizens and of their legally recognized associations to use freely land, water, minerals, and other treasures of nature may be subject to limitations for public reasons. The land, as one of the most important factors of the existence of the nation and the state, may not be the subject of unrestricted transfer (commerce). Statutes will define the right of the state to buy up land against the will of the owners, and to regulate the transfer of land, applying the principle that the agrarian organization of the Republic of Poland should be based on agricultural units capable of regular production and constituting private property.”

as exclusive state property and to what extent, and in what cases the rights of citizens and their right to the free use of property could be restricted. The doctrine was in agreement with the legislator's approach; Waclaw Komarnicki emphasized the fact that land, as one of the most important elements of ownership, "could not be subject to unlimited trade", and it was the Act that determined the conditions under which it was sold, acquired, or other activities related to it could proceed.<sup>31</sup> A unique legal framework applied to properties secured in the form of *fidei-commissa*, which also impacted and protected the civil obligations of the owners.<sup>32</sup> Under the democratic Constitution of 1921, the inherited structure of land ownership was preserved. In practice, this meant a privileged situation for the noble owners of large estates (also when the nobility was formally abolished) and for the Catholic Church, yet another major landowner. The Constitution of 23rd April 1935, under Article 81 (2), maintained Article 99 of the 1921 Constitution on property.

As indicated, the fundamentals of the economic system of the People's Republic of Poland were completely different. They were encapsulated by the category of "social property". Individual property remained in the background (when it came to be perceived as one of the components of the rather enigmatic "citizens' rights") or was not discussed at all. The Constitution cemented the model introduced by the ruthless agricultural reform carried out after the Second World War, which radically changed the structure of land ownership in favour of a small peasantry.<sup>33</sup> The state was to provide special assistance to agricultural cooperatives, which formally operated voluntarily (Article 10). From the end of the 1940s, special legislation, which implemented collectivist principles, also established special organizational units, such as State Agricultural Enterprises.<sup>34</sup>

31 KOMARNICKI (1922) 567.

32 Fidei-commissa, called in Polish "ordynacje rodowe", were to dissolve according to the procedure introduced by the Law of 1939: Ustawa z dnia 13 lipca 1939 r. o znośeniu ordynacji rodowych (Journal of Laws No. 63, item 417). NAWORSKI et al. (2020).

33 The land-depriving process violated, in many cases, not only "classical" civil ownership rights, but even the rules applying to Communist reform. It happened in many cases with properties in Warsaw that were taken over by the state on the basis of the so called "decree of Bierut"; Dekret Krajowej Rady Narodowej (KRN) o własności i użytkowaniu gruntów na obszarze m. st. Warszawy z 26 października 1945 r. (Journal of Laws No. 50, item 279). The consequence has been a large number of legal disputes and litigation lasting until today.

34 JAROSZ (1998) 109.

The Constitution of 1997 adopts the political, not ethnic, category of the Nation and applies it to the citizens of the Republic of Poland. It introduces a modern principle of equality and the prohibition of discrimination with the words: “equal in laws and obligations”, so that it repeats Article 32, already cited above. At the same time, the Constitution admits limitations in the exercise of constitutional freedoms and rights. Following Article 31 (3),

“any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

As regards the right to property, we must note that, in Article 21, the Republic of Poland shall protect ownership and the right of succession. Expropriation is allowed only if the public necessity requires it and with fair compensation. Besides, Article 64 of the Constitution states that everyone shall have the right to ownership, other property rights and the right of succession. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such a right. According to Article 22, on the other hand, “limitations upon the freedom of economic activity may be imposed only by means of statute and only for public necessity”.

Therefore, no indication of the issue of ownership differentiation or economic activity may be found. Nevertheless, in Article 23, the Constitution treats family-owned farms in a particular way, stating that “the basis of the agricultural system of the state shall be the family farm”. However, this principle must not affect the equal protection of property and the freedom of business activity.<sup>35</sup>

In the light of the Act of 11th April 2003 on the shaping of the agricultural system<sup>36</sup> under Article 2a, only an individual farmer may be a buyer of agricultural property, unless the Act provides otherwise (in the case of matrimonial property, it is sufficient when one of the spouses is the individual farmer, and the area of the purchased agricultural property must not, as a rule, exceed 300 hectares of agricultural land). The subjective exclusions from

35 RAKOCZY/BIEŃ-KACALA (2015).

36 Journal of Laws No. 64, item 592 with amendments.



the scope of the above provisions include, among others, a close relative to the seller; a local-government unit; and legal persons acting on the basis of the provisions of the relationship between the state and the Catholic Church in the Republic of Poland, of the relationship between the state and other churches and religious associations, and of guarantees of freedom of conscience and religion, as well as the rights of inheritors. Other persons may acquire land if they give a guarantee of the proper conduct of agricultural activity and if there is no excessive concentration of agricultural land. The purchaser may be a natural person who intends to establish a family farm, who must have agricultural qualifications, or who has been granted support under specific programmes, including EU programmes, and who fulfils further detailed requirements.<sup>37</sup> The purchased property cannot be sold or given to other entities during this time. A family farm is considered to be an agricultural concern run by an individual farmer, with an agricultural area of not more than 300 ha (Article 5 (1)). Article 6 (1) specifies in detail who, in the light of the Act, is considered to be a farmer, indicating that such a person must have agricultural qualifications.<sup>38</sup> Therefore, the statutory regulation establishes far-reaching subjective and objective restrictions, which give the ownership of a family farm (Article 23 of the Constitution) an exclusive character. The equal constitutional provision derived from Article 64<sup>39</sup> is undoubtedly prejudiced, here.

