

Editorial

THE POLISH STATE FROM THE FALL IN THE 18th CENTURY TO ITS RECONSTITUTION IN THE FIRST QUARTER OF THE 20th CENTURY

The Polish state was founded in the second half of the 10th century, the symbolic birth being the date the first recognized ruler, Mieszko I (960) assumed the throne or the date of baptism of Poland (966). Despite various ups and downs, as well as more serious political transformations (feudal fragmentation in the 12th-14th century, Polish-Lithuanian union from the 14th-18th century), Poland survived as a state until its liquidation as a result of three partitions forced by its neighbors: Russia, Prussia and Austria (1772, 1793, 1795)¹ and the abdication of the last ruler, King Stanisław August Poniatowski (25.11.1795). This act is considered the fall of Poland as a state (disappearance of organs exercising sovereignty).

The partitions were based on international agreements between the partitioners, then striving to legitimize them by compelling Poland to accept the first two (in the Sejms (Polish parliament) of 1773 and 1793, respectively, and in bilateral international agreements with Russia, Austria and Prussia from 18.9.1773, and with Russia and Prussia, respectively from

¹ According to J. Makowski, *Prawo międzynarodowe* [International Law], Warszawa 1922, p. 94, the partitions were initiated by the King of Prussia, Frederick II. The powers recognized that the territorial benefits of one of them must be offset by the benefits obtained by the others. However, Austria did not participate in the second partition of Poland.

3.8.1773 and 25.9.1793). The third partition was a mere tidying up through treaties between the partitioners.²

Assessing the legality of the partitions of Poland is not a simple task. It must be done on the basis of the then law of nations, based on the principle of balance of power in Europe. At the end of the 18th century, the criticism of the partitions was not obvious, although it was assumed that the acquisition of territories in a spirit of balance should take place, e.g. by marriage or succession.³ It was also sometimes argued that the partitions violated the principle of non-intervention, which guaranteed the balance of power.⁴ More negative views can be found only in the 19th and 20th centuries. It was then considered that the partitions constituted an obvious and arbitrary violation of the natural justice and law of nations.⁵ However, they did not violate the principle of self-determination of nations, which at that time was not widely known and accepted in the law of nations.⁶

Nevertheless, the partition of Poland became a political fact (the partitioning treaties are sometimes referred to as confirmation of *fait accompli*⁷), strengthened by treaties concluded in the first half of the 19th century by the partitioning powers. The political responses of other European states were very reserved. Real politics has taken the lead and being a consequence of actual approval for the right of conquest.

In turn, the assessment of the effects of the partitions in relation to the existence of the state, even in the Polish doctrine relating to the

² Texts of treaties regarding Poland of the period 1762-1862 cited from: Le Comte Angeberg, *Recueil des traités, conventions et actes diplomatiques concernatnt la Pologne 1762-1862*, Paris 1862. The first of the agreements confirming the partitions contained the surrender of Poland to the territories already subjected to them, the second concerned the assignment and ensuring the entirety of the remaining fragment of the Polish state. See also C. Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów* [The creation of the Polish State in the light of the Law of Nations], Warszawa 1934, pp. 80-83. See the information about partitions and situation in Poland as well as about international reactions to them: V. Kattan, *To Consent or Revolt? European Public Law, the Three Partitions of Poland (1772, 1793, and 1795) and the Birth of National Self-Determination*, 'Journal of the History of International Law' 2015, vol. 17, no. 2, pp. 261-277.

³ V. Kattan, *To Consent...*, pp. 247-248.

⁴ W. Grewe, *The Epochs of International Law*, pp. 338-339, noted that the principles of balance of power and legitimate self-preservation served as the basis for intervention by powers and partitions.

⁵ W. Grewe, *The Epochs...*, p. 339.

⁶ C. Berezowski, *Powstanie Państwa Polskiego...*, p. 83.

