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Andrzej Jackiewicz

TERRITORIAL ORGANIZATION OF EUROPEAN STATES.
FEDERALISM, REGIONALISM, UNITARISM

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LIST OF ABBREVIATIONS

EEC	– European Economic Community
EU	– European Union
EUTreaty	– Treaty on European Union
FCC	– Federal Constitutional Court
FRG	– Federal Republic of Germany
GDP	– Gross Domestic Product
GDR	– German Democratic Republic
MP	– Member of Parliament
MSP	– Member of Scottish Parliament
NATO	– The North Atlantic Treaty Organization
NSDAP	– National Socialist German Workers' Party
STV	– single transferable vote
UK	– United Kingdom of Great Britain and Northern Ireland
UN	– United Nations

INTRODUCTION

This book is devoted to territorial structures of the contemporary European states perceived through the issues of federalism, regionalism and unitarism. Over recent decades in Europe we can observe two tendencies concerning the aforementioned issues. On the one hand, it is decentralisation of modern democratic states as well as overlapping actions of various political and ethnic movements seeking to gain its own political space: sovereignty, autonomy or independence within the framework of territorial self–government. On the other hand, we can notice a progressive European integration embracing increasingly broader circles, first within the framework of the European Communities, and in the framework of the European Union[1].

The objective of this publication is presenting solutions concerning territorial systems in some selected European states: Switzerland, Germany, Italy, Spain, France, Poland and the United Kingdom. The selection of these states is justified by their rich experience in the historical evolution and the origins of their current solutions in the territorial structure, as well as the peculiarity of their modern constitutional solutions.

The first, introductory, part serves to present some basic terminology of the issues of territorial structures of contemporary states and to signal the characteristics of such constitutional forms as confederation, federation, regional state and unitary state. Also the notion of devolution, becoming part of the image of present day Europe

1 M. Montanari, Between European integration and regional autonomy: the case of Italy from an economic perspective, Constit Polit Econ 2006, no. 17, p. 277–278, see also: J.M. Josselin, A. Marciano, Unitary States and Peripheral Regions: A Model of Heterogeneous Spatial Clubs, International Review of Law and Economics 1999, no. 19, p. 501 and next, Ch.B. Blankart, The European Union: confederation, federation or association of compound states? A Hayekian approach to the theory of constitutions, Constitutional Political Economy 2007, no. 18, p. 99–106. See also: A. Schade, A research topic in education law and policy: The development of regionalism and federalism in Europe and their impact on educational policy and administration, European Journal for Education Law and Policy 2000, no. 4, p. 35–39.

was taken into consideration. The book points at the special importance of the regional tier and local government to the organisation of the territorial system of modern democratic states.

Parts II and III are dedicated to two federal states: the Swiss Confederation, which is confederation but by historically justified name, and the Federal Republic of Germany, whose current form is a result of the territorial changes after World War II. Parts IV is about the United Kingdom of Great Britain and Northern Ireland, where the devolution in progress is an original solution not lending itself to an unequivocal classification. Parts V and VI present the Italian Republic and the Kingdom of Spain – the states constituting a transitional form between federation and unitary state, and simultaneously being an arena of vivid debates on the constitutional territorial transformations. Parts VII and VIII discuss unitary states: the French Republic, historically and presently recognised as a typical centralised state and the Republic of Poland, a still young democracy, which after the constitutional transformation implements the model of decentralised unitary state.

Particularly important from the point of view of the issues presented in the title were the constitutional solutions which determine the legal order of the states under discussion and make a testimony of assuming certain conceptions of territorial organisation and their evolution. As far as it was necessary for the presentation of a particular model, also normative acts of lower rank were used as auxiliary sources. Introducing successive states a uniform pattern was used: presenting a synthetic constitutional outline of forming the territory of the state under discussion, and discussing the structure of central authorities and their relations with the lower tiers of the territorial structure. The last subchapter of each part serves to briefly present solutions in local government.

Andrzej Jackiewicz

Part 1

AN INTRODUCTION TO THE TERRITORIAL ORGANISATION OF THE EUROPEAN STATES

1. Principles of decentralisation and subsidiarity

The **principle of separation of powers** is invariably counted among the modern canons of democratic states. However, beside the evolving vertical perspective, according to which in the system of public authorities there are legislative, executive and judiciary, a standard of democracy has also become the division of power in a horizontal dimension, consisting in division of power between the central government and territorial organs of the public power, taking forms of components of compound states or territorial self–government. An indispensable element of the characteristics of a democratic state nowadays becomes, by the same token, the principle of decentralisation of public power.

The **idea of decentralisation** is a doctrinal basis of the European Charter of Local Self–Government adopted by the Council of Europe in 1985. In view of the provisions in its preamble "the local authorities are one of the main foundations of any democratic regime", and "the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe" and "it is at local level that this right can be most directly exercised".

The essence of decentralisation of public power is transferring part of important responsibilities and competences of the central government to the units of lower tier, providing them with independence in implementing the tasks. This should be followed by a transfer of appropriate resources for implementing the delegated tasks and

competences. In this system there is no hierarchic subordination of the organs of lower tier to the organs of higher tier, and any intervention of the central administration organs in operation of these territorial units of public power should occur exclusively within the limits determined by law.[1]

In connection with the fact that decentralisation is a process in which competences are transferred from the centre "downwards", it is possible in the states where centralisation[2] of the state power have previously occurred, which was the process reverse to decentralisation and took place foremost in a historical process of forming absolute monarchies in modern Europe. We can talk about a phenomenon of this type in reference to the former socialist states, whose system was characterised by "democratic centralism". In reference to a few states where the process of centralisation has never occurred, we can talk about "uncentralisation" of the state power (Britain, Sweden).[3]

Beside the term decentralisation, it is necessary to explain the term deconcentration, which consists in transferring responsibilities and competences onto the organs of lower tier. In this case, unlike in decentralisation, the implementation of these delegated tasks is not at their discretion; they do that on account and in accordance with the recommendations of the organs of the higher tier, so they are hierarchically subordinated to them.

The principle of decentralisation of public power presented above is a reflection of the principle of subsidiarity, established in the doctrine and legislation of democratic states, on the plane of organisation of public power. As its source it is usually recognised the teaching of the Catholic Church (writings of St. Thomas Aquinas, modern encyclicals: Rerum Novarum by Leo XIII (1891) Quadragesimo Anno by Pious XI (1931)). The **principle of subsidiarity** also found its place in the law

1 A. Jackiewicz, A. Olechno, K. Prokop, Samorząd terytorialny, Siedlce 2010, p. 10.

2 About the terms overcentralisation and undercentralisation (in context of federalism) see more in: Congleton R.D., Kyraciou A., Bacaria J., A Theory of Menu Federalism: Decentralisation by Political Agreement, Constitutional Political Economy 2003, no. 14, p. 170.

3 H. Izdebski, Samorząd terytorialny. Podstawy ustroju i działalności, Wydawnictwo Prawnicze LexisNexis, Warszawa 2006, p. 43–45. See also: H. Wollmann, Local Government Reforms in Great Britain, Sweden, Germany and France: Between Multi–Function and Single–Purpose Organisations, Local Government Studies 2004, vol. 30, no. 4, p. 643, 647.

of the European Union: the Treaty on the European Union declares the foundation of the European Union on the principle of subsidiarity.[4] Also the aforementioned European Charter of Local Self–Government forms the principle of subsidiarity. According to article 4 para 2 of this international agreement: "Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority." Furthermore, paragraph 3 states that: "Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy."

The principle of subsidiarity is considered an implied rule of constitutional law, and therefore not all Constitutions express it literally. Such records could be found, however, in the Constitution of Italy, according to article 118, para 4 of which: "State, regions, metropolitan cities, provinces and municipalities support autonomous initiatives promoted by citizens, individually or in associations, in order to carry out activities of general interest; this is based on the principle of subsidiarity." It is also part of the Constitution of the Republic of Poland. In this case it is declared in the preamble: "We, the Polish Nation – all citizens of the Republic,, […]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 powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities." So understood the principle of subsidiarity sets directions of legislative actions as well as directions of the application of law.[5]

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4 The UE Treaty mentions the principle of subsidiarity 9 times, e.g. in the preamble it is stated that: "Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity, in view of further steps to be taken in order to advance European integration." These principles concern also Article 5 and 12 of the UE Treaty. For example, Article 5 para 1 states that "the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." See also: N. Aroney, Subsidiarity, Federalism and the best Constitution: Thomas Aquinas on City, Province and empire, Law and Philosophy 2007, no. 26, p. 161–163.

5 The Basic Law for the Federal Republic of Germany (1949) and the Constitution of Portugal (1976) express this principle exclusively in the context of the European integration.

The essence of the principle of subsidiarity is indicating the secondary and auxiliary role of the state. Its intervention in the affairs of particular citizens and local communities is acceptable only when there are difficulties in the implementation of their tasks. The crucial recommendation resulting from the principle of subsidiarity is taking decisions closest to the citizens.[6]

In accordance with the principle of subsidiarity, in the situation of existence of a mulit–tier structure of the public authorities, determined by the principle of decentralization, and lack of possibility of implementing tasks by the units of the lower tier, the competence of their implementation is taken by the higher–tier units[7]. Thus the organs of the central government should intervene only when the implementation of a particular task exceeds the capacity of the lower–tier units, or else such an action is justified from the point of view of the national interest, eg.: economy, security or foreign relations. Besides, the matters connected with the distribution of public responsibilities among the particular tiers of public authorities, are one of the factors determining the form of the state: its recognition as a unitary, regional or federal state.

2. Federal state vs. unitary state

The constitutional structure of a modern democratic state is based on the foundations established by the catalogue of constitutional principles and developed by further ones specifying them with the provisions of their Constitutions. These principles, usually of the highest level of generality, affect the whole legal order determining the form of statutory solutions and serving as interpretative guidelines: directives defining the way of understanding and interpretation of other legal regulations.

6 A. Jackiewicz, A. Olechno, K. Prokop, Samorząd terytorialny, Siedlce 2010, p. 11–18.

7 See: A. Schade, A research topic in education law and policy: The development of regionalism and federalism in Europe and their impact on educational policy and administration, European Journal for Education Law and Policy 200, no. 4, p. 37.

One of the important elements of the constitutional characteristics of the state to which the constitutional principles are referred, is its form of territorial organisation. From this point of view states are divided into unitary ones and compound (federal) ones[8]. However, it is necessary to note straight away that the distinctive factor is not the fact of the territorial division, which occurs in both. In a unitary state such a division is of exclusively administrative nature and may be discretionarily shaped by central authorities (parliament). On the other hand, in the compound state the division into components is by rule constitutionally protected, and particular units are not only elements of the administrative structure but also entities of the federation (confederation) of the qualities of state, with authority parallel to that of the federal organs. Taking an attempt at a synthetic answer to the question what unitarism or federalism is, it is important to bear in mind that the variety of constitutional forms of the contemporary states allows us to explain these notions only to a limited degree. Both unitary states and federal states differ significantly from one another.

The definition of **unitary state** which can be found in the Encyclopaedia Britannica, emphasises the opposition of the two territorial organisations of the state: unitary state and federal state. According to this source, the "unitary system, is a system of political organization in which most or all of the governing power resides in a centralized government. It contrasts with a federal system. In a unitary system the central government commonly delegates authority to subnational units and channels policy decisions down to them for implementation. A majority of nation–states are unitary systems. They vary greatly. Great Britain, for example, decentralizes power in practice though not in constitutional principle. Others grant varying degrees of autonomy to subnational units. In France, the classic example of a centralized administrative system, some members of local government are appointed by the central government, whereas others are elected[9].

8 See: A. Breton, A. Fraschini, Vertical competition in unitary states: The case of Italy, Public Choice 2003, no. 114, p. 57.

9 "Unitary system" Encyclopædia Britannica. Encyclopædia Britannica Online. Encyclopædia Britannica, 2011. Web. 17 May. 2011. <http://www.britannica.com/EBchecked/topic/615371/unitary–system>

P. Sarnecki proposes another, one of better systematised definitions of unitary state. According to this author, among the attributes of a unitary state are:

1) integrity of public authority organs, which means that there are only these elements of one (unitary) organisation, united by the common aim of functioning, which is maintaining and developing this statehood; there are no active factors of other public authority, not included in this structure,
2) integrity of the legal status of its population, for there is only one nationality (citizenship) here, being an expression of an institutionalised bond between the population and this integrated statehood;
3) integrity of its territory, which means that either there is no division of this territory (which is possible to imagine only in very small states), or there occurs a division but only for the needs of this only public authority there to function.[10]

Centralisation, characteristic of the unitary state model, is understood in a special way. A vertical division of power between particular units of the territorial division of a state is impossible. This results from the definition of the entity of sovereign authority in the state, which is the whole society. For example article 4 of the Constitution of the Republic of Poland reads: "Supreme power in the Republic of Poland shall be vested in the Nation." Acceptable, though not necessarily, is a vertical division of the executive power, which, by the same token, a starting point of the institution of local government. If this division of executive power occurs and meets certain assumptions, we can talk about decentralisation.

Of course, the question of the vertical division of power is completely different in a federal state, where the legislative, executive and very often also judicial powers are separated according to the division of sovereignty between the federation and its components. Thus, federal states are all the more defined as decentralised.

10 P. Sarnecki, Uwagi do art. 164 Konstytucji RP, [in:] L. Garlicki, (ed.), Komentarz do Konstytucji Rzeczypospolitej Polskiej vol. IV, Wydawnictwo Sejmowe, Warszawa 2007, p. 1.

Defining **federation**, let us refer to the Encyclopaedia Britannica again, which proposes the following definition of federation: "mode of political organization that unites separate states or other polities within an overarching political system in such a way as to allow each to maintain its own fundamental political integrity. Federal systems do this by requiring that basic policies be made and implemented through negotiation in some form, so that all the members can share in making and executing decisions[11]. The political principles that animate federal systems emphasize the primacy of bargaining and negotiated coordination among several power centres; they stress the virtues of dispersed power centres as a means for safeguarding individual and local liberties."[12] It seems, however, that the definition quoted above takes into consideration only a few of qualities characterising modern federations. Many authors have taken an attempt to answer the question what federal state is, and their definitions frequently differ from one another, for they focused their attention on different, in their opinion most important, aspects of this form of state[13]. For example, K.D. MacKenzie says that federalism is used to describe a system of government in which sovereignty is constitutionally divided between a central governing authority and constituent political units such as states and provinces[14]. Such systems of governance change and evolve. The principles of federalism are adapted to meet specific historical and political contexts. Hence, there are varieties of federalism[15].

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11 See: R.D. Congleton, A. Kyraciou, J. Bacaria, A Theory of Menu Federalism: Decentralisation by Political Agreement, Constitutional Political Economy 2003, no. 14, p. 167–190.

12 "federalism" Encyclopædia Britannica. Encyclopædia Britannica Online. Encyclopædia Britannica, 2011. Web. 17 May. 2011. <http://www.britannica.com/EBchecked/topic/203491/federalism>

13 For example: J. Bednar, J. Ferejohn, G. Garret, The Politics of European Federalism, International Review of Law and Economics, 1996, no. 16, p. 281 and next. About definitions of federalism see J. Bednar, Federalism as a Public Good, Constitutional Political Economy 2005, no. 16, p. 189–205.

14 There is also a common term – asymmetrical federalism, which as F. Requejo defines refers to the degree of heterogeneity that exists in the relations between each member state and the federation, and between the member states themselves. F. Requejo, Cultural pluralism, nationalism and federalism: Are vision of democratic citizenship in plurinational states, European Journal of Political Research 1999, no. 35, p. 270, also: J. Horn Asymmetric federalism: Are federated micro–regions viable? Asia Europe Journal 2004, no. 2, p. 573–587. See also: literature cited there.

15 K.D. MacKenzie, Turf disputes within federal systems: Leadership amidst enforceable checks and balances, The Leadership Quarterly 2010, no. 21, p. 1051. See there about author's concept of the "pure federal system".