## 6 Summary

Polish constitutionalism in the 20th century may be viewed as a process of evolution clearly bookended by the two democratic constitutions of 1921

- 37 Residency for five years in the local area (commune) where the family farm is created and located is required. The purchaser should also run the farm for 10 years and in person, if he (or she) is a natural person (Article 2b (1)).
- 38 "Qualifications" may mean a basic vocational agricultural education; a basic vocational, secondary, secondary vocational or higher education; or a qualification title, a professional title, or a professional title of a master in a profession that is useful for conducting the agricultural activity and a specific length of service in agriculture.
- 39 Article 64: "(1) Everyone shall have the right to ownership, other property rights and the right of succession. (2) Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. (3) The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such a right."

and 1997. In all cases under research – the 1921, 1935, 1952 and 1997 Acts – equality clauses formally belonged and still belong to the constitutional fundamentals. Yet, in each of the texts, one can find provisions favouring certain groups of citizens and vice versa, and the lack of a mention of a certain group in the context of equality provisions must also be perceived as a deliberate decision on the part of constitution-makers, with the full spectrum of consequences of such a decision.

Both democratic Acts, of 1921 and 1997, laid the groundwork for constructing, step by step, an equal society by abolishing previously existing provisions favouring certain social or political classes. ‘Anybody’ and ‘nobody’ is the basic phrase which defines the subject in the constitutional catalogues of rights and freedoms. Still, in the first case as generally formulated, constitutional equality was not successfully introduced even on a basic level, – whether it was the problem of the constitutional dominance of a certain religion, or a direct clash caused by provisions or constitutional violations maintaining old, ordinary legislation discriminating against certain groups (such as women), or privileging a certain group of landowners, for instance. The unconstitutional character under the 1921 Constitution could not be formally established as the Polish Constitutional Tribunal was not established until 1985. In the case of the 1997 Constitution, some reluctance to distinguish groups or to back affirmative action can also be observed. The Constitution only singles out the categories that are subject to the protection which is based on the principle of social justice, such as children, the youth, or disabled persons. The equality of women is emphasized as a separate area, which has obvious potential in legal argumentation. The constitution-makers of 1935 and 1952 did not dodge the issue of equality at all: on the contrary, it constructed the initial myth of the new political reality. At the same time, a certain group called to power was distinguished – on the basis of prior merit or prior discrimination. And yet, from the very beginning, when these constitutions came into force, these groups served as nothing more than a fig leaf for specific political factions.

To apply a comparative approach, the changeable understanding of ‘citizenship’ in Chile may be pointed to as the difference between the Chilean and the Polish cases. The concept of citizenship, which Polish constitutions of the 20th century deal with, is based exclusively on objective and binary dimensions: it just refers to “belonging to the state”. Limitations of voting rights, as regards legal capacity impacted by age or mental disabilities, are

not prerequisites perceived as derived from ‘citizenship’: they run parallel to this category, all the more so since the same rules apply to foreigners – European Union citizens – for instance, who are authorised to participate in the elections to the European Parliament and local councils’ elections during their permanent stay in Poland. So, Polish citizenship does not determine voting rights in the case of these elections: it is replaced by the construct of EU member states’ citizenship.<sup>40</sup> Of course at the time of the Old Polish Republic before the partitions (in the 1770s and 1790s), the notion of ‘citizen’ was identified with a person, i.e. a man belonging to the political ‘nation’ – a nobleman.

It is obvious that, in the search for the constitutional embedding of diversity, one should not stop analysing these obvious, eye-catching provisions. The constitutional equality principle can be violated in many different manners. It may take the form of setting this principle as general, regardless of provisions benefiting privileged categories and then, the potential collision must be solved by the constitutional judiciary. Also, on the grounds of formally equal regulations, one may build an exclusive interpretation and then, develop a similar constitutional practice as its aftermath (as in the case of the role of the Catholic religion in the public space). Another way is to adopt ordinary legislation that introduces extended requirements deviating from the constitutional provisions. The equality principle may also be enhanced by underpinning certain relations between categories, as in the case of women’s equality to men (1952/1997). That offers the possibility to question the constitutional nature of ordinary provisions by referring to a particular, higher-level norm. Consequently, such specific norm can be understood as a higher standard of protection, which is not provided for the groups protected by the general norm. Striving for equality may paradoxically result in its erosion in other fields. This illustrates how far-sighted and cautious constitution-makers must be, by relying on legal tools oriented towards equalization.

40 In the Ruling of the Constitutional Tribunal K18/04 of 11th May 2005, OTK-A 2005 No. 5, Pos. 49, the Tribunal expressly referred to “EU citizens”.

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