⁷ V. Kattan, *To Consent...*, pp. 261-262.

regained independence in the early 20th century, was ambiguous. According to some, the partitions caused the definitive collapse of the state, and Poland was reborn a new state⁸; according to others, its illegal nature meant that the subsequent reconstruction of the state was considered an expression of its continuity (restoration or resumption of statehood). The doctrine of restoring statehood was sometimes based on the principle of *ius postliminii*. In any case, the concept of resuming or restoring independence was based on the conviction that during the partitions, the state remained somewhat dormant, after which the state was restored.⁹

The view that Polish State was restored after the First World War has found recognition, among others, in the reasoning of the Polish Supreme Court of that time. This Court has repeatedly (rulings of 17.10.1919, 29 and 30.9.1922, 11 and 12.5.1928, 14.2. and 4.3.1930, 9 and 20.1.1931) emphasized that the Polish State did not cease to exist after the third partition. It also pointed out that the Polish nation did not lose its sense of distinctiveness, and the population, territory and power as components of the state need not always be united. The Supreme Court also claimed that the acts of the invaders were unlawful and the limitation period for claims against the invaders was suspended.¹⁰

During the partitions, state formations appeared to give Poles a sense of certain political subjectivity. However, they were usually restricted entities and could not be called states. Sometimes they took the form of dependent bodies in the internal sphere of locally dominant states, usually deprived of the capacity to act in foreign relations. These include first the

⁸ J. Makowski, *Prawo...*, p. 150.

⁹ In this way e.g. S. Hubert, *Rozbiory i odrodzenie Rzeczypospolitej Polskiej. Zagadnienie prawa międzynarodowego* [Partitions and Rebirth of the Republic of Poland. The issue of international law], Lwów 1937, pp. 281-284; L. Ehrlich, *Prawo narodów* [Law of Nations], Warszawa 1932, pp. 147, 301-304.

¹⁰ A critical view on this matter: C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 97-108. The author concluded that the Supreme Court assessed cases in an ahistorical way, i.e. former cases were analyzed through the current state of international law. A similarly critical position today: see S. Zaremba, *Ciągłość państwa polskiego od 1918 r. z punktu widzenia prawa międzynarodowego* [Continuity of the Polish State since 1918 from the point of view of International Law], 'Sprawy Międzynarodowe' 2018, no. 3, pp. 270-273. The author emphasized that this concept was not found in contemporary international law. It also notes that, despite some treaty formulations, Poland was treated as a new state in the treaties ending World War I and in the case law of international courts. See also L. Antonowicz, *Status prawnomiędzynarodowy Polski (1918–2018)* [International Legal Status of Poland (1918-2018)], Lublin 2018, pp. 14-20.

Duchy of Warsaw, which was established by Napoleon I, although formally established under the treaties of Tilsit from 1807 (it existed in 1807-1815).¹¹ After the fall of Napoleon, pursuant to Articles I-XIV of the final act of the Congress of Vienna,¹² in which Poland or its representatives did not participate, the Kingdom of Poland was then joined in union with Russia, and compelled to follow a constitution granted by the tsar (Poland also existed as a more independent entity in 1815-1831; then in 1832-1918 – as the unilaterally established Kingdom of Poland with Russia's Tsar at the head of state and with increasingly limited autonomy imposed¹³). In addition, the Act of the Congress of Vienna established the emergence of the Grand Duchy of Poznan, whose Grand Prince was either a ruler of Prussia, or later of Germany (the Duchy existed between 1815-1848, and then was fully incorporated into Prussia as Poznań province). Finally, at the Congress it was decided to establish the Free City of Krakow as a protectorate of the three partitioning powers (This was in existence in 1815-1846, and was then incorporated into Galicia as the Grand Duchy of Krakow; in 1861, Galicia and Lodomeria based in Lviv gained autonomy under the Empire, with power expanded after the establishment of Austria-Hungary in 1867. Galicia and Lodomeria existed until the end of World War I). During the partitions, Poles did not accept (or did not fully reconcile) the collapse of the state. This was demonstrated by, among others, national uprisings from 1830-1831,¹⁴ 1863-1864 – although Poles were not officially considered belligerents.¹⁵

¹¹ C. Berezowski, *Powstanie Państwa Polskiego...*, p. 87, claims that the Treaty of Tilsit contained the renunciation of some Polish provinces of Prussia in favor of the future Duchy. Napoleon gave the Duchy a statute in Dresden on 22.7.1807. On the same day, the Franco-Saxon Convention on the Assignment of the Duchy was signed. It was not until 17.9.1807 that the act of handing over the principality to the Kingdom of Saxony by France was made.