W. Suchecki, seeing the multitude of these definitions, proposed an explanation of the term federation by means of three criteria (aspects): genetic, structural and functional–teleological.[16]

From the genetic point of view for a federal state it is necessary the existence of the basic law determining the scope of competences of the federation and its members.

From the structural point of view a federal state has mostly the following qualities:

1) the federal Constitution establishes the division of competences between the federal organs and the organs of the member–states;
2) there is an established path of solving competence conflicts;
3) some federal acts have direct effects on the territory of the whole country; as a rule, in the event of collision between the federal law and the law of the components the binding force of the normative act of the member–state is lifted or suspended;
4) adjudications of the Supreme Court of the federation have to be implemented throughout the territory of the federation; this is also applicable in the case of the Constitutional Tribunal (Court) or another federal organ adjudicating on competence conflicts between the federation and its components;
5) the federal Constitution recognises the separateness of the federal organs and the organs of its components;
6) federal organs fulfil their functions on the whole territory of the federation according to the competences determined by the Constitution;
7) representative bodies usually have a bicameral structure, which facilitates the representation of the interests of particular components;
8) generally, the principle of equal rights of the members of the federation and the purposefulness of the member–states'

16 W. Suchecki, Teoria federalizmu, Warszawa 1968, p. 94–95.

participation in the management of the affairs of the whole federation are recognised;

9) there is unitary federal citizenship (nationality);

10) the components of the federation are not treated as units of administrative division but as states, whose Constitutions are not granted by the federal authorities but created by the representative bodies of particular member–states .

From the functional–teleological point of view, the aim which a federal state intends to achieve is important. A federal state may set as a goal: maintenance of the political unity of heterogenic community at the expense of autonomy or some rights of sovereign member–states; political, economic and cultural levelling of different regions with their ethic, religious etc. idiosyncrasies; and finally, a federal state may be treated as an organisation of transitional nature heading for making a unitary state.

It is worth noting that the first two criteria are based on structural elements, i.e. they take as a basis typical constitutional institutions in the states commonly recognised as federations; they make an analytical definition then. Of different nature is a definition of federal state assuming as a criterion an analysis of the aim of a federal state, not free from evaluative elements since its basis is the establishment of accordance between the aim and the real development tendency. Thus, only the structural definition, based on objective criteria, meets the requirement of the definition classifying a state as a federation. In the case of the functional–teleological definition, this correctness is impossible, because the qualities included therein do not determine the federal nature of a state, but may be useful only to establish the genesis and reasons of the lasting of this form. Therefore, it seems justified to reduce the notion of the federal state model exclusively to the structural elements.

Such an objective definition is proposed by K.A. Wojtaszczyk. He counts among the qualities of federal states the following:

1) the territory of a federal state is not a political and administrative homogenous entirety; it consists of the territories of entities

of the federation devoid of full participation in international relations and usually without the right of secession;

2) entities of the federation have at their disposal constitution–making and legislative power or the right to adopt their own Constitution and to enact, within the framework of the separation of power, laws binding on their territories; according to the principle of subordination these acts should remain in compliance with the federal legislation; moreover, the federal legislative organs are to issue special legal act for particular members of the federation;
3) the components of the federation may have their own legal and judicial system;
4) there is double citizenship: each citizen, in most of the states, is a citizen of the federation and the appropriate component of the federation (e.g. in Austria, FRG, Switzerland, USA);
5) the federal parliament is bicameral: the interests of the entities of the federation are represented by the second chamber; there are two principles of representing a component: the principle of equal representation (e.g. in the US 2 senators from each of the 50 states) and the principle of diversified representation depending on the population (e.g. in Canada);
6) there is a division of competences between the federation and its components.[17]

A transitional form of the territorial organisation of a state is a **regional state**, also called a state based on regional autonomy, the typical examples of which are Spain and Italy. The characteristics of this form of statehood consists in the system in which the regions as its component, have their parliaments and executive bodies but their competences are, in comparison with the components of federations, limited and often strongly diversified[18].

17 K.A. Wojtaszczyk, Państwo współczesne, [in:] Społeczeństwo i polityka. Podstawy nauk politycznych, ed. K.A. Wojtaszczyk, W. Jakubowski, Aspra, Warszawa 2003, p. 263–264.

18 About term "regionalization" see: E. Gualini, Regionalization as `Experimental Regionalism': The Rescaling of Territorial Policy–making in Germany*, International Journal of Urban and Regional Research 2004, vol. 28, p. 330 and next.

As B. Giordano says, "it is useful to differentiate between two categories of regionalism. Separating out the diversity of contemporary manifestations of regionalism into broad categories allows the phenomenon to be more easily understood and analysed. Although the categories are by no means the only ones that could be used, they are useful because they allow distinctions to be made between the various types of regionalism. The categories used here are 'institutional' and 'autonomist' regionalism. The former relates more to the processes of 'regionalisation' which have taken place within and between European states, whereas the latter refers to the forms of minority, separatist and ethnic regionalisms which have gained increasing exposure in recent decades. Also, it must be pointed out that the two categories are not mutually exclusive because there are often many links between the two, for example, often the processes of regionalisation within a state develop into, and provide legitimisation for, forms of 'autonomist' regionalism."[19]

This certainly does not mean that the federalist or regionalist conception of the territorial organisation of a state excludes a possibility of further territorial decentralisation. The most frequently, both the components of federations and the regions, are divided into further, lower tiers of public authority of self–governing nature.

Inasmuch as a federation (federal state) is an entirety of legal and constitutional institutions which enable to tell a particular state from unitary, regional or, also aforementioned, confederation, it is necessary to explain then what federalism, unitarism and regionalism are. These terms cover political processes, legal and political doctrines, philosophical ideas, legal solutions and constitutional practice concerning the rising, functioning or reforming a particular type of state (federal, unitary or regional).

Table 1. Federations in contemporary world

19 B. Giordano, Italian regionalism or 'Padanian' nationalism – the political project of the Lega Nord in Italian politics, Political Geography 2000, no. 19, p 448 and next. About models of regionalism see also A. Schade, A research topic in education law and policy: The development of regionalism and federalism in Europe and their impact on educational policy and administration, European Journal for Education Law and Policy 2000, no. 4, p. 39.

Federation	Type	Components	Head of State
Argentina	Republic	Provinces	President
Australia	Federal monarchy	States	British monarch (represented by the Governor–General)
Austria	Federal republic	Lands	President
Bosnia and Herzegovina	Federal republic	Administrative units	Collective president
Brazil	Federal republic	States	President
Canada	Federal monarchy	Provinces	British monarch (represented by the Governor–General)
Comoros	Union	Self–governing islands	President
Ethiopia	Federal republic	Regions	President
Germany	Federal republic	Lands	President
India	Republic	States and territories	President
Mexico	Republic	States	President
Micronesia	Federal republic	States	President
Nigeria	Federal republic	States	President
Russia	Federal republic	Entities of Federation	President
Switzerland	Federal republic	Cantons	President
United States of America	Republic	States	President
Venezuela	Republic	Federal States	President

Source: J. Jaskiernia, Wprowadzenie do systemu państw federalnych, [in:] Jaskiernia J. ed., Problemy rozwoju federalizmu we współczesnym świecie. Wydawnictwo Uniwersytetu Humanistyczno – Przyrodniczego Jana Kochanowskiego, Kielce 2010, p. 10.

3. Federal state vs. Confederation

The term confederation is also worth noting. Its understanding, unfortunately like the term federation, is not uniform, since in the literature of the subject we will meet a wide variety of different definitions of confederation. The notion of confederation appeared as early as ancient Greece in form of sympoliteia (the Confederation of Boeotia, the Confederation of Lacedaemon). In the modern era examples of confederation were the United Netherlands (1579–1795), the Confederation of the Rhine (1254–1350 and 1806–1813), the Hanseatic League (1367–1669), the Swiss Confederation (1291–1798, 1803–1814, 1815–1848), the German Confederation (1815–1866), the United States (1781–1787), or the Confederate States of America (1861–1865).

Although the aforementioned examples of confederations are historical, and present–day Switzerland, despite the name the Swiss Confederation, is a federation, the phenomenon of confederation is still perceived as an important tool for solving complex political problems or else, a transitional form towards a tighter union of states (federation). The idea of confederation returned especially in connection with the discussion on the future of integrating Europe.

The most accurate way of defining the system which is called confederation, from the point of view of the problems discussed in this textbook, seems the comparison of this constitutional form with the above–defined federation. It is worth noting, that like in the case of federacy, confederations also took various images, and therefore the definition can be of general nature, not taking into consideration the specific solutions which can be found in particular confederations.

Federacy and confederation differ in many respects. The differences are of various nature and may occur in particular fields to a different degree of intensity.

As far as the origins of federacy and confederation, many authors assume that a confederacy results from an agreement of international law, the legal relation between the states is based on the international law, whereas federacy is an act of internal law.

Confederation is based on the principle of legal order. If in a confederation there occurs a subordination to its organs, it is of voluntary nature. The states are bound by the decisions of the confederation but the binding force of these decisions is based on a treaty, i.e. mutual and voluntary reduction the sovereignty of the states by themselves.

In the hitherto existent confederations the confederal authority in a higher or lower degree intervened in the internal affairs of particular member–states. However, assuming that exercising sovereign rights may be limited by the consent of the given state, we may assume that also in this case the states may grant their superior rights extended onto the affairs of internal nature without detriment to their sovereignty.

Normative acts in a federal state are enacted by proper organs by majority of votes, while in a confederacy unanimity is required.

The issue of lasting of a confederation or a federacy is connected with the right to secession, which stands in contrast with the essence of federal state. In the case of confederation, a unilateral secession is justified at the application of the *rebus sic stantibus* clause.

Differences can also be observed in the ways of the authorities' functioning in confederation and federation. Generally it is maintained that in a confederation the confederal authorities exercise their power only through the member organs. In practice, however, the power of a confederation is exercised not only through its member–states but also directly in relation to the citizens of the member–states. The law established by the federal legislator binds the citizens directly, whereas in a confederation it is directed to particular member–states, which make this law binding for their citizens through an appropriate publication.

To sum up, confederation has not only a common aim, especially as far as relations with other states are concerned, but also common will and organs which implement this will. Beside an assembly consisting of the representatives of particular states, there are also organs appointed by this assembly and accountable thereto. A confederation has its own finance and army, and also exercises superior rights over the territory belonging to the whole confederation. This uniform nature of confederation manifests itself especially in relation to the third states in signing treaties on its own behalf and in representing the interests of the confederation by the deputies.[20]

4. Devolution

A special form of territorial organisation of state is the phenomenon of devolution, which in Europe can be found foremost in the United Kingdom (some authors consider the Spanish or Italian regionalism as a particular variations of devolution).

The term '**devolution**' in the science of law is usually defined in the way proposed by the Encyclopaedia Britannica. According to this source, devolution is the transfer of power from a central government to subnational (e.g., state, regional, or local) authorities. Devolution usually occurs through conventional statutes rather than through a change in a country's Constitution; thus, unitary systems of government that have devolved powers in this manner are still considered unitary rather than federal systems, because the powers of the subnational authorities can be withdrawn by the central government at any time.[21]

The phenomenon of devolution is characterised by a few qualities that help to understand it, which are strictly connected with one another and in some aspects overlap.

Firstly, devolution is a particular form of decentralisation of state power, which means, in this case, the transfer of *imperium*,

20 W. Suchecki, Teoria federalizmu, p. 110.

21 "devolution" Encyclopædia Britannica. Encyclopædia Britannica Online. Encyclopædia Britannica, 2011. Web. 17 May. 2011. <http://www.britannica.com/EBchecked/topic/155042/devolution>

in a certain scope, onto regional organs. Secondly, devolution means deconcentration of power or its delegation from one tier of administrative hierarchy to another: lower one and spatially farther from the centre.[22] Thirdly, devolution concerns both the legislative and the executive branch of power. The judiciary, as will be presented, also manifest numerous organisational distinction, which, however, do not result from the modern process of devolution but rather evidence of the traditional autonomy of the territories nowadays subject to this process.

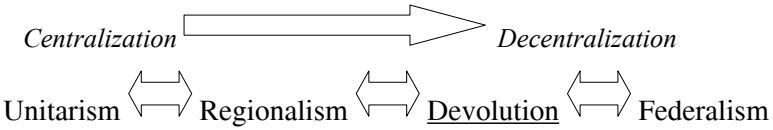
The fourth quality of devolution is that the power is transferred to the organs resulting from the elections based on geographical criteria.[23] The fifth quality is treating these organs as parliamentary and governing bodies, in contrast with "ordinary" legislative and executive bodies that are part of local government. The sixth quality is a formal possibility of reversing the process of devolution: the transfer of competences is not durable. The range of rights may be either increased or reduced. The decision in this case remains a property of the central authorities. This lability leads us to another quality of devolution: evolutionarity. This process is strongly historically determined. It forms itself in relation to the changing geopolitical circumstances, flexibly adjusting to the expectations of the "peripheries" as well as the will of the centre. Because these expectations are different, we may form a thesis on another quality of devolution, which is of heterogenic nature: different parts of the United Kingdom obtain different legal statuses. The last quality has a geographical dimension: devolution occurs on the territories of certain "peripheries" of Great Britain, while the centre itself remains unchanged in this respect.[24]

The process of devolution may be compared with the process of regionalisation, as the transfer of power also occurs in other European states, such as discussed before Spain and Italy. However, in the case of

22 G. Smith, Życie polityczne w Europie Zachodniej, Warszawa 1992. p. 73.
23 V. Bogdanor, Devolution in the United Kingom, Oxford 1999, p. 2.
24 P. Sarnecki, Ustroje konstytucyjne państw współczesnych, Kraków 2003, p. 80. For further reading on the United Kingdom see also: M. Kaczorowska, Dewolucja systemu politycznego: istota, wpływ i znaczenie – casus Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej [in:] J. Szymanek, M. Kaczorowska, A. Rthert (ed.), Ewolucja. Dewolucja. Emergencja w systemach politycznych, Warszawa 2007

the United Kingdom, there are constitutional solutions so original that the Spanish and Italian regionalisms and the British devolution may be treated as separate forms of territorial system.[25]

Searching for an answer to the question on the constitutional nature of the territorial organisation of the United Kingdom, considering the aforementioned qualities of devolution and dissimilarities in relation to the regional states, and all the more the federal states, we have to recognise the fact that inasmuch as the United Kingdom formally remains a unitary state with a peculiar, original territorial structure, in the functional sense the range of rights which the components of this state possess, justifies the statement that the British devolution places itself on the scale of territorial systems of the European states between federalism and regionalism. Chapter IV of this textbook discusses the specific solutions of the British territorial organisation.



5. Region as a criterion of the formal classification of European states

In the analysis of territorial organization of particular European states the key role is played by the notion and the legal status of region. This defines, to a remarkable degree, the territorial formula of the state, determining if we have to do with a unitary or compound (federal) state or a transitional model.

It is worth bearing in mind that particular states define their regions differently, either in their names, constitutional status or in the public responsibilities vested in them. It is impossible then to develop a precise and specific definition of region. In view of the European states and their territorial organization presented in the successive chapters

25 I. Pietrzyk, Polityka regionalna Unii Europejskiej i regiony w państwach członkowskich, Warszawa 2006, p. 253.

it turns out that their qualities differentiate them quite remarkably. Searching for a common denominator to help us answer the question what are the regions in Europe, we should reach for the definition of regional self–government which can be found in the European Charter of Regional Self–Government, which is a source of European standards in this matter and should be taken into consideration while determining the meaning of this term. article 3 para 1 of this international agreement reads that "Regional self–government denotes the right and the ability of the largest territorial authorities within each State, having elected bodies, being administratively placed between central government and local authorities and enjoying prerogatives either of self–organisation or of a type normally associated with the central authority, to manage, on their own responsibility and in the interests of their populations, a substantial share of public affairs, in accordance with the principle of subsidiarity."[26]

Table 2 presents the qualities of administrative regions in various types of states. Four types of states occurring in the European Union were taken into consideration, allowing for the range of the impact of decentralisation of public power on their territorial structure and four qualities determining the status of the regions: direct electing regional authorities, the right of the regions to a part in creating national policies, the right of the regions to sign international agreements as well as the right to political/legal control over the subregional authorities.[27] Four types of regions can be distinguished from this comparison:

1. Autonomous regions in federal states: e.g. German lands.
2. Autonomous regions in unitary states: e.g. Spanish autonomous communities or Italian regions.
3. Self–governing regions in unitary states: Polish regions should be counted among this category.