¹² A. Nussbaum, *A Concise History of the Law of Nations*, New York 1954, pp. 186 and seq.; W. Grewe, *The Epochs...*, transl. and rev. by M. Byres, Berlin-New York 2000, pp. 429 and seq.

¹³ J. Makowski, *Zasady prawa międzynarodowego* [Principles of International Law], Warszawa 1915, p. 46, emphasized that although after 1832 the Kingdom of Poland was more strongly united with the Russian Empire, no formal act was issued regarding its liquidation or incorporation into the Empire until World War I.

¹⁴ J. Makowski, *Prawo...*, p. 218, believed that with the dethronement of Tsar Nicholas by the Sejm in January 1831 until the conquest of the Kingdom by tsarist army in September 1831, Poland was an independent state.

¹⁵ J. Makowski, *Zasady...*, p. 51, claims that prince A. Czartoryski unsuccessfully asked for this in 1863 in a request directed to the French and English governments.

The First World War (1914-1918), which was also a conflict between the partitioning powers, enabled the reconstruction of the Polish State. However, it was a painful, difficult and stretched process. During the First World War, Poland as an entity adapted to its course and the conditions it created. Later, the rebuilding of the state took place in a situation no less turbulent, and the northern, western and southern borders were not fully delineated. Because of the situation, the Versailles conference ending World War I decided to hold referendums on some fragments of these borders (conducted e.g. in East Prussia in the very difficult situation of the Polish-Bolshevik war), and their results sometimes led to uprisings (Upper Silesia). Indeed, the situation of Great Poland (Wielkopolska) was sealed at the conference only after the uprising (December 1918-February 1919) and the actual takeover of power by Poles. In the case of the eastern border, its course was to be determined only by a bloody war with Soviet Russia (1920-1921).

In practice, the reconstruction of the state took place between the years 1916/1918-1923. In this context, it is inadequate to the then reality to search for one date of regaining independence (although in some areas it has significant legal significance), but one should rather talk about the process of shaping Poland as an independent and sovereign state. This reconstruction can be viewed from an internal and international point of view, with the two dimensions intertwining with each other. In the first case, it should be noted that the individual definition components of the state were reconstructed from the perspective of what was happening in the former Polish-Lithuanian Commonwealth. This matters because it is recognized that the Polish State regained independence and sovereignty as a result of using the principle of national self-determination that was already recognized in international law at that time.¹⁶

It can be assumed that when World War I was over, the belief that the state is formed by a community of citizens settled on a given territory and submitting to a recognized state authority was already established.¹⁷

¹⁶ See, however, the cautious position of the Committee of Lawyers of the League of Nations, Iles d'Åland, *Différend suédois-finlandais, décision du 5 septembre 1920*, [in:] G. Distefano, G. P. Buzzini (eds.), 'Bréviaire de jurisprudence internationale', Bruxelles 2005, pp. 1049-1064. See also the Covenant of the League of Nations where self-determination as a notion is not present.

¹⁷ The German-Polish Mixed Tribunal in the award in the case of *Deutsche-Continental Gas-Gesellschaft v. Polish State* of 1.8.1929 r. In the context of recognizing the Polish State as a subject of international law, it formulated the following view:

However, the reconstruction of the state should be also seen in the context of its position in international law, i.e. a treaty determination of individual components, primarily territory and population, and the recognition of the state and / or government by other states.

In the case of state power, it is worth noting that from 1916, and thus during the First World War, various power centers appeared both in the territory of the former Commonwealth and abroad (the Polish National Committee in Paris operated between the years 1917-1919). The centers of power in Poland were initially initiated and established by the partitioners. In the Kingdom of Poland, occupied by German troops by a joint decision of German and Austro-Hungarian emperors, the Provisional Council of State (the embryo of parliament) was created on 26.11.1916, and later also the Regency Council (a kind of collective head of state in the absence of a ruler) on 12.9.1917. Subsequent centers of power were more independent, although they were formed at the end of the war (i.e. the Polish Liquidation Committee in Galicia established on 28.10.1918 and abolished by the decree of the Chief of State in January 1919; Provisional People's Government of the Republic of Poland in Lublin – 7-11.1918). In the country and abroad, Polish armed forces were also created (J. Piłsudski's brigades in the Austria-Hungarian army, the division of J. Haller in France, military corps in Russia).¹⁸

Despite the lack of recognition from the winning powers during the war, important focal points for Polish statehood turned out to be the centers of power in the Kingdom of Poland, i.e. the Regency Council (the Council finally recognized itself as the highest and most independent authority of the Polish state in an appeal from 7.10.1918) and the Provisional Council of State (transformed by the Regency Council into the Council of State

‘The state exists only on the condition that it has a territory, a community of people residing in that territory, and a public authority exercising it against that community and this territory. These conditions are considered indispensable and one cannot imagine it without them’.

Excerpts from the award: G. Distefano, G. P. Buzzini, *Bréviaire*, pp. 1188-1191. See also J. Makowski, *Zasady...*, p. 42; J. Makowski, *Prawo...*, pp. 132-134; Z. Cybichowski, *System prawa międzynarodowego* [System of International Law], Warszawa 1923, p. 1; L. Ehrlich, *Prawo...*, p. 109.

¹⁸ C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 143 and seq.; J. Makowski, *Prawo...*, p. 218, noted that there was a transitional period from 5.8.1916 to 31.3.1917. He even believed that this was the only known example of ‘Poland’ as a state embryo, without specific borders and authorities, and under war occupation, receiving from all the Great Powers, including the USA, the promise of recognition of an independent state.

(4.2.1918)). As the war progressed, they became more and more independent of Germany. These bodies also began to rebuild various state institutions (among others, a decree was issued on the provisional organization of supreme authorities in the Kingdom of Poland, which was a substitute for the Constitution; 3.1.1918). Moreover, a government was established and the process of rebuilding the Polish judiciary and education began.¹⁹ In addition, the beginnings of the Polish army were also strengthened. Under the terms of German surrender, the Regency Council eventually handed over to J. Piłsudski all military power (11.11.1918)²⁰ and then civil (14.11.1918; with that date, the Regency Council dissolved). These decisions coincided with the truce in Compiègne, ending hostilities in the West.²¹ Hence, 11.11.1918 became the official celebration of independence in modern Poland.

The key organ of the state became the Provisional Chief of State, which was J. Piłsudski. On 20.2.1919, the Legislative Sejm adopted the so-called Small Constitution, constituting the temporary basis of the state system under which the office of the Chief of State was consolidated. It was replaced by the first full constitution of independent Poland of 17.3.1921. Herein, a state's action is based on recognition of its own legal order, and, in the case of Poland, again composed of territories subject to the laws of the three partitioners, it was only necessary to create one overall legal order. The process of building Polish legal order lasted throughout the interwar period, and even at that time was not over yet. On the other hand, the element that strengthened state independence was the relatively quick introduction of the zloty as legal tender issued by Poland's Central Bank (1924).

For the state to function internationally, it is important to declare independence and have the state or government (formal or *per facta concludentia*) be recognized by other members of the international community.²² Initial forms of recognition for emerging centers representing Polish interests took place during the World War. In particular, it should be noted that a number of Entente states recognized the Polish National

¹⁹ C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 143 and seq.

²⁰ L. Ehrlich, *Prawo...*, p. 146, noted that on that date the Polish state already had authority at least in part of its territory.

²¹ The Armistice of 11.11.1918 did not promise or guarantee Poland regaining statehood. Nor did it require the surrender of the occupied lands to any Polish authorities. See C. Berezowski, *Powstanie Państwa Polskiego...*, p. 259.