26 A. Jackiewicz, Status prawny regionu w świetle Konstytucji RP z 2 kwietnia 1997 r. – wybrane uwagi konstytucjoprawne. Polska wschodnia – perspektywy rozwoju. Białystok 2008, p. 139–140.

27 The division and the criteria proposed by J. Loughlin, Regional and local democracy in the European Union, Office for Official Publications of the European Communities, Luxemburg 1999.

4. Administrative–functional regions in unitary states: e.g. regions in France in the period 1972–81.

Table 2. Types of administrative regions in different types of states

Type of state	Qualities of administrative regions			
	Local government elections	Share in creating national policies	Signing international treaties	Political/legal control over subregional authorities
Federal	++	++	+	+
Regional unitarny	++	+	–	–
Decentralised unitary	++/+	–	–	–
Centralised unitary	–	–	–	–

Symbols:
++ a quality occurring very frequently
+ a quality occurring frequently
– a quality does not occur
Source: A. Miszczuk, Regionalizacja administracyjna III Rzeczypospolitej. Koncepcje prawne a rzeczywistość, Lublin 2003, p. 36.

6. Local government as an element of territorial organisation

The indispensable element of modern territorial organisation of state, without which it is difficult to imagine democracy at work is local government. It is one of the crucial manifestations of the implementation

of aforementioned principles of subsidiarity and decentralisation being democratic standards. It is also a basic mechanism of civil society through which local communities may satisfy their needs.

Local government is nowadays a standard of democracy but considering its various models, which correspond with various forms of territorial organisation of state, federalism, regionalism and unitarism, it is difficult to define this term precisely. Legislators also avoid legal definitions in this respect. Defining the term local government remains largely a task for the science of law.

According to B. Banaszak, the science of law most frequently recognises that local government is a form of self–government with compulsory membership, embracing all the people inhabiting the territory of a certain unit of the territorial division of state, which manages own affairs of the local community independently from the state administration. In this understanding local government is part of the executive.[28]

In order to establish the meaning of the term local government treated as a European standard, it is useful and necessary to quote the provisions of the European Charter of Local Self–Government, whose article 3 para 1 states that: "Local self–government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population." The Charter includes several more solutions characterising local government, e.g. the Charter demands basing the operations of local government on the principles of democracy, decentralisation and subsidiarity, (adopting the structures and administrative means to the responsibilities of local communities, appropriate defining the mandate of representatives of the residents in local government organs, possibility of establishing supervision over local government in accordance with the principles of legality, purposefulness and proportionality, guarantee of financial

28 B. Banaszak, Porównawcze prawo konstytucyjne współczesnych państw demokratycznych, Warszawa 2007, p. 493, A. Jackiewicz, A. Olechno, K. Prokop, Samorząd terytorialny, Siedlce 2010, p. 6–7.

independence, possibility of organising of local government units and its judicial protection).

Seeing that the European Charter of Local Self–Government, as a ratified international agreement binding the member–states, outlines European standards for local government, the aforesaid definition is in this matter a common denominator in all European democratic states. However, beside the standards included in the Charter, the characteristics of present–day local government requires allowing for circumstances connected with a particular state, its constitutional tradition as well as modern solutions for the constitutional form. One of the factors determining a particular model of local government is the type of territorial organisation: federalism, regionalism and unitarism.

The basic difference between unitary and federal systems is that in federal systems there is a tendency to stronger reducing the importance of the central government in relation to local government. What is more, within the framework of federal state there may exist various systems of territorial self–government while in a unitary state there is generally one system of self–government all over the country. In regional states, being a transitive form between federation and unitary state, there is a uniform model of territorial government. However, within the framework determined by the Constitution and national laws, regions do affect the form of local government on their territories (e.g. the regions in Italy decide on bringing a new municipality to existence)[29]

Beside the aforementioned systemic discrepancies, differences also occur within the states counted among one of the three categories, which usually results from constitutional traditions of particular states and evolving geopolitical circumstances.

It is worth noting that there are terminological inconsistencies in Europe. Inasmuch as each language has its proper names of particular local government units, presenting their equivalents in English may be really problematic. This tbook, as a rule, was based on official translations of the Constitutions of the states under discussion, but the

29 L. Rajcy, Modele samorządu terytorialnego, [in:] Samorząd terytorialny w Europie Zachodniej, Warszawa 2010, p. 17–20.

reader should bear in mind that in the doctrine and journalistic texts we may come across other terms.

In spite of all those differences, the solutions, developed over time in particular states, concerning local government, began to become similar in their essential elements. Among these elements, as B. Banaszak maintains, we may count:

1) separation of local government organs from state administration organs; they have their own competences resulting from law; exercise public responsibilities independently and on their own accountability;
2) providing territorial self–government with competences to make local law, which to their inferiors is as binding as the commonly binding acts enacted by the chief state organs (of course, the norms of local law must remain in compliance with the hierarchically superior legal norms, and those included in the acts established by the chief executive bodies);
3) granting territorial self–government organs competences to take administrative decisions and exacting their implementation;
4) providing a municipality/commune and other units of local government with legal personality; they are independent addressees of legal norms; they are self–contained entities of rights, especially public rights;
5) conferring local government financial control including the right to collect taxes in legally determined cases;
6) providing local government units with the right to employ people in accordance with the generally binding norms of labour law; a municipality/commune and other local government units employ their staff and, depending on the local needs, determine their number; office personnel and other local government employees are not dependent on the state but are bound to their employer, i.e. local government.
7) providing local government organs with competences to decide on spatial management plans, enabling self–governments of particular units of territorial division to make unions in order

to cooperate in fulfilling the tasks proper for self–governments; these unions may be permanent or temporary, or else they may be agreements just to achieve one goal; such unions are particularly popular on the level of municipalities/communes and take different legal forms in particular states.[30]

30 B. Banaszak, *op. cit.*, p. 493–494.

Part 2

THE SWISS CONFEDERATION AS A FEDERAL STATE

1. Development of the Swiss federalism

Switzerland is a state whose modern territorial system has been shaped through evolution over a few hundred years. The binding Constitution, establishing the bases of the system, is a successive constitutional act reforming the structure of the Swiss state, which has always been of complex nature.

The framework of the Swiss statehood was founded as early as 1291[1] along with the conclusion of the eternal alliance between the three cantons: Uri, Schwyz and Unterwalden, whose objectives were, for instance, assistance to the wronged in the event of a violent or unlawful act. committed on their persons or possessions; resolving debates on casus foederis by their own arbitrators, as well as establishing criminal regulations concerning homicide, arson, robbery and theft, and also sanctions concerning executions of sentences.[2] It was that moment which can be called the beginning of the Swiss Federation.

The aforesaid alliance was being concluded in a complex geopolitical situation connected with the dependency of the cantons on Austria, whose supremacy, due to the Emperor's support, skilful policy and successful military manoeuvres (e.g. victorious battles of Morgarten in 1315, Sempach 1386, Näfels 1388) the Swiss finally

1 Z. Czeszejko–Sochacki remarks that the first agreement for security between these settlements took place as early as 1260 but that federation was not as important as the alliance of 1291, and the act of this federation has not survived; Z. Czeszejko–Sochacki, System konstytucyjny Szwajcarii, Warszawa 2002, p. 5, and, quoted there: S. Wachholz, Geneza i rozwój Związku Szwajcarskiego, „Czasopismo Prawnicze i Ekonomiczne", Kraków 1936, p. 93. On earlier history of the territory of present day Switzerland see: Z. Porębski, Wielokulturowość Szwajcarii na rozdrożu, Kraków 2009, p. 13–21.

2 Z. Czeszejko–Sochacki, *ibidem*, p. 5

managed to throw off, the independence of Switzerland was recognised by the Empire in 1499 by virtue of the Peace of Basel (Emperor Maximilian I), and confirmed by the Peace of Westphalia in 1648.[3] The struggle for independence from the Habsburgs was carried out on the basis of ally agreements concluded by cantons (Stande) and settlements (Orte), whose number, by successive agreements and conquests, constantly increased (8 cantons to the end of the 14th century, 10 cantons in the 15th century, 13 cantons in the 16th century). Despite the fact that the Swiss Federation was based on the agreements concluded between its members, there was the Assembly (Tagsatzung) including representatives of particular cantons and towns. The range of affairs it could deal with was in truth quite limited but the very existence of such a body is evidence of the fact that statehood had shaped.

Since the 15th century the increasing territory of the Swiss Federation had faced serious difficulties threatening consolidation processes of the Federation. First, they resulted from an inter–cantonal conflict, on the grounds that the "old" cantons exploited the newly added ones, as well as because of peasant riots stirred by the policy of the government unfavourable to the rural cantons (in 15th century the urban cantons gained majority in the Federation). The other source of threat to the solidarity of the Federation was the Reformation and the activity of such thinkers as Ulrich Zwingli and Erasmus of Rotterdam. This divided the cantons into those pro–Reformation, radical ones (mainly urban), and those Catholic, conservative ones (rural), which would also have impact on modern Switzerland. This resulted in four religion–based civil wars (16th–18th centuries) and, finally, in the French intervention concluded with the imposition of the Constitution of the Helvetian Republic in 1798, defining Switzerland as a unitary centralised state and reducing cantons to administration divisions of the state. The successive French intervention brought a new, also imposed, Constitution: the Act of Mediation, which this time allowed for the federal form of the Swiss state with the highest body of the Federation: the Assembly. After Napoleon's defeat at Leipzig, the Assembly by

3 M. Matyja, Swiss made. Jak funkcjonuje wielokulturowa Szwajcaria?, Brzezia Łąka, p. 14.

resolution of 1813 lifted the Act of Mediation (under the pressure of the anti–Napoleonic Coalition).[4]

Extremely important decisions concerning Switzerland were made at the Congress of Vienna (1815): the victorious powers guaranteed neutrality and inviolability of the area of the Swiss Confederation, which has been a fundamental doctrine of the Swiss foreign policy ever since.[5] Switzerland did not join the United Nations until 10 September 2002, when this decision was passed by a narrow majority of 52% of votes.

The constitutional basis became the Federal Treaty of 7 August 1815, determining the nature of Switzerland as a federation of states (Staatenbund), embracing altogether twenty–two cantons, and of very limited competences of the federal authorities.

Another step towards the modern federalism was the Constitution of 1848 being a response to successive conflicts between radicals and conservatives about religion and the form of the state. This Constitution is called the founding Constitution as it was the first time when the hitherto prevailing loose federation of cantons (Staatenbund), guaranteeing sovereignty of the cantons, was transformed into a federation (Bundesstaat) with a relatively strong federal authorities in the form of the bicameral parliament: the Federal Assembly (the National Council and the Council of States), the government: the Federal Council, as well as the Federal Court. This Constitution provided for referendum and popular initiative (which became signum specificum of the Swiss democracy). As Z. Czeszejko–Sochocki writes: "the essence of the Swiss state lies in the organic tie of federalism and institutions of direct democracy, especially referendum." As he demonstrates, "one may find in the doctrine the term 'referendum democracy', i.e. the democracy in which the nation's will not only legitimises the existence of the Confederation, but may also be, at any moment, manifested in the basic affairs of this state."[6]

4 M. Aleksandrowicz, System prawny Szwajcarii. Historia i współczesność, Białystok 2009, p. 34 and next.
5 M. Matyja, *op. cit.*, p. 79–84.
6 Z. Czeszejko–Sochacki, *op. cit.*, p. 13.

The subsequent Constitution, which resulted from, on the one hand, the need for strengthening the federal authorities in face of the German–French conflict, and, on the other hand, the expectations of the cantons, affirmed by the referendum of 1874, was not a completely new act, in fact being a novelised version of the previous one. The essence of the changes came down to the transfer of the centre of gravity towards the rights of the federal authorities at the expense of some competences which hitherto were prerogatives of the cantons.

The Swiss had to wait for the next Constitution 125 years, over which only particular provisions to the Constitution of 1874 were added, which, according to Z. Czeszejko–Sochacki, took place in as many as 140 cases.[7] Social, economic and political changes forced needs for further changes, although the text of the Constitution was so much a "patchwork in style, language, and density of very diversified legal norms."[8] that it became natural to start, in 1965, works on the project of a new Constitution. which lasted, however, quite long, as it was not until 1996 that the government directs draft of the Constitution, accepted by both chambers on 18 December 1998. Then the Constitution was admitted by the nation and the cantons in the constitutional referendum and came into force on 1 January 2000.[9]

The history of shaping the Swiss Confederation is an example of the origins of a multi–faith state based on consensus and coexistence of various ethnic, religious and language groups.[10]

Modern Switzerland is a mountainous country (the Alps, the Swiss Plateau, Jura) of a relatively small area, 41,290 sq. kilometres, which is quite compact, and the Swiss themselves joke that it resembles a hedgehog. The population of Switzerland oscillates around 7.7 million, most of which living in the cantons in the Swiss Plateau, which are more industrial that the Alpine cantons where the dominating

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7 Z. Czeszejko–Sochacki, *op. cit.*, p. 16, compare M. Aleksandrowicz, *op. cit.*, Białystok 2009, p. 64.

8 R. Rhinow, Konstytucja Federalna Szwajcarskiej Konfederacji [in:] Konstytucja Federalna Szwajcarskiej Konfederacji z 1999 r. i Konstytucja Rzeczypospolitej Polskiej z 1997 r., (ed.) Z. Czeszejko–Sochacki, Białystok 2001, p. 37.

9 It is worth mentioning, that despite the fact that both chambers of Parlament accepted the Constitution with no problems (in the Council of States even unanimously).

10 See also: W. Linder, Demokracja szwajcarska, Rzeszów 1996, p. 71–72.

economy is based on agriculture and tourism. In the former one more often meets Protestants, while in the latter Catholics, which results from the aforementioned religious conflicts.[11] The biggest cities are Zurich, Geneva, Basel, Lausanne and Bern (capital). They are not, however, metropolises equal to the biggest cities of Europe, which is confirmed by the fact that the biggest city, Zurich, is inhabited by c. 370 thousand people.

Switzerland is a multilingual state. There are four official languages among which the Aleman variation of the German language (Schwyzerdütsch, used by 64% of the population). The remaining official languages are: French (19.5%), Italian (7%) and Romansh (0.5%). However, it is important to remember that the attachment to local dialects is very strong in Switzerland and practically each town cultivates its own variation of the language.[12]

The state is one of the richest of the world, undoubtedly considered as highly developed one. The evidence thereof may be, for example, its GDP per capita: USD 65 thousand, which places Switzerland as the 6th in the world.[13] Undoubtedly, this results from trust in the Swiss finance, established due to the neutrality of the state and the strictly obeyed rule of bank secrecy, which makes Switzerland the financial world centre (over 600 banks, 6 stock exchanges, numerous insurance companies). Moreover, agriculture as well as electronic and machine, chemical, and food industries are highly developed. Although Switzerland is not a member–state of the European Union, since 2008, has been a party in the so–called Schengen Agreement. The currency is the Swiss franc.