²² See J. Makowski, *Prawo...*, pp. 138-139.

Committee as an official Polish organization between September and November 1917, but at the same time refused to recognize it as a government²³). After the February revolution of 1917 in Russia, the Provisional Government agreed to restore the independence of the Polish state, which, as stated, had already been recognized as a sovereign and independent state by the Central Powers. This position was maintained by the Bolshevik government. The Council of People's Commissars, by Decree No. 698 of 9.9.1918, terminated the partition treaties together with the subsequent partition treaties of the 19th century (13 treaties in total). The commissioners also acknowledged that the partitions were contrary to the principle of self-determination of nations.²⁴

As a result of World War I, a number of countries were created, especially in Central and Eastern Europe. Many of these based their statehood on declarations of independence and acts of national parliaments.²⁵ In the case of Poland, the dynamics of events meant that the declaration of independence took the form of a dispatch initially issued by J. Piłsudski of 16.11.1918 notifying 'governments and fighting nations and the neutral existence of an independent Polish State in all territories of united Poland.' The author stated that regaining Poland's independence and sovereignty is henceforth *fait accompli*. In addition, he emphasized that the Polish State was reborn under the will of the entire nation on a democratic basis. The Polish government replaces the rule of violence – and order and justice are restored.²⁶ Recognition from numerous European countries (Germany, France, Great Britain, Italy, Belgium, Finland, Switzerland, Greece, Roman Curia, Norway, Spain, Czechoslovakia, Denmark, Sweden, Portugal, Romania) and non-European (United States, Japan, Brazil, Argentina, Chile, Persia, Paraguay) followed systematically in 1919, but in some cases took place later (China – 27.3.1920, Iceland – 28.1.1922).²⁷

²³ By the diplomatic note of 30.11.1918 addressed to the French Ministry of Foreign Affairs, the British government rejected the Committee's recognition of the factual government. See S. Kutrzeba, *Polskie prawo polityczne według traktatów* [Polish Political Law by Treaties], part I, Kraków 1923, p. 31.

²⁴ S. Kutrzeba, *Polskie prawo polityczne...*, pp. 29-30, 186-187.

²⁵ C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 74-78.

²⁶ Text: *Polskie dokumenty dyplomatyczne 1918 (listopad-grudzień)* [Polish Diplomatic Documents 1918 (November-December)], Warszawa 2008, pp. 34-35.

²⁷ S. Kutrzeba, *Polskie prawo polityczne...*, p. 187; C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 358 and seq. Contemporary position: L. Antonowicz, *Status prawnomiędzynarodowy Polski...*, pp. 10-13.

As for the other components that define the state, i.e. the territory of the state, and the population understood as a community of Polish citizens, these have been largely prejudged by the victorious powers in the treaties.²⁸ When determining the territorial shape of the Polish State, certain treaties ending World War I should be mentioned, in particular, the Treaty with Germany of 28.6.1919.²⁹ Poland was also a party to it, although Poland was formally established basically after the end of hostilities and did not participate in the war. The Treaty of Versailles in a number of provisions referred to Poland (in particular Articles 87-93: 'Poland', but also others, e.g. Articles 100-108 regarding the Free City of Gdańsk/Dantzig³⁰). On their basis, Germany recognized the complete independence of Poland and renounced its rights and titles to a number of territories, including Great Poland (Wielkopolska) and Pomerania, but with the exception of East Prussia and the Free City of Gdańsk. In Upper Silesia and in some areas of East Prussia and the Duchy of Cieszyn, in Orava and Spisz, plebiscites were ordered. Final decisions were made by the Conference of Ambassadors. Most of the plebiscite lands of East Prussia were granted to Germany (decisions of 12 and 15.8.1920), while the Duchy of Cieszyn, Spisz and Orava fell to Czechoslovakia (decision of 28.7.1920). However, as a result of three uprisings in Upper Silesia, despite the results of the referendum, about 1/3 of its territory was finally granted to Poland (decision of 20.10.1921). In relation to the eastern borders, the Riga Treaty, concluded on 18.3.1921, played a key role after the Polish-Bolshevik war, between Poland and Russia and Ukraine. The shape of the eastern border of Poland was approved by the Conference of Ambassadors on 15.3.1923. In addition, in the conditions of conflict with Lithuania, Poland took the Vilnius region. Its accession to Poland, the League of Nations Council recognized, despite Lithuania's opposition, by a resolution of 3.2.1923. In the implementation of all these