2. Principles of the constitutional system of the state

The constitutional system of the Swiss Confederation is based, according to R. Rhinow, on the following fundamental premises: human dignity as the highest constitutional principle, the constitutional

11 A. Porębski, Wielokulturowość Szwajcarii na rozdrożu, Kraków 2009, p. 11 and next.
12 M. Matyja, *op. cit.*, p. 19–23, A. Porębski, *op. cit.*, p. 135 and next.
13 The World Bank data for 2008 available at: data.worldbank.org

principle of federal state, the principle of democratic state of law, the principle of social state, the free–market–oriented economic system, as well as on the principle of subsidiarity.

The **principle of dignity** is the central value of chapter to of the Constitution, which it opens, being, as the Constitution itself states, a starting point for the constitutional catalogue of basic rights (articles 7–36). However, the meaning of the principle of dignity does not end here, because, as R. Rhinow maintains, the whole structure of the state serves the realisation of human dignity, and the traditional constitutional principles are all the manifestation of human dignity: they all are directed to the leading star of human dignity, which radiates on other constitutional principles and the whole legal order.[14] It is worth noting that the second chapter of the Constitution was already dedicated to the basic rights, which is currently standard for new Constitutions of democratic states based on the individualistic conception of the individual's status. Questions connected with the individual's status were one of more important factors deciding on the need for a new Constitution and the adjustment of the catalogue of freedoms and rights reflecting modern standards of individual's rights.

Another constitutional principle is the **principle of federalism**, to which the Constitution dedicates a major part of parts 3 and 4, as well as other provisions "scattered" in other parts of the Constitution. The structure of the federation has always been a matter especially important to the Swiss, by which also this time it was a subject of a vivid discourse in the process of creating the binding Constitution. The Swiss model of federation is based on its own statehood and independence of the cantons, which, according to the Constitution, should be protected by the Confederation, which is to protect the existence, the territory and the constitutional order of the cantons. The key to defining federalism as a constitutional principle determining the territorial organisation of the state is the issue, defined in the Constitution, of the division of tasks and competences between the Federation and the cantons. In general, there is a presumption of responsibilities and competences in favour of the cantons and, based on the principle of subsidiarity, the property

14 R. Rhinow, *op. cit.*, p. 43.

of the Federation which may accept only those tasks which require homogenous regulation. The **principle of the primacy of the federal law** serves this goal.

Federalism the Swiss way is an example of cooperation federalism, based on the cooperation of legally equal cantons on the level of Federation, indispensable in the process of parliamentary decision–making (Council of States) as well as referendum decision–making concerning changes in the Constitution and the major state agreements. This cooperation should be multilateral and solid, through which the Swiss federalism is sometimes defined as a partner federalism.

It is worth recalling R. Rhinow, who, defining the Swiss federalism, persuades that it cannot be confined to federal statehood, for the Constitution demonstrates that "Switzerland is a creation full of art, based on the integration of various minorities as well as linguistic and cultural communities, the integration which should always be enlivened." Examples "supporting" the formal constitutional platform of federalism may be the fragment of the Preamble confirming the will of the Swiss people and cantons "to live together with mutual consideration and respect for their diversity", Articles 2 and 69 para 3 obliging to internal integrity and supporting cultural and linguistic diversity of the country, article 4 determining the four national languages, article 70 para 2 and 3 requiring "to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take account of indigenous linguistic minorities", and article 175 para 3 obligating the Federal Assembly to take care "to ensure that the various geographical and language regions of the country are appropriately represented" in electing the Federal Council.[15] K. Matyja assesses the political system of Switzerland alike, stating that the Swiss political culture emphasises the principle of proportionality and consensus in political representation and applies it both for political parties and national languages. This results in very low rate of legal decisions of the Federation, the cantons and local communities that contradict or overlap each other. The local political affiliation is very deeply rooted in the Swiss citizen's mentality, who definitely first

15 *Ibidem*, p. 43–45.

identifies with his community and canton whereas Bern is to him more the seat of the Government than the capital city of the state.[16]

The **principle of democratic state of law** is expressed in article 5 of the Constitution, where there are references to legality and state activity based on law, public interest and proportionality of any state actions, requirement of acting in good faith and primacy of international law before the whole home law. These records are required to define more precisely the meaning of the principle of democratic state of law present in the Swiss doctrine. For it is, according to Z. Czeszejko–Sochacki, understood foremost as the state's commitment in all its forms of operation, to limit its authoritative intervention in order to protect freedom. The state of law should reduce its operation so as to secure "peaceful order by means of law". In Switzerland the state of law is defined like in other European countries by means of formal and substantive elements. The former include the constitutionality of the state, the principle of legality, division of powers and legal protection, especially in form of constitutional and administrative jurisdiction. The substantive elements are foremost freedom and equality before the law as well as individual procedural rights to protect these values.[17]

Although in the Constitution there is no literal reference to Switzerland as a social state, this rule is constructed on the basis of the systematic analysis of the content of all constitutional decisions. It is already in the preamble that the phrase "the strength of a people is measured by the well–being of its weakest members" is used, and in the provisions of chapter 1 and successive ones, e.g. article 2 where common welfare and care for the greatest possible equality of opportunity among the citizens are mentioned. Alike, in article 94 we can find welfare and economic security of the population as principles of economic order of the state and the cantons. Also the catalogue of social rights provides evidence thereof, especially the right to aid in distress[18] and particular commitments (especially resulting from Title III, Part 2, Section 8 of the Constitution: Housing, Work, Social Security and Health)

16 M. Matyja, *op. cit.*, p. 34.
17 Z. Czeszejko–Sochacki, *op. cit.*, p. 33–34.
18 Art. 12: Whoever is in distress without the ability to take care of himself or herself has the right to help and assistance and to the means indispensable for a life led in human dignity.

imposed upon both the Federation and the cantons to involvement in social welfare policies in such issues as social security, health, family, maternity, labour, care of elderly people, widows and orphans – of course, within the framework of their constitutional competences.

The **principle of subsidiarity** is extremely important and connected with the principle of federalism. According to Z. Czeszejko–Sochacki, the Constitution is downright permeated with this principle and the debate in parliament during the work on the new Constitution revolved around this principle, both in the relations between the state and society as well as between the Federation and the cantons.[19] In the former aspect the principle focuses on individual and communal responsibility, borne by each person for him/herself and is expected to contribute, according to his/her own strength, to implement the tasks of the state and society. The supplement of the principle of subsidiarity in this aspect are the aforementioned regulations of social nature securing existence for those who are not able to take care of themselves" (article 12).

The principle of subsidiarity in the context of the relation between the Federation and the cantons foremost consists in implication thereof in favour of the cantons and committing the Federation to respect the cantonal autonomy. The Federation should use its competences at the highest consideration of the independence of the cantons.

The constitutional characteristic of the Swiss Confederation that makes this country different, is the scale of consideration of direct democracy mechanisms. At present Switzerland is referred to as "the homeland of direct democracy". This manifests in both the number of forms and the scope of its application both in the objective and territorial aspect (federal, cantonal and local levels). It is worth mentioning that all constitutional changes require to be confirmed in referendum, and the Constitution of 1948 was accepted by the people in this form, although there was not such a formal obligation yet.[20]

19 Z. Czeszejko–Sochacki, *op. cit.*, p. 33–34.
20 Z. Czeszejko–Sochacki, Referendum i inicjatywa ludowa w systemie politycznym Konfederacji Szwajcarskiej, „Studia Prawnicze" 1989, nr 2–3, p. 27.

3. The system of government of the Swiss Confederation

A constitutional standard of modern democratic states is the organisation of the central state authorities according to the principle of division of powers. In Switzerland the implementation of this principle, which actually was not expressed explicitly in the Constitution, took a quite original form. It is connected with the particular constitutional status of the Federal Assembly, which, in accordance with the Constitution, exercises the highest authority in the Federation (article 148 para 1), which means the supervision over the other bodies of authority fulfilling the tasks of the Federation (article 169). The consequence thereof is a very limited possibility of influencing the Parliament by other state organs. By the same token one of the elements of the principle of separation of powers, mutual containment of the authorities.

The Federal Assembly consists of two chambers: the National Council and the Council of States. In the Swiss constitutional model there occurs equivalent (symmetrical) bicameralism: both chambers have the same influence on the legislative power function (article 148 para 2). They have no independent separate competences, since it is they both that deal with all the affairs constitutionally subjected to the competence of the parliament. An example is legislative procedure, which may be launched in one of these two chambers, and to pass a law their consensus is necessary (more about it in the further part of the text).

Among the most important prerogatives of the Federal Assembly are:

- supervision over other federal bodies,
- making law,
- co–shaping of foreign policy,
- enacting the budget
- appointing new organs and their staff,

– protection of external security, independence and neutrality of Switzerland.

The chambers of the Federal Assembly are elected in different way, which causes doubts as to the nature of deputy's mandate in the context of the principle of representation.[21]

The **National Council** consists of 200 national deputies, who are elected for a four–year term in common, direct and proportional elections. From the point of view of the territorial organisation of Switzerland, it is important that each canton makes one constituency, and the number of seats (at least one seat for each canton) is determined by the number of residents.[22]

The **Council of States** includes 46 canton deputies, where 20 cantons elect 2 deputies each, while six cantons determined in article 150 para 2 of the Constitution, (called demicantons) elect one candidate each. They way the cantons elect their deputies depends on their legislation. The cantonal regulations show that these are common elections[23].

At determining the representative nature of the both chambers the legal nature of the mandate is essential. Taking into consideration article 161 of the Constitution, which states that deputies vote without instruction, it is a free mandate, which means that they are not formally bound by the will of their voters or political parties. It is worth bearing in mind, however, that inasmuch as the deputies to the National Council are representatives of the people and its interest, the deputies to the Council of States are deputies of the cantons and are expected to guard their interest. Hence the Council of States is treated as a form of cantonal participation in the process of shaping the Federation's decisions.

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21 Z. Czeszejko–Sochacki, Rada Kantonów Konfederacji Szwajcarskiej [in:] Izby drugie parlamentu (ed.) E. Zwierzchowski, Białystok 1996, p. 241 and next.

22 In Switzerland the voter has the right to the so–called 'panaching of lists', which involves crossing out some candidates from the list and putting candidates from other lists instead. The voter may also cumulate votes, which involves concentrating a higher number of votes for one candidate. The voter crosses out a certain number of names from the list, and in their place puts in the name of the candidate he wants to single out.

23 About Swiss electoral system and Swiss federal elections of 2007 see: P. Dardanelli, The Swiss federal elections of 2007, Electoral Studies 2008, no. 27, p. 748–751.

The best illustration of the Swiss bicameralism, and simultaneously the strongest position of the second chamber of the parliament,[24] among all discussed in this book, is the legislative process. According to Z. Czeszejko–Sochacki, it is peculiar in Switzerland because of the evolutionary nature of shaping constitutional institutions as well as the relation between the chambers: equivalency. This peculiarity manifests itself already at the stage of initiating the legislative procedure, as all deputies may use this right, both the National Council and the Council of States, each fraction, parliamentary committee, canton and the Federal Council. Due to the equivalent bicameralism the legislative works may be carried out in one or another chamber (exceptionally simultaneously). Z. Czeszejko–Sochacki presents comprehensively the equivalence the equivalence of the chambers: "in the cases under the competences of the Federal Assembly it manifests itself in necessity to pass by them both a unanimous resolutions. The resolution of one chamber is immediately sent to the other. Each of them has the right of veto to the other chamber." Due to this "balance of power" the procedure of eliminating differences between the chambers, which, although present in this or that form also in other bicameral parliaments, in this case becomes extremely important. In the case of a difference between the texts resolved by the chambers, the one which first launched the legislative procedure chooses between the options of maintaining their own text, a consent to the version of the other chamber or produces a new version of the bill. As Z. Czeszejko–Sochacki remarks "actually this attempt at consensus lasts as long as a compromise is reached."[25] For both chambers deal with potential discrepancies. In the case of failure in their elimination, an attempt to harmonise the text takes a common Conciliatory Committee. Passing the law, however, always requires a consent of the both chambers to the text of the law and there is no possibility that one of the chambers imposes its position upon the other.

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24 See also: A. Jackiewicz, Zasada federalizmu a funkcja ustawodawcza izb drugich parlamentu w federacjach europejskich, [in:] S. Bożyk, A. Jamróz (ed.), Konstytucja, ustrój polityczny, system organów państwowych, prace ofiarowane Profesorowi Marianowi Grzybowskiemu, Białystok 2010.

25 Z. Czeszejko–Sochacki, System konstytucyjny…, *op. cit.,* p. 73.

The highest governing and executive authority, in compliance with article 174 of the Constitution is the **Federal Council** or the Swiss government. This constitutional name should be interpreted in the context of the supremacy of the Federal Assembly and federalism, determining the borders to the competences of federal authorities and protecting independence of the cantons. In connection therewith functioning of the Federal Council requires, on the one hand, cooperation with the parliament which makes the law, budget and exercises supervision, and, on the other hand, cooperation with organs of the cantons, especially in execution of federal legislation (article 186 para 2: The Federal Government approves cantonal legislation where the implementation of federal law requires so). The constitutional status of the Federal Council undoubtedly exceeds, however, the model of "ordinary" executive, through its significant role in shaping the State's policies. Therefore, the aforesaid article 174 of the Constitution above all defines it as a governing power, and only later as executive.

Z. Czeszejko–Sochacki, on the grounds of the Swiss doctrine, defines the very governing function as "planned, perspective and referring to the common good supreme state management". In the context of the territorial organisation of Switzerland, it is worth noting that although according to article 180 para 1, the Federal Government determines the goals and the means of its government policy and plans and coordinates the activities of the state, fulfilling its tasks it should seek for state unity and solidarity of the nation, as well as preserving the federalist diversity.[26]

The federal constitutional structure sets before the Federal Council particular tasks in the relation between the Federation and the cantons. This function of the Federal Council is called federal supervision. This manifests itself, firstly, in the supervision over the matters passed to the cantons, as already mentioned, especially in the execution of the federal legislation, and, secondly, respecting cantonal Constitutions, legislatures and cantonal administration.

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26 Z. Czeszejko–Sochacki, System konstytucyjny…, *op. cit.,* p. 58. The author underlines the difficulty in classifying these competences on the grounds of the classic model of separation of powers.

Assessing the constitutional status of the Federal Council it is worth bearing in mind that it actively participates in law–making, exercising the right of legislative initiative as well as giving an opinion on projects sent to it by the chambers and the cantons. This results in the situation, as W. Haller claims,[27] that *de facto* it is the government that prepares all normative bills, while independent parliamentary initiatives occur in the Parliament relatively rarely. Moreover, the Federal Council, on the basis of constitutional or statutory authorisations, issues ordinances.

The composition and institution of the Federal Council is remarkable. It consists of sever "federal councillors" elected by the Federal Assembly. They are appointed by means of the so–called magic formula (Zauberformel), which involves the necessity of recognition in the Federal Council representatives of the major parties, cantons, religions as well as all linguistic areas.[28] The constitutional status of the Federal Council is strengthened by the fact that there is no possibility to revoke either the whole Federal Council or single federal councillors. The Swiss political system does not know the institution of vote of non–confidence.

The Federal Council makes its decisions collegially; the chairperson is just *primus inter pares*. What is also characteristic is the principle of departmentalism meaning permanent division of work of the federal councillors according to seven determined departments, for which they bear political responsibility.

An original solution of the Swiss constitutional system is the institution of "rotary president and vice–president", who is, respectively, the president and the vice–president of the Federal Council. Fulfilling the functions of presiding this body and, simultaneously, fulfil representative functions outward. They are elected by the Federal Assembly from among the members of the Federal Council for a year's term (calendar year), which cannot be prolonged.[29]

27 *Ibidem*, The author refers to W. Haller without citing the source of this opinion.
28 F. Kinsky, Federalizm. Model ogólnoeuropejski, Kraków 1999, p. 49.
29 In practice the order of election results from the seniority of membership in the Federal Council.

The **judicial power** in Switzerland was divided between the Federation and the cantons. At the federal level, a court of higher instance is the Federal Court (germ. Bundesgericht, fr. Tribunal fédéral) and two courts of the first instance : the Federal Criminal Court and the Federal Administrative Court.

Since 2004 there have been also functioning a federal court of the first instance : the Federal Criminal Court (German: Bundesstrafgeric ht, French: *Tribunal pénal fédéral*, Italian: Tribunale penale federale) with the seat in Bellinzona, proper for the so–called federal criminal cases, such as crimes against federal institutions or officials, money laundering, organised crime. Appeals from the judgements of this court are considered by the Federal Court. In passing, it is worth adding that it is the first organ of the federal power situated in the "Italian" canton of Ticino. The court includes 17 judges elected for a six–year terms by the Federal Assembly.

The Federal Administrative Court (German: Bundesverwaltungs gericht, French: *Tribunal administratif fédéral*) was instituted in 2005 and commenced its work in 2007. It deals with appeals from administrative decisions of federal authorities and the highest cantonal authorities. It consists of five departments including 73 judges appointed by the Federal Assembly for a six–year term. Its seat is temporarily Bern, although ultimately it will be Sankt Gallen, when the construction of the court buildings is completed.

From 1917 on in Switzerland also functioned the Federal Insurance Court (German: *Eidgenössisches Versicherungsgericht*, French: *Tribunal fédéral des assurances*), established in Lucerne, proper for social security affairs. However, from 1969 on, despite preserving its full organisational and judicial independence it was practically a Department of the Federal Court. On 1 January 2007 it was formally incorporated into the structures of the Federal Court, although its seat remained in Lucerne.

The remaining Swiss courts are cantonal courts. The aforementioned Federal Court is, in compliance with article 188 para 1 of the Constitution "the highest federal judicial authority". Its seat is in Lausanne, and 57

independent judges of the Federal Court are elected for a six–year term by the Parliament. Re–election is admissible and practised.

From the point of view of the Swiss federalism the institution of the Federal Court is essential for at least two reasons: its property but also the role it played in the process of shaping the present complex structure of the state. It was instituted in 1848 as a court for disputes between the Federation and the cantons as well as between the cantons alone. Its responsibility was, by the same token, for example, to guarantee the independence of the cantons. Along with the Constitution of 1874, the role of the Federal Court increased. It became independent and was endowed with new competences: affairs connected with the application of the federal law as well as to control the compliance of the cantonal law with the federal law. The Federal Court has enjoyed these competences until now, playing the role of constitutional court in this area. According to article 189 para 1 of the Constitution, the Federal Court adjudicates:

a) complaints about the infringement of constitutional rights
b) complaints about the infringement of local autonomy and other guarantees by the cantons to public law institutions;
c) complaints about the infringement of international agreements and agreements of the cantons
d) disputes between the Federation and cantons or between cantons.

It is worth noting that the Federal Court does not adjudicate competence disputes between the federal organs themselves. In this case, in accordance with article 173 para 1i of the Constitution, the Federal Assembly is proper.

Beside adjudicating disputes of public law, the Federal Court is entitled to hear legal disputes on private law: it judges as the highest instance in administrative, civil, criminal and other legally determined affairs.

In the context of the aforesaid constitutional statuses as well as functional mechanisms of the federal authorities, the Swiss government

system can be recognised neither as a parliamentary system nor, obviously, as a sort of presidential system.[30] This system is sometimes called a system of assembly governing or a system of directorial governing, although the most cogent seems to recognise this form as a parliamentary–committee system.[31]

4. The constitutional status of the cantons

The constitutional status, as well as the historical factors presented above, do not allow for reducing the role of the cantons to just components of the Swiss state. Evolutional history of the formation of the present day federation demonstrates a generally consensual process of emerging intercantonal bonds, which, tightening with the course of time, led to the Swiss state in its present form. Binding themselves with mutual commitments, and then ceding part of their competences to the Federation, the cantons have never renounced the attributes of their own separate statehoods. The origins of Switzerland as a separate political entity required consideration of political, religious and cultural diversity, and guaranteeing particular cantons respect for this diversity. Hence, the Swiss federalism is characterised by the furthest–going in federal states independence of the component–entities. Suffice it to say that it is reminded in the preamble and article 1 of the Swiss Constitution where is a phrase that it is the people and the cantons that establish the Constitution and make the Swiss Confederation.[32] It is important, however, to bear in mind that this approach somewhat disavows the previous construction of a federation based on the agreement concluded exclusively between the cantons. Nowadays two state–building factors occur then: the people and the cantons.

30 R. Rhinow, Die Bundesverfassung 2000, Eine Einführung, Helbing & Lichten–hahn, Basel–Genf–München 2000, s. 286, W. Haller, A. Kölz, Allgemeines Staatsrecht, Basel–Genf–München 1999, p. 210.

31 Z. Czeszejko–Sochacki, System konstytucyjny…, *op. cit.,* p. 48, I. Rycerska, Tendencje reform samorządu terytorialnego w Szwajcarii, [in:] L. Rajcy (ed.), Samorząd terytorialny w Europie Zachodniej, Warszawa 2010, p. 181 and the literature cited there.

32 Article 1 of the Federal Constitution of 1874 contained the phrase: "Together, the peoples of the 23 sovereign Cantons of Switzerland united by the present alliance".

The constitutional status of the cantons is also determined by article 3, which confirms sovereignty of the cantons, setting, however, its limits, which was necessary for securing effective functioning of the Federation. The sovereignty, however, is limited only by the Federal Constitution. The consequence of the constitutional provisions is, by the same token, implication of competences in favour of the cantons. They are actually in all affairs not reserved for the Federation.

One of the crucial attributes of cantonal statehood are Constitution, in which the cantons clearly manifest their statehood. Each canton itself establishes its Constitution and the Federal Constitution requires (article 51) that these Constitutions be democratic, accepted by the people of the given canton and must be revised if the majority of entitled voters demand so. So accepted, it must be approved of by the Federation, which the Federal Constitution call a guarantee, which occurs if the cantonal Constitution is in conflict with the federal law. This guarantee means that the Federation protects the constitutional order of the cantons, and suggests that if the order in a canton is disturbed or endangered, and the canton in question cannot protect it itself or with other cantons' aid. The sphere of federal constitutional guarantees (article 53) embraces with its scope also the existence and territories of particular cantons, allowing for changes in the number and constitutional status only by the joint consent of the population concerned, the cantons concerned as well as the people and the cantons. On the other hand, changes of territories between the cantons require a consent of the population concerned as well as their approval by the Federal Assembly in form of a federal resolution. The Swiss Constitution allows for so–called regulation of borders, which actually means small corrections and, consequently, may be carried out by means of agreement between the cantons concerned. The Constitution also lays on the federal authorities responsibilities and rights connected with economic disproportions of particular cantons. These solutions are one of the forms of federal intervention in the independence of the cantons. One of examples may be the institution of so–called financial equalisation envisaged by articles 128 and 135 of the Federal Constitution, enabling extra federal benefits in favour of the cantons of lower economic potential.

It is also worth noting that the cantons take part in the procedure of changing the Federal Constitution, as the referendum approving the changes is of "double" nature, i.e. the votes of all voters are summed separately from the votes of the cantons. To assent the project of the Constitution majority is required from both the whole population of the country and the cantons.

Due to the fact that each canton has its own Constitution, this could lead to a far–going constitutional diversity on the map of Switzerland. However, despite some differences, we can observe a dominating model of the cantonal system. The separation of powers (trias politica) occurs in all the cantons. Also in all the cantons the legislative power is vested in unicameral parliaments. However their names (Grand Conseil, Grosser Rat, Kantonsrat, Landrat, Gran Consiglio) and numbers of members (Appenzell Innerrhoden: 49, Obwalde: 55, Szafuza: 60, Zug: 80, Freiburg: 110, Graubünden, Sanki Gallen: 120, Aargau: 140, Vaud: 150 deputies) differ quite remarkably. The term of local parliaments is four years, though there are exceptions to this rule; e.g. in Freiburg the term lasts 5 years. Elections are, of course, common with a proportional electoral system. It is worth noting that additionally, in two cantons (Glarus, Appenzell Innerrhoden) there is legislature in the form of direct democracy: the popular assembly (Landsgemeinde). In the other cantons the popular assembly has been abolished on the level of canton, whereas it very often occurs on lower levels: in districts or communities.[33]

Executive power in particular cantons is exercised by cantonal governments, the most frequently called Governing Councils (Regierungsrat) or Cantonal Councils (Conseil d'Etat). They consist of a few people, usually 5–7 councillors. It is worth noting that the cantonal governments are also formed in common elections, usually for a four–year term.

The judiciary in Switzerland generally lies in the competences of the cantons, which, through their legislation, determine themselves the organisation of courts of law on the territory of a given canton, their

33 I. Rycerska, Tendencja reform samorządu terytorialnego w Szwajcarii, [in:] L. Rajca (ed.), Samorząd terytorialny w Europie Zachodniej, Warszawa 2010, p. 186 and next.

properties and procedures. In general, the cantonal judicial system is two–instance, e.g. in the canton Bern the first instance is district courts, while the second instance is the Supreme Canton Court (Germ. Obergericht, French: Cour suprême), in the canton Nidwalden the first instance is borough courts (Kantonsgericht), whereas the other, depending on the matter, the Cantonal Supreme Court (Obergericht) or the Administrative Court (Verwaltungsgericht).

The Federal Constitution points at the cantons as proper for regulating a broad range of matters, these being, for example, cases connected with culture, education, healthcare and an essential part of criminal and civil law. These regulations are passed in acts of cantonal parliaments (alternatively popular assemblies), and then are specified in executive acts of the same parliaments or (usually) the local executives.

Inasmuch as the federal law envisages it, cantonal laws and regulations are presented to the Federation for its assent which gives them a legal force. Such assents are granted by accurate departments and, in the case of doubts, the Federal Council in pleno. The government is allowed to place its reservations in the assents granted.[34]

5. A community as a basis of the political and territorial organisation of the Swiss Confederation

The origins of local government in Switzerland in its present version dates back to the times of the Helvetian Republic (1798–1803), and in some cases its roots reach even the times preceding the formation of the first alliances in the 13th century, discussed in the first part of this chapter.[35] At that time the basis of the organisation of local communities were private legal unions of farm–owners, which rose for joint solutions of problems of the property rights. With the course of time, however, beside the affairs connected with farming, they also

34 M. Aleksandrowicz, *op. cit.*, p. 173–174.
35 *Ibidem*, p. 185.

dealt with affairs of the whole local community, transforming into unions of public law nature. Citizenship was granted to residents only, separately by each town and village. The Helvetian Republic created a uniform Swiss citizenship, which applied equally for citizens of the old towns and their tenants and servants. Since then, there were two politically separate but often geographically similar local organizations. The first one, municipality, created by the Helvetian Republic, was a political community consisted of all resident citizens. The second one, called Bürgergemeinde, based on former local citizens was the land and property community. Such a dualism has survived until now, and the municipality is of dominating importance. However, the Bürgergemeinde has remained, and it includes all individuals who are citizens of the Bürgergemeinde, regardless of where they were born or where they live. The Bürgergemeinde often holds and administers the common property in the village.

The Constitution of 1999 provides for a three–tier organisation of the state: allotting a defined scope of competences each of these tiers: the Federation, the cantons and the local communities. In the case of doubts the implication speaks for the competence of local communities and then cantons. The Swiss solution is recognised as a manifestation of strong preferences for a broad cantonal autonomy, which prevents any uncontrolled grow of federal power. Local communities, with their remarkable autonomy, are considered fundaments of the political life and culture.[36] M. Aleksandrowicz claims that they are elements of the three–tier Swiss federalism and are entitled to the basic attributes of power: competences to make and apply law as well as independent dealing with their affairs.[37]

In accordance with article 50 of the Constitution "the autonomy of Local Communities is guaranteed according to cantonal law". This results in diversification of the constitutional status and organization of local communities in different cantons. In the same provision the Constitution requires that the Federation organs, while exercising their competences, take into consideration their consequences to the local

36 Z. Czeszejko–Sochacki, System konstytucyjny..., *op. cit.*, p. 37, M. Matyja, *op. cit.*, p. 35, M. Aleksandrowicz, *op. cit.*, p. 112.

37 *Ibidem*, p. 185–186.

communities, particularly special situations of cities, agglomerations, and mountain regions.

Z. Czeszejko–Sochacki points at the rights which make the core of the autonomy of the Swiss local communities. These are:

a) the constitutional right to existence, including freedom of combining with other local communities or preserving independence, which cannot be taken away by the cantons,

b) freedom of choice of appropriate political structure and administration, determined by cantonal legislation,

c) the right to impose taxes in order to satisfy their own needs,

d) freedom of action in the cases which are not in competences of the cantons or the Federation, including granting the citizenship of the local community, which is a condition of obtaining the Swiss citizenship (article 37 para 1). The means of the constitutional protection of this autonomy is a complaint to the Federal Court (article 189 para 1d).[38]

Particularly important quality of the Swiss local government is the broadly developed financial autonomy of the local communities. They have a right to have their own budget, from which they finance their tasks. They can collect taxes and fees, which make the source of their revenues. The budget is enacted by the municipal parliament, assembly or sometimes directly by the citizens. Supervision over the finances is exercised by committees and the cantonal administration supervising accountancy and intervening in the event of law infringement, though this seldom happens. The cantons determine tax brackets within which property and income taxes may be established. The citizens of Switzerland pay taxes to all three tiers of power, out of which over a third of the total taxation of an individual is paid to the local community, less than 30% to the canton and less than 30% to the Federation. The amount of these taxes differs very much from canton to canton and from community to community.[39] It is worth noting that the level of the

38 Z. Czeszejko–Sochacki, System konstytucyjny..., *op. cit.*, p. 39

39 I. Rycerska, Tendencje reform samorządu…, *op. cit.,* p. 199, A. Ladner, Local Government and Metropolitan Regions: Switzerland. Paper prepared for the international roundtable "Local Government and Metropolitan Regions in Federal Countries" in Johannesburg, April 19–22,

local community revenues gained from its own sources, c. 70% of all incomes, is the highest in Europe, which demonstrates the role of local communities in the implementation of public tasks.

There are two basic constitutional models in Switzerland, which results from the degree of decentralisation, the diversification of the population and area of the local communities, but foremost the traditions of particular cantons. Currently there are 2603 local communities in Switzerland,[40] the biggest of which having over 100 thousand residents (Zurich, Geneva, Basel, Bern, Lausanne, Winterthur), and the smallest even fewer than 100 citizens (Corippo, Steinhaus, Mauraz). In most of the cantons the cantonal law allows the local communities themselves decide on their concrete constitutional form.

As a rule, in the eastern cantons the communal legislative body is a communal assembly (Gemeindeversammlung), presided by the president of the community, or else the residents make decisions by means of polls (Urnabstimmungen). Beside making the most important decisions for a given community, a Community Council (Gemeinderat) as an executive body is directly elected.

In the local communities of western cantons, in general legislative functions are performed by community parliaments elected in majority elections (or in c. 30% of communities in the proportional system) by the community assembly for a term lasting 2–4 years. The tradition of direct democracy is also alive in these communities and their inhabitants quite often express their will in common voting. The executive body is, like in smaller communities, a community council (Gemeinderat), whose members (3–9) are elected by the community parliament.

The head of the council is the president of the community, who is a central figure in the community. The members of the community council manage their departments. Particularly in bigger communities

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2007, p. 13, available at: http://www.idheap.ch (04.04.2011), R. Steiner, The causes, spread and effects of intermunicipal cooperation and municipal mergers in Switzerland, "Public Management Review" 2003, vol. 5, no. 4, p. 553.