²⁸ L. Antonowicz, *Status prawnomiędzynarodowy Polski...*, pp. 20-24.

²⁹ The treaty came into force in relation to Poland on 10.1.1920. In addition, the Peace Treaty of Saint Germain en Laye with Austria of 10.9.1919 had some significance, where in Article 89 Austria has committed itself to recognizing the borders of new states, including Poland. See S. Kutrzeba, *Polskie prawo polityczne...*, pp. 12 and seq.; C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 267 and seq.

³⁰ The implementing act was the decision of the Council of Ambassadors of 27.10.1920 establishing the Free City of Gdańsk, determining, *inter alia*, its boundaries and giving it a constitution. It entered into force on 15.11.1920. Under the Paris Convention between Poland and the Free City of Gdansk of 9.11.1920, Poland took over the broadly understood foreign affairs of the Free City.

treaties, Poland concluded a number of executive agreements and issued numerous national legal acts.³¹ In this way the process of defining the territory of the Polish State was completed.

For the population, treaties concluded after the end of the war (not only with Germany, but also with Austria – the Treaty of Saint Germain en Laye of 10.9.1919, Hungary – Treaty of Trianon of 4.6.1920, and with Russia and Ukraine – Treaty of Riga in 1921, as well as the treaty concluded by Poland and the five victorious powers in Versailles on 28.6.1919 on the protection of minorities) and the decisions of the Conference of ambassadors in connection with the establishment of plebiscite borders determined on what terms who would become a Polish citizen. The basic principle for acquiring citizenship according to treaties and decisions became *lex domicilii* (Germany) or belonging to a municipality (Austria), albeit with the right of option (this rule was the main one according to the Treaty of Riga). In addition, the issue of citizenship was regulated by the Polish Act of 20.1.1920. In this case, the basis for acquiring citizenship was *ius sanguinis*, and the key principle was to prohibit other citizenship.³²

Rebuilt after World War I, the Polish State remained intact until the outbreak of World War II, when it was under war-time occupation for five years as a result of the German and Soviet invasion. However, it cannot be assumed that Poland ceased to exist as a state, as the continuity of state authority was maintained (the president and government were active in exile). The victory of the allied powers in 1945 brought Poland partial success. She found herself as a loser among the winners. Admittedly, under the intergovernmental arrangements of Yalta and Potsdam (January 1945, June-July 1945), the state was rebuilt territorially and formally, albeit within significantly reduced and differently shaped borders, with huge human losses and material damage and never compensated in full, although on the other hand much more ethnically compact. By the superpowers, Poland was once again faced with a situation of non-alternative consent to the new shape of its statehood and not necessarily preferred alliances, making it a dependent state. It was only the changes in the Soviet Union, the collapse of that state and the Soviet bloc (Warsaw Pact, Comecon) and the end of the Cold War that enabled gradual regaining of real independence and sovereignty.

³¹ S. Kutrzeba, *Polskie prawo polityczne...*, pp. 33-70; C. Berezowski, *Powstanie Państwa Polskiego...*, pp. 339 and seq.

³² Polish OJ 1920, no. 7, item 44. S. Kutrzeba, *Polskie prawo polityczne...*, pp. 71-111.

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In the years 2018-2023, a hundred years have passed since Poland regained its independence and sovereignty and the relatively complete formation of individual components that defined the then state. This prompts to desire to dedicate this issue of the Polish Review of International and European Law to this process. This issue contains articles on events from one hundred years ago and their significance for Poland and international law of that time, as well as on today's Polish practices in the field of international law.

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