40 Data from "Répertoire officiel des communes de Suisse". Statistique Suisse. Access: 4.04.2011. According to M. Aleksandrowicz, the number of municipalities falls systematically: in 1990 there were over 3 thousand, but in 2005 2758. This results from the fusions between the municipalities because it is easier for larger bodies to fulfil the tasks imposed upon them. M. Aleksandrowicz, *op. cit.*, p. 187

we can observe special committees, operating beside the Community Council and inferior thereof, which deal with matters vested in them, e.g. issues of landscape planning or social security.

Each canton sets limits to the responsibilities of its constituent local communities. Usually, the communities cover services such as education, medical and social services, public transportation, local infrastructure and tax collection.

The degree of decentralization determined in this way by the cantonal law differs: the degree of autonomy of communities is lower in the francophone cantons, whereas in the German–speaking communities, they enjoy broader autonomy.[41] Consequently, the communal autonomy may be considered only through the law of a given canton, also in the event of filing a complaint of its infringement to the Federal Court.[42]

Because relations between a canton and its communities are regulated by the cantonal law, cantons may supervise the local communities. The communal law, as a rule, does not need an assent of the canton authorities to be effective. In practice, however, cantonal laws usually contain reservations envisaging this requirement. Communal decisions are usually challenged in the proper canton authorities. In the case of contradiction of a communal law with a cantonal law, the cantonal law always has priority.[43]

Characteristic of Switzerland is simultaneous functioning of several categories of local communities in one area. They all may fulfil certain public tasks. Beside the already mentioned municipality of political nature and Bürgergemeinde of civil and proprietary nature, there are also special communities dealing with specific matters. They are church, school, forest communities as well as communities of the poor.[44] Nowadays there is a characteristic tendency to extend competences of political communities at the expense of the others. This type of community has now become dominating.

41 I. Rycerska, Tendencja reform samorządu…, *op. cit.*, p. 200.
42 M. Aleksandrowicz, *op. cit.*, p. 112.
43 *Ibidem*, p. 186.
44 A. Ladner, Local Government and Metropolita Regions: Switzerland…, *op. cit.,* p. 6.

The aforementioned diversification of population potential of Swiss communities causes now a discussion on the reduction of the number of communities. "The number of communes is falling: many of the smaller ones are no longer viable and have found themselves obliged to merge with their neighbours."[45]

Many people today believe the system needs a thorough overhaul, but proposals to merge smaller communes often run into stiff opposition. Some of this comes from communes with low tax rates. Paradoxically these are the richest areas, because they attract high earners; not surprisingly they do not want to be burdened by the liabilities of poorer neighbours, or to lose the incentive which attracts their wealthy residents.

However, in other cases mergers are welcomed. In a surprise vote in 2006, for example, voters in Glarus decided to reduce the number of communes in the canton from 25 to three. The cantonal government had called for ten".[46]

Another effect of the existence of many "weaker" communities is the phenomenon of widely applied community unions, serving the fulfilment of common tasks difficult to carry out independently. These unions are separate carriers of rights and are created on the basis of public legal agreements concluded between the communities in question. Another form of cooperation is agreements concluded on the basis of private law, which determine common implementation of particular projects based on the principles of partnership. All forms of cooperation between communities are definitely supported by both federal and cantonal authorities as this enables to save funds for subsidising the poorest local communities.

45 The future of communes, http://www.swissworld.org/en/politics/general_information/the_future_of_communes/, Accessed 24. 03 .2011

46 The future of communes, http://www.swissworld.org/en/politics/general_information/the_future_of_communes/, Accessed 24. 03 .2011

Part 3

THE FEDERAL REPUBLIC OF GERMANY AS AN EXAMPLE OF A FEDERAL STATE

1. Historical origins of the German federalism

The history of Germany is one of the stormiest lots of states and nations of contemporary Europe. The way towards the current constitutional form of the state, both politically and territorially, ran through various historical meanders, which more often than not were opposite to the current state of things.

The beginning of the history is connected with the arrival of Germanic tribes in the basins of the rivers Elbe and Rhine as early as the 10th century BC. However, until the 9th century it is difficult to talk about a German state. The territories inhabited by these tribes, called Germania, witnessed wars against the Roman Empire as well as raids of other tribes wandering westwards. This also concerned Germanic peoples themselves, who due to the Huns' incursion in the 4th century moved westwards.

The foundations of statehood on the territory of Germania were built by the Franks, who from the 6th and 8th centuries gradually incorporated these territories into their state. At that time Germanic peoples were baptised and life concentrated around archbishoprics founded by the Franks: Aachen, Hamburg, Cologne and Mainz. However, by the 9th century separatist tendencies appeared in Germania, which later were to lead to territorial separateness.

A key factor for the origins of the German state was the civil war which broke out after Louis the Pious. The result of the Treaty of Verdun concluding the war was a division of the Franks' state into three

parts, of which the eastern one became a protoplast of later Germany. Nevertheless, after a few decades the East–Frankish state fell apart into a few duchies mutually connected. These divisions impressed their durable stamp on the future history of the new–created state. It was Otto I the Great who led to the unification of the country and who changed the state's name into the Kingdom of Germany, simultaneously founding the Holy Roman Empire, in 962, including, beside the Kingdom of Germany, also the Duchy of Bohemia, the Kingdom of Italy and, later, also the Kingdom of Burgundy, and temporarily the duchies of Poland, Hungary, Denmark and Croatia.

Against the background of his predecessors' achievements, the idea of Otto III is worth noticing. Announcing the renewal of the Roman Empire, he wanted to build with peaceful methods a Christian empire embracing Germania, Galia, Italia and Sclavinia. It may be treated as one of the first projects of European federation.

From this emperor's death a gradual and lasting fall and political collapse of Germany took place. What seriously affected this process was the era of feudal disintegration as well as privileges issued by Frederick II Hohenstauf in 1220 and 1232 for German bishops and dukes, passing most of the basic royal rights (regalia) into their hands. From that time on they could independently decide on most of internal affairs in their duchies and exercise their own policies.

The active policy of expansion resulted in weakening of the authorities inside the Empire; a strong opposition forced emperors to transfer elements of monarchic power to dukes. In the course of time this process brought about a situation in which most of the emperor's decisions required consents of princes expressed in the Diet of the Holy Roman Empire (Reichstag), as well as permits for patrimonial divisions in principalities (duchies). Soon the Reich (Empire) comprised approximately 300 small states and the period of Great Interregnum just intensified the political disintegration. An important event shaping the history of Germany was the Golden Bull of 1356, in which Charles IV of Luxembourg appointed electors, whose responsibility was from then on to elect an emperor. The group of electors were from that time on the King of Bohemia, the Count Palatine of the Rhine, the Margrave of

Brandenburg, the Prince of Saxony and archbishops of Mainz, Cologne and Trier.

The divisions in the Reich were deepened by the Reformation, which led to lengthy religious wars, because in theological disputes and fights for the freedom of confession the princes saw an opportunity to weaken the imperial suzerainty. The religious divisions exist even today: Roman Catholics, Lutherans and unbelievers make 30% of society each. By the 17th century the German states constituting the Reich, had become just a federation of states able to act together only at moments of a strong external menace. The power of particular electors grew all the time, which stemmed from the extraordinariness of the international situation. This was favourable for the then players on the political scene of Europe.

The process of further disintegration of the Empire was not stopped until the end of the 18th century, which was connected with constitutional changes. On the map appear subsequent bodies of federal nature: in 1785 the League of Princes (Fürstenbund), a confederation of princes against the attempts at limiting their rights with the leadership of Prussia. In 1806, as a result of Napoleonic wars and leaving the German Reich by 16 German states, a confederation was founded: the Confederation of the Rhine (Rheinbund), whose protector became Napoleon. The confederation lasted very shortly, till 1813, when further federal states joined the anti–Napoleonic coalition. The origins of this confederation is also connected with the end of the Roman Empire of the German Nation, which ceased to exist after over 800 years of functioning, when after the battle of Austerlitz Francis II renounced both the honour of Roman emperor as well as German king and freed his vassals from their obligations to the Empire.

An important event of that time was the mediatisation: several tiny German states were eliminated in favour of larger states. This concerned foremost small church states, free cities and so–called noble states (Liechtenstein and Luxembourg managed to avoid the mediatisation). Over a few dozen of years the number of German states decreased from 360 to 38.

The next confederation was the German Confederation being a result of the Congress of Vienna's decisions. It comprised 34 states and its functions were narrowed down to safety affairs and common defence. The confederation organ was the Federal Assembly, which was to be presided by Austria. It survived until 1866, when, after the Austro–Prussian War for Holstein, by force of the Prague peace treaty, it was replaced by the North–German Confederation, consisting of only 21 states under the leadership of Prussia.

After another victorious war, this time with France, Prussia succeeded in unifying the German Lands, founding the Second Reich (Deutsches Reich).[1] The German Empire included states (monarchies) and free states. The state took a form of constitutional monarchy, where the emperorship was always held by the king of the largest state, Prussia. From the territorial point of view, classifying the Second Reich is quite controversial, for one part of the doctrine regarded it as a "federal state" (Bundesstaat), whereas another part as a "federation of states" (Staatenbund). Relations between the central authorities and particular rulers were regulated in a different, often informal way, which additionally conduced to the domination of the chancellor appointed by the emperor, who actually ruled the country. As T. Doring and J. Schnellenbach say, "the proposal of a decentralized system in Germany has in particular served as a tool of pragmatic power politics. Regional power holders could not simply be coerced into forming an unified nation state. A federal system allowed preservation of a domain of sub – central sovereignty, and thus the political cost of consenting to a nation state was reduced for regional power holders. The Constitution of 1871 thus also followed the principle of explicitly enumerating the competencies of the federal level, and of leaving all other competencies to the sub–central level."[2]

The end of the Second Reich resulted from the failures of the First World War. In 1918 the November Revolution broke out, and on the abdication of the emperor, the discontented society

1 Also known as the German Empire: Deutsches Kaiserreich.

2 T. Doring, J. Schnellenbach, A tale of two federalisms: Germany, the United States and the ubiquity of centralization, Const Polit Econ 2011, no. 22, p. 88. See also: literature cited there.

proclaimed a republic, Deutches Reich (commonly referred to as the Weimar Republic), which was the first democratic German state and, simultaneously, a federation. The Reich was made up by 18 federal Lands (not states any more), each of which had its own parliament and government elected in common elections. The were represented on the federal level by the State Council (Reichsrat), which consisted of delegates from particular Lands. Moreover, on the federal level there were the Reichstag (parliament), government and president. Resolving disputes between the members of the federation was vested in the Supreme Court.

The fundamental constitutional changes took place in the 1930s, which resulted from the takeover of power in Germany by the Nazis (NSDAP). The state, despite formally the same constitutional bases, changed its nature. From 1933 on, formally called the Third Reich, territorially it remained a federation, although a strong centralisation of power took place, as a result of the totalitarian nature of the state.

After the lost Second World War, the territory of Germany was divided into four occupational zones, from which two German states emerged: the present day Federal Republic of Germany and, functioning within the so–called eastern bloc, the German Democratic Republic, as a unitary state[3]. The unit of administrative division of the GDR was from 1952 a district (Bezirk), of which there were 14 altogether. It was not until 3 October 1990, on the unification of Germany, that five Lands were created instead of the districts.

The present day Federal Republic of Germany, after the reunification with the German Democratic Republic, is a country of the total area of 357, 114.22 square kilometres, and the population of almost 82 million (16th place in the world).[4] The official language is German, although on the territory of the FRD there are numerous dialects which allow to tell which region a particular person comes from.

Germany is one of the major economic powers of the contemporary world. It is the second biggest exporter and its GDP situates it in the

3 See: J.L. Payne, Did the United States Create Democracy in Germany?, The Independent Review 2006, v. XI, no. 2, p. 221 and next.

4 Data as in the German Statistics Office: www.statistikportal.de (20.11.2010).

fourth place. The best developed sectors of industry are machinery, electric equipment, chemicals, smelting, energy and refineries (the Ruhr is one of the most industrial areas of the world). Germany is also famous for its fine road (over 12 thousand kilometres of motorways) and railway infrastructure.

2. The Basic Law and the constitutional principles of the FRG

Despite the fact that establishing in 1949 the Basic Law (Grundgesetz) the Parliamentary Council emphasised its temporary nature, after the reunification of Germany a new Constitution was not resolved on the grounds that over the 40 years of its binding force, the Basic Law rooted deeply in the Germans' consciousness, its provisions turned out a good basis for the political system of the state, and the institutions developed by it proved its value in practice. After the reunification of Germany the changes in the Basic Law were sparse and limited to an indispensable minimum.[5]

The Basic Law consists of 146 articles in 11 parts. Moreover, by force of article 140, articles 136–139 and 141 of the Weimar Constitution, concerning religious freedom and relations between the state and the churches, were included therein. The constitutional taxonomy attracts attention in the very first chapter of the regulations concerning basic rights and, what is more important from the point of view of this study, moving the problems of relations between the Federation and lands before the regulation determining the structure of the government system (Part II).

Among the most important constitutional principles of the FRG, claims B. Banaszak, are: the principle of the sovereignty of the nation, the principle of democratic state of law, the principle of social state and the principle of federal state.[6] It is worth emphasising that article 79 para 3 introduces a particular status of some constitutional regulations,

5 B. Banaszak, System konstytucyjny Niemiec, Warszawa 2005, p. 23.
6 *Ibidem*, p. 28

foremost that referring to the very constitutional principles. This rule forbids to change the parts of Basic Law that concerns the division of the Federation into federal Lands, principal cooperation of the Lands in legislature, as well as other principles: inviolability of human dignity as well as human rights and binding all branches of power by basic laws, democratic and social federal state, sovereignty of the nation, subduing legislature to the constitutional order, and the executive and judicial powers to acts of law, and the principle of the right of resistance to anybody who attempts to overthrow the constitutional order. The interdiction of changing these provisions introduces a category of invariable norms, determining the permanent federal organisation of the FRG, whereas the German doctrine of constitutional law interprets these restriction as applicable only in the event of partial changes of the Constitution and not binding in the event of enacting of a completely new Constitution.

As the first, already in the preamble, the Basic Law evokes the **principle of sovereignty** of the nation recognising the German people (all the citizens) as the creator of statehood and source of the constitutional system. In Article 20 para 2 there is an expression that the people is a collective subject of authority in Germany,[7] which decides about its affairs by means of elections and elected representatives or directly by voting. Moreover, the people is the creator of law and the being of state organs.

A special significance is ascribed in Germany to the **principle of democratic state of law**, which was expressed in article 28 para 1 of the Basic Law. It is related to the notion of 'legal state' (Rechtstaat), which arose in the German jurisprudence in the 19th century. Without going deeper into extremely rich and broadly understood interpretation of this principle, it is enough to recognise that the democratic state of law is considered in two aspects: formal and substantial. The former involves foremost the rule that the binding law has to stay in accordance with such formal requirements as hierarchy of legal acts, ban on ex post facto laws and obligation of accurate publication, and the state organs should act on the basis of this law and in accordance therewith. In the

7 Article 20 para 2, sentence 1: All state authority emanates from the people.

substantial understanding, law and order means conditions determining the content of the binding legal norms, which should be based on particular values such as, justice, pluralism, dignity and equality in and before the law. Thus, the principle of the democratic state of law is frequently defined as the collection of various elements. The Federal Constitutional Court (FCC) of Germany classified the following as components of this principle: sovereignty of the people, division of power, superiority of the Basic Law, or proportionality.

The German constitution–giver determined the FRG as a social state, which means that the state organs are obliged to consider in their functioning social rights of the individual, which are treated as programme norms imposing particular goals upon the state, especially for making law guaranteeing existence on a proper level as well as in the application of law securing the implementation of social rights. The principle of the social state is normatively not sufficiently précised, leaving its implementation to the state's discretion.

The constitutional principle of the FRG most important to the issues under discussion is the **principle of federalism** (article 20 para 1)[8]. It determines the intricate structure of the state, which consists of 16 federal Lands. On the grounds of article 29 para 1 a new division would be admissible "to ensure that each Land be of a size and capacity to perform its functions effectively".[9] The construction of the German federal state is of decentralised nature, granting broad competences to federal Lands, which are sovereign and attributed with elements of statehood[10], including an active role in international relations[11]. Inasmuch as one common legal system and the system of federal organs based on the Basic Law function in the FRG, their tasks and competences, clearly constitutionally determined, are limited to the

8 See: A. Schade, A research topic in education law and policy: The development of regionalism and federalism in Europe and their impact on educational policy and administration, European Journal for Education Law and Policy200, no. 4, p. 36.

9 Changes in the territorial structure of the federal Lands are performed in accordance to the rules determined in Article 29 of the Basic Law.

10 About financial aspects of German federalizm see: H. Pitlik, G. Schmid, H. Strotmann, Bargaining Power of smaller states In Germany's Länderfinanzausgleich 1979–90, Public Choice 2001, no. 109, p. 283–201.

11 K.H. Goetz, National Governance and European Integration: Intergovernmental Relations in Germany, Journal of Common Market Studies 1995, vol. 33, no. 1, p. 92.

affairs of national significance, exceeding those of the Lands. In the remaining affairs the principle of the implied competences in favour of the federal Lands is applied.[12] Each Land is to a high degree self–reliant and independent, which results in the federal Lands' own Constitutions and systems of power based thereon (legislative, executive and judicial). The constitutional principle of federalism determines the substantial division of legislative competences, characteristic of this state, between the Federation and federal Lands (discussed in the part dedicated to the constitutional position of the federal Lands), as well as the special role of the Federal Constitutional Court, whose task is, among other things, deciding whether the federal or land law complies with the Basic Law, as well as whether the land law stays in accordance with the federal law. The FCC does so on the application of the Bundesrat, the government or the parliament of a federal Land. As T. Doring and J. Schnellenbach say the German "constitutional court plays a much smaller role in federal relations in Germany due to the fact that the vertical allocation of competencies is to a larger degree explicitly defined in the written Constitution, the Grundgesetz, leaving relatively little room for interpretation."[13]

3. Federal institutions of the FRG

Despite the fact that the Basic Law does not use the term 'parliament' referring to the Bundesrat, both the theory of law as well as jurisdiction treat the Bundesrat as a parliamentary chamber. The **parliament** of the FRG has a two–chamber structure then: it consists of the **Bundestag** and the **Bundesrat**. In the German case we deal with unbalanced bicameralism where the dominating chamber is the Bundestag. Whereas the Bundestag is, considering the responsibilities of both chambers as well as their content, a representation of the German people, the Bundesrat may be defined as a chamber representing the federal Lands[14].

12 Basic Law, Article 30.
13 T. Doring, J. Schnellenbach, *op. cit.*, p. 92.
14 About German bicameralism see: T. Bräuninger, T. König, The checks and balances of party federalism: German federal government in a divided legislature, European Journal of Political Research 1999, no. 36, p. 207–234.

The **Bundestag** is elected in general elections for a four year's term. According to the Basic Law the elections are direct, free, equal and secret. The content of the Bundestag is determined in accordance with the mixed electoral system[15]. Half of the mandates is distributed throughout the Federation proportionally (Saint–Laguë method) up to the joint number of votes for particular parties' lists, and then the mandates obtained by a given party are distributed among the lists of this party in particular federal Lands. The distribution of the remaining mandates is performed in one–mandate constituencies: where the candidate who received the highest number of valid votes passes (plain majority). The peculiarity of the German electoral system results in a frequent phenomenon of the so–called superfluous mandates, which means that the number of Bundestag deputies is higher than that statutory.[16]

The parliamentarians elected in this way are, according to Article 38 of the Basic Law, representatives of the whole people and are not bound by any instructions from electors or political parties. They cannot be recalled by them either. Leaving or exclusion from the party does not entail mandate expiry.[17]

The term cannot be shortened or lengthened, which, as B. Banaszak writes[18], is justified by the fact that deputies received their mandate from the people for a determined period, so any manipulation in the length of the current term would infringe the principle of sovereignty of the people.[19]

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15 About German electoral system see: U. Sieberer, Behavioral consequences of mixed electoral systems: Deviating voting behavior of district and list MPs in the German Bundestag, Electoral Studies 2010, no. 29, p. 484–496.

16 In Germany there is a 5% election threshold. The party which does not exceed it in the proportional elections, does not enter the Bundestag. However, the candidates elected directly in one–mandate constituencies are always granted their mandatem (even if their party did not go beyond the 5% threshold). If there are at least three such candidates, the 5% clause ceases to be applicable for this party.

17 However, in the event of delegalisation of the party to which a given deputy belongs decided by the FCC, his/her mandate expres.

18 B. Banaszak, *op. cit.*, p. 58.

19 The Basic Law envisages, however, two exceptions to this rule. Article 63 para 4 allows the Federal President to shorten the term in the event of election of Federal Chancellor in the last round by simple, and not absolute, majority. The president may within seven days appoint a given person chancellor or dissolve the Bundestag. In Article 68 para 1 we find the pres-

The form of the Bundestag's work, which debates in the permanent mode, is public sessions summoned by the Chairman on dates appointed by the chamber itself or the Council of Elders. It itself determines the internal organisation and procedures. As for the rule, it takes its decisions by simple majority quorum of more than half of the deputies, and exceptionally by absolute majority or qualified majority (2/3).[20]

Among the internal organs of the Bundestag are the President and Vice–Presidents as managing organs, the Presiding Board as an opinion–giving and advisory organ of the President , as well as the Council of Elders as an organ which formally supports only but in practice has also managerial functions. The Council of Elders include: the President, the Vice–President and 23 deputies representing particular fractions (proportionally to their numbers). An important role in the daily work of Bundestag is played by committees, internal organs appointed to consider and prepare affairs being the subject of the Chamber's works. They also express their opinions in the affairs directed to them as well as act as control instruments within the framework of the control function of the Bundestag.

One of the distinguishing qualities of the German parliament is the content of the Bundesrat, being a derivative of the constitutional assumption (article 50), that federal Lands cooperate in the legislation and administration of the Federation as well as in the matters concerning the European Union through the Bundesrat (cooperative federalism)[21].

The **Bundesrat** consists of premiers and government members of federal Lands, which appoint and recall them. The number of the representatives of each Land depends on the number of its inhabitants. It is minimum three votes, whereas in the case where the number of residents exceeds 2 million, they are 4 votes, when it exceeds 6 million,

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ident's rights to dissolve the Bundestag within 21 days on the Bundestag's rejection of the Federal Chancellor's motion for a vote of confidence.

20 Rules of Procedure of the German Bundestag contains, in Rule 45, para 2, an implication that a quorum occurs unless at least 5% of the deputies or a fraction question it, and the presiding board of the sitting unanimously confirm it. If they do not do so, they order to count the quorum carefully in the next voting.

21 T. Doring, J. Schnellenbach, *op. cit.*, p. 84, 89 and next.

it is 5 votes, and in the case of the Lands inhabited by over 7 million, it is 6 votes.

Since it is not, in contrast to the Bundestag, an elected chamber, in the Bundesrat there are no terms of office for its content evolves; it changes in the part allotted to a particular Land as a result of the changes in the content of the delegation or completely along with the change of the Land government (for instance as a result of political changes after elections in a particular land).

The mode of the Bundesrat's works is similar to the functioning of the Bundestag allowing for the special nature of this chamber. Thus, for example, the sittings of the Bundesrat are summoned by the President of Bundesrat on his own initiative or on the motion of the Federal Government or on the motion of representatives of at least two federal Lands.[22]

The most important internal organ of the chamber is, like in the Bundestag, the President elected by the chamber for one year.[23] It is a managerial organ of the chamber, which, in addition to managing and representing, is also the deputy of the federal president when the latter cannot perform his functions or if his office has become vacant. Moreover, the Budnesrat organs are three Vice–Presidents, whose appointment, also for a year's term, is regulated by a custom: they are: the previous President of the chamber, the premier of one of the federal Lands on the territory of the former GDR and the premier of one of the "old" federal Lands (as for the latter two by rotation, beginning with the least populated Lands).

The President and his/her vice–presidents, like in the Budnestag, make up the Presiding Board, the President's advisory and opinion–giving organ.[24] In the Bundesrat also another advisory organ of the President and the Presiding Board: the Permanent Advisory Council, which consists of the members of the Presiding Board of the Chamber as well as representatives of particular Lands at the Federal authorities.

22 The statute of the Bundesrat imposes on the President a responsibility of summoning the session on the motion of representatives of at least only one federal Land.
23 According to B. Banaszak, in practice.
24 One Land may have only one representative in the Presiding Board.

The Council also acts as a mediator in contacts between the Bundesrat and the Federal Government. Also it is this chamber where are committees in which each Land has only one vote. They may consist of members of Land governments who are no members of the chamber or representatives of federal Lands.[25]

The Bundesrat gathers for public sessions more than a dozen times a year and considers affairs on the agenda. A distinguishing quality of the Bundesrat is the way of passing resolutions; they are passed by absolute majority of votes. However, since the members of the chamber representing a given federal Land are bound by the instructions from their governments, the whole delegation votes unanimously on pain of invalidation all the votes from the land. To vote on behalf of all members in the number due to the given delegation the presence of one of its representative is sufficient[26].

A special form of realisation of the function of the Bundesrat is the Chamber for European Affairs (Europakammer), appropriate for affairs connected with the European Union in urgent situations or when there is a necessity of a closed (hidden from public scrutiny) session. According to article 52 para 3a of the Basic Law, its decisions are treated as decisions of the Bundesrat. Summoned on exception occasions so far, it has functioned through the representatives of the federal Lands of the number of votes corresponding with the number of votes in the Bundesrat.

The representation of federal Lands in federal institutions takes place also through the Federal Convention. It is an organ including, in addition to Bundestag deputies, the same number of elected persons, preserving the population parity, by the representative organs of the

25 Customarily, a representative of each of the Lands assumes presidency of one of the committee.

26 See: T. Bräuninger, T. König write about party–orientated approach – "party politics dominates legislative decision–making in the Bundesrat, too. Federal and state governments are formed by parliamentary groups based on a common party system promoting policy positions to be structured along the party line." Bräuninger T., König T., The checks and balances of party federalism: German federal government in a divided legislature, European Journal of Political Research 1999, no. 36, p. 217+. See also S. Shikano, The Dimensionality of German Federal States' Policy Preferences in the Bundesrat, German Politics 2008, vol.17, no. 3, p. 340 and next.

federal Lands, where in the election the principle of proportionality rules, which aims at taking into consideration various fractions represented in a given Land parliament. The responsibility of the Federal Convention is the election of the Federal President.

The exercise of the function of the German parliament, allowing the principle of superiority of the Bundestag's constitutional position, was distributed between the two chambers. It is particularly significant with reference to the legislative function and is derived from two provisions of the Basic Law: Article 27 para 1 informs that federal laws are made in the Bundestag, and in article 50 it specifies that the Bundesrat is the institution through which the Lands cooperate in legislature.

In spite of the dominating constitutional status of the Bundestag, the Basic Law also grants the Bundesrat the right to legislative initiative. This chamber may exercise this right only through (opinion) the Federal Government. An analogues situation occurs when the Federal Government exercises its right to legislative initiative: it is the Bundesrat that pronounces an opinion.[27] Independently from the type of legislature, the proper legislative works (three readings) always take place in the Bundestag. It is not until the bill is passed when the Bundesrat deals with it. Its capacity depends on the substance of the bill. In some cases named in the Basic Law, the Bundesrat's consent is required (mandatory and non–mandatory bills[28]). According to B. Banaszak, there are 50 such cases in the Constitution, and the most important among them are changes of the Constitution, competition legislation affairs, laws establishing the organisation of the federal administration authorities and administration procedures, as well as bills of the exclusive legislation regulating legal relations of the persons being in service for the Fedaration and federal corporations of the public law[29]. Few years ago, B. Banaszak estimated that approximately 60% of bills require the Bundesrat's consent. Its lack means the failure

27 Legislative initiative is also enjoyed by a fraction in the Bundestag and a group of deputies made up by at least 5% of theirno total number.

28 T. Bräuninger, T. König, *op. cit.*, p. 211 and next.

29 See: S. Burkhart, P. Manow, D. Ziblatt, A More Efficient and Accountable Federalism? An Analysis of the Consequences of Germany's 2006 Constitutional Reform, German Politics 2008, vol. 17, no. 4, p. 524 and next.

of the bill. In the remaining situations the Bundesrat has the right to object and demand summoning of the Mediatory Committee.[30] In the event of no result of the mediatory proceedings expected by the Bundesrat, it may pass an objection to the bill. If such an objection was passed by the Bundesrat majority, the Bundestag may also reject it by the same majority, whereas if the objection was passed in the Bundesrat by the qualified majority of 2/3 of votes, its rejection would require the majority of 2/3 in the Bundestag, or at last the statutory majority[31]. Theoretically the constitutional status of the Bundesrat as a legislative body, is strengthened due to the institution of the state of higher legislative necessity allowing the Federal Government to force a bill thanks to the Bundesrat and against the Bundestag. However, due to the fact that so far this institution has never been used, it remains insignificant for the constitutional system.

The both chambers have control instruments for their disposal, among which there are ones which are used by the whole chamber (in pleno), through the committees of the particular chamber as well as through the members thereof. Among the most important are: granting the government vote of approval[32], hearing reports and explanations (information) of ministers and state officials, who, on the demand of a particular chamber, are also obligated to participate in the committee sessions and interrogate the members of the both chambers. Among other control rights, in the context of the German federalism, it is important to mention the Bundestag's right to demand to withhold the military action ordered by the Federal Government in order to fend off a danger threatening the existence or the constitutional system of the Federation or one of the Lands. The Bundesrat, on the other hand, as the chamber representing interests of the federal Lands, is authorised to control the Federal Government's actions in states of emergency

30 The demand for summoning of this Committee may also occur in the case of bills to which the Bundesrat has to grant its consent.

31 P. Schwarz, Deficits and divided governments: the case of the German 'Bundesrat', Constitutional Political Economy 2006, no. 17, p. 88 and next, M. Brunner, M. Debus, Between Programmatic Interests and Party Politics: The German Bundesrat in the Legislative Process, German Politics 2008, vol. 17, no. 3, p. 232–251.

32 The Federal Chamber of Auditors is obligated to produce annual reports on the budget implementation to the Bundesrat. On this basis Bundesrat, in pleno, assesses the implementation of the budget act by the Federal Government.

and federal coercion. In the former case it may demand cancelling the orders of the Federal Government to Land governments in the state of natural emergency or catastrophe as well as a Government–ordered use of units of the Federal Border Guard and police forces to fend off a danger threatening to the existence or the constitutional order of the federation or one of the Lands, and in order to withhold the use of military forces ordered by the Federal government for this purpose. Moreover, a consent of the Bundesrat is required when the Federal Government takes measures necessary to force a federal Land to fulfil its responsibilities by means of federal coercion.[33]

Some regulations issued by the Federal Government also require the Bundesrat's consent. This concerns, for example, regulations concerning the laws which themselves require the consent of this chamber, regulations for the laws which are to be implemented by particular federal Lands and regulations concerning the subject enumerated in the Basic Law, for example, the post or telecommunication.

The control function includes also the joint competence of the both chambers to express, by means of legislation, their consent to the Federal President's signing international agreements regulating political relations of the Federation or concerning affairs which are a subject of the Federal legislation.

The creative functions of the German parliament comprise some signalised elements of the legislative function: creating bases for state organs' actions, and the control function: recalling people from particular offices. In the remaining scope this function is exercised foremost by the Bundestag, which appoints the stuff for such offices as: the Federal Chancellor and the Bundestag Military Commissioner and indirectly takes part in the election of the Federal President and judges. Moreover, within the framework of the autonomy of the chamber, it decides on the content of its own internal organs. The role of the Bundesrat is a little narrower, since it is reduced to the election of internal organs and, exceptionally, in the state of higher legislative necessity, has influence on the existence of the Federal Government.

33 B. Banaszak, *op. cit.*, p. 75.

In the political system of the FRG, the **Federal President** is an institution of a quite limited role. This results from the idea of the system of government in which the Federal Chancellor plays a prominent role within the executive. It is also worth noting that along with the limited competences goes the practice of quite cautious using them.

As mentioned before, the Federal President is elected by the Federal Convention by an absolute majority, and in the situation where in two consecutive votes no candidate achieve it[34], in the third vote a relative majority is sufficient. The term lasts five years and there is a possibility of one re–election of the same person.

The Federal President's competences concern foremost representation of the Federation in internal and international relations, with the reservation that it is the Government that outlines the directions of these policies. For example, the President sings international agreements but it is the Federal Government that runs negotiations and prepares their content. Another competence of that nature is dispatching foreign representatives of the FRG and receiving and accrediting diplomatic representatives of foreign countries.

The president takes also part in the process of appointing the Federal Chancellor. He/she presents the candidate to the Bundestag as well as appoints the person elected chancellor by the Bundestag. Formally he/she also appoints ministers, but here he/she is bound by the chancellors motions.

Another competence of the Federal President is connected with the functioning of the Federal Government and its relations with the Bundestag. In the event when the candidate for Federal Chancellor does not gain an absolute majority but only a relative majority, he/she may dissolve the Bundestag or appoint such a person Chancellor. The second situation occurs when the Federal Chancellor does not gain the

34 Each German over 40 entitled to vote for the Bundestag enjoys the eligibility (passive suffrage), and the Federal President cannot be a member of the Government, Federal or Land parliament, and cannot exercise any other paid office or run his/her own business. During his/her term, the President customarily suspends his/her membership in the party to which he/she belongs.

vote of approval in the Bundestag. In this event the President, on the Chancellor's application, may dissolve the chamber within 21 days.[35]

In addition, it is worth noting in the relations with the parliament the right to summon the chambers and legislative competences: proclaiming the state of higher legislative necessity as well as preparing federal acts of law.

The Federal President decides also on the question of federal symbols. He also possesses the so–called traditional competences of the head of state, for example exercises the right to grant pardon. Among the relations with the judiciary power the most significant right of the president is appointing and dismiss federal judges.

The constitutional position of the Federal President is also defined by the institution of counter–signature. The counter–signature of the Chancellor of an appropriate minister is required for the President's orders and regulations to be valid.

The president is not accountable politically, but only constitutionally for deliberate infringement of the Basic Law or the Federal Act. In such a situation the President is charged by one of the chambers and is judged by the Federal Constitutional Court, which may end in his removal from the office.

The outline of the limited constitutional status of the Federal President presented above predestines the other centre of executive power, the Federal Government, to a real control over the country. The government system of the FRG is called the chancellor system just because of the role played by the Federal Chancellor being a head of this government and sometimes called its keystone. It is a variation of the parliamentary–cabinet system.

The **Federal Government** is elected in a quite complex procedure of three rounds, of which each successive is applicable if the previous one fails, while the unsuccessful course of all the rounds results in dissolution of the parliament and earlier parliamentary election. In the first round, the president, after consultations with parliamentary

35 This right expires if the Bundestag elects another Federal Chancellor by an absolute majority.

fractions points at a candidate for chancellor, which must gain the support of the statutory majority in the Bundestag. In the second round, if no candidate is elected, the Bundestag itself may, within 14 days, elect a chancellor, also by the statutory majority in the Bundestag. If even in the second round they fail to elect a chancellor, a runoff occurs (third round). Immediately a voting is carried out in which the winner is the one who gains the most votes.[36] In the procedure of forming the federal government the key person is the Chancellor; all the more that on his/her election he/she presents to the president candidates for ministers, whom the president has to appoint.

In view of the fact that it is the **Chancellor** who decides on the make–up of the Federal Government, it is also he who is accountable therefore before the Bundestag.[37] This takes the form of a constructive vote of non–confidence, which is an original German solution which assumes that the Bundestag may recall the Chancellor only when it simultaneously points at a candidate for the new Chancellor. This prevents the situations in which it would be possible to construct a majority capable of recalling the Chancellor in the parliament (negative majority), but incapable of reaching an agreement on the election of the new one (positive majority).

The key role of the Chancellor manifests also through such mechanisms as:

a) the Chancellor decides on the scope of responsibilities of particular ministers and on their number,

b) on the motion of the Chancellor, the President dismisses ministers,

c) the Chancellor manages the work of the Government and presides its sessions,

d) represents the Government outside,

36 If he/she was elected by absolute majority, the Federal President has to, within seven days, appoint him/her chancellor. If it is a regular majority, the President either appoints this person chancellor or dissolves the Bundestag.

37 In the German system there is no individual political accountability of minister to the Bundestag.

e) the Chancellor determines the guidelines of the Government's policies, for the implementation of which each minister, managing independently his/her department, is accountable to the Chancellor.

Tasks of the Federal Government in the FRG are typical of an executive organ of the state. Thus, among the Government's responsibilities are: management of the foreign policy, security, coordination and control over the federal administration and implementation of the budget. One of the most important tasks of the Federal Government is implementation of acts. Therefore the Government issues regulations, although it is worth having in mind that the German federalism vests the implementation of acts either in federal organs or in organs of federal Lands. The Federal Act, depending on the subject–matter, entitles the Federal Government, a federal minister or the government of a federal Land to its implementation. The Federal Government may also issue general administrative instructions with guidelines for federal Lands. These do not require statutory authorisation, although in some cases, like regulations, they need the consent of the Bundesrat.

The Federal Government has been also endowed with some competences towards the federal Lands, which are of subsidiary nature: they may be applied only in extraordinary, "irregular" situation. First of all, such a competence is the federal coercion, which consists in measures taken by the Federal Government, by the Bundesrat's consent, towards the federal Lands which fail to meet their constitutional or statutory responsibilities towards the Federation, in order to make a particular Land to fulfil them. This coercion means the right to issue orders to Land governments, for example to give away their own police forces to other Lands in the event of natural catastrophe or disaster threatening the territory of the Federation or more than one Land. In such a situation, also military forces and units of the Federal Border Guard may be involved. The Guard may be also employed on demand of a federal Land in order to maintain or restore order or public security on its territory. On the other hand, with the moment of the announcement of the state of defence, beside the commanding of the military forces

passes onto the Federal Chancellor, he/she may issue instructions also to governments of federal Lands.

It is also worth noting that these mechanisms, so deeply intervening into the independence of federal Lands, are subject to control from the Bundesrat.

4. Legal status and organs of federal Lands

As already mentioned in the part devoted to the constitutional principles, the FRG is a state consisting of sixteen components: federal Lands. Each of them, as well as the whole Federation, maintains its separate statehood, which is manifested through, for example, Land Constitutions and representative assemblies of the federal Lands working on their bases, or their right, envisaged in Article 32 para 3, to sign, within their legislative competences and by consent of the Federal Government, agreements with other states.

However, the most important for determining the level of independence of federal Lands, is the division of competences between the Federation and federal Lands, which is a central issue in every federal state. This is the so–called functional division, consisting in the definition of federal organs and federal Lands' organs' properties within the framework of each of the three functions of state: making law, executing law and judging.

The basis of this division within the legislative function is the already–mentioned distinction of three legislation spheres, which then implies the activity of also powers other than the legislative organs of the federal power or federal Lands' power. These three spheres of legislation are:

a) the sphere of exclusive competences of the Federation,

b) the sphere of concurrent competences,

c) the sphere of exclusive competences of the federal Lands.

Among the first group the Basic Law counts the matters in which the federal organs have the **exclusive legislative power**, unless the Lands

gain such power by force of the Federal Act in a form of a specific delegation; the Federal Act authorises the organs of federal Lands to issue acts of law (article 71 of the Basic Law). Article 73 of the Basic Law enumerates the domains of exclusive legislative power of the Federation; for example foreign affairs, state belonging on the federal level, freedom of movement, procedures connected with passports, registration and identity cards, immigration and emigration as well as extradition, currency and monetary issues, weights and measures as well as time standards, and air transport.

In the sphere of **concurrent legislation**, the federal Lands are authorised to issue acts, only if, and to the extent that, the Federation, by means of an act of law, does not exercise its legislative rights. For instance, this sphere includes: civil law, criminal law, the system of judicature, the procedure of the courts, the legal profession, notaries and legal advice; registration of births, deaths, and marriages, the law of association and assembly; the law relating to residence and establishment of aliens. However, the Federal Act itself may determine that the federal legislative regulation may be replaced by the law of the federal Lands. Moreover, the concurrency consists in the provision of Article 72 para 3 of the Basic Law, that in the event when the Federation has exercised its legislation entitlement, the federal Lands may, by virtue of the Act, adopt different legal regulations in the matters determined by this provision, such as: hunting, protection of nature and care of the countryside; land distribution, regional planning, water conservation and rules concerning higher school admittance and graduation. In such cases every time the priority is granted to the later act. Moreover, the Federal Act itself may determine that the federal legislative regulation may be replaced by the law of federal Lands.

The third sphere, in accordance with the implication of legislative competence included in article 70 of the Basic Law, embracing all matters not reserved for the Federation, provisions on exclusive or concurrent legislation belongs **exclusively to the powers** of federal Lands.

This distinction results in the competences of the legislatives of federal Lands, which are predominantly called Landtag. The Basic Law

determines the way of shaping their make–up: they are one–chamber and come from general, direct, free, equal and secret elections. Their basic function is making Land acts in the spheres envisaged by the above–presented division of legislative competences. They also play a key role in planning the budget economy of a given federal Land, which, although in accordance with article 109 para 2 of the Basic Law, is expected to take into consideration the requirements of the national (federal) financial balance, it remains within the sphere of federal Lands' power.[38] Taking the aforesaid into consideration the landtags enact budgets of the federal Lands. It is worth bearing in mind that Articles 105–115 of the Basic Law quite specifically defines the share of the Federation, federal Lands and local government units in various public levies, for example it reserved for the Federation incomes from monopolies, for federal Lands incomes from property taxes and a tax from vehicles, and for districts incomes from land taxes.

As for the executive power on their territory, each Land is independent and responsible for implementation of Land acts, and in accordance with article 83 of the Basic Law, also federal ones, unless the Constitution itself envisages the power of the federal executive in this matter. This indicates that the centre of gravity in the implementation of acts is located by the Basic Law closer to Land executive power centres. Articles 86–90 enumerate affairs reserved for the federal executive organs, e.g. foreign affairs, federal finance administration, administration of federal water transport, federal criminal police and armed forces. It is worth reminding that in the implementation of federal acts the Federal Government supervises their performance by the Land governments.

Each federal Land performs this task through its own executive organs: Land governments and administration. Land governments are appointed by proper landtags, which control them and exact political accountability. It is important to note two questions: first, the political option ruling a particular federal Land may differ from the political option in power on the federal level, and, secondly, such diversification

38 Article 109 para 1 of the Basic Law: "The Federation and the Länder shall be autonomous and independent of each other in their budget management."

determines the political shape of the Bundesrat. The make–up of the Land government in a given federal Land is defined by the Land legislation, whereas, as B. Banaszak writes, in all federal Lands there are the following departments (ministries): interior, justice, economy, transport, labour, social welfare and culture.[39]

The judiciary system of the FRG is largely based just on the judiciary organs of federal Lands, which considering hierarchical relations apply both Federal and Land law. The courts of federal Lands are principally courts of first and second resort,[40] while, as already mentioned, the courts of the highest rank are proper federal courts.[41] The status of Land judges, appointed by a proper minister of justice of the federal Land is approximate to the status of federal judges. In the first resort, beside judges, also independent jurors appointed by special committees adjudicate.

The independence of Land courts manifests especially in the fact that there also function constitutional courts, whose judges are appointed by Land parliaments.

5. Local government in the FRG

Local government in the form of counties and communities is guaranteed by the Basic Law (article 28) and relevant provisions of Land Constitutions[42]. A large margin of freedom in regulating the system of local government units was given to federal Lands, although providing in article 28 para 1 of the Basic Law that, like on the level of federal Lands, in counties and communities the nation must have a representation coming from general, direct, free, equal and secret

39 B. Banaszak, *op. cit.*, p. 103.

40 There are also exceptions: for instance, in Bavarian judiciary there is, additionally, the Bavarian Land Supreme Court (Bayerischen Obersten Landesgericht), partly a counterpart of the Federal Court.

41 They also apply both federal and Land laws.

42 About German local government, especially in historical context see H. Wollmann, Local Government Modernization in Germany: between Incrementalism and Reform Waves, Public Administration 2000, vol 78, no. 4, p. 915–936, H. Wollmann, Local Government Reforms in Great Britain, Sweden, Germany and France: Between Multi–Function and Single–Purpose Organisations, Local Government Studies 2004, vol. 30, no. 4, p. 650 and next.

elections.[43] The Constitution allows to replace an organ elected in this way by a form of direct democracy: a community assembly. The provision crucial for the institution of local government of the FRG is the regulation in article 28 para 2, which states that "the communities must be guaranteed the right to regulate on their own responsibility all the affairs of the local community within the limits set by law".[44] This means that the basic local government unit is a community and it is in its favour that implied competences in local affairs were envisaged. This is in accordance with the principle of subsidiarity, which recommends the implementation of public tasks possibly "closest to the citizen".

Local government units, beside implementing tasks important from the point of view of satisfying needs of the particular local community, sometimes also implement tasks of federal or land nature, important for the function of the Federation or a given federal Land. In the event of such tasks, the supervision over their implementation is exercised by appropriate federal or land organs. Tasks of this type, in contrast to the local government's own tasks, will be defined as delegated tasks, and an example of such a task is holding vital records.

The territorial structure of a particular federal Land is decided upon by the Land government, which acts on the basis of law of the Land, which contains specific rules determining creating communities, counties and, in some cases, also other local government units. The Land law also decides on the structure of local government organs. Thus, the normative basis for functioning of local government units in particular federal Lands is Land acts, called in the case of counties county ordinances (Landkreisordnungen), and in the case of communities community ordinances (Gemeindeordnung). The observation of the German solutions leads to a conclusion that on the territory of the FRG there are a few constitutional models on the level of communities and two dominating models for counties, though also here some peculiarities occur.

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43 In the elections in counties and communities the active and passive electoral rights is also granted to people having, in accordance to the EU law, citizenship of one of the EU member states.

44 Article 28 para 2 also states that "The associations of communities also have the right of self–government in accordance with the law within the limits of the functions given them by law."

Legislation of federal Lands (Constitutions and federal acts: community ordinances) generally distinguishes two types of communities: rural (Gemeinde or Ladgemeide) and urban (Stadt). It is a basic factor determining tasks and constitutional order of these basic units of local government which are communities. Such factors as historical events, cultural peculiarities, external influences, as well as foremost the federal structure of the state result in the fact that the territorial local government in Germany, although based on the same foundations created by the Basic Law, in the case of both communities and counties, was constitutionally very diversified. Despite this, analysing constitutional solutions of particular federal Lands, the theory of law points at qualities common for all communities as well as the qualities which make them different, constructing a few constitutional models for the community local government. However, currently, the system of local government units is being subject to constant standardising. It is similar in county local governments, which will be discussed in the further part of this text.

All German communities have a system based on a dualistic structure: there is a legislative organ, which is the council, and executive one, which is, depending on the model valid in a given Land, a mayor, a community managing board or a municipality.

The Council (depending on the type of community: rat, gemeinderat, stadtrat) is elected in accordance with the principles determined by the Basic Law. Let us remember that the elections are general, direct, free, equal and secret. The term of the community council lasts usually five years.

The committees of the Council, which are just its internal organs, are not organs of the community local government. However, two characteristic qualities of these committees are worth noting. First, beside tasks connected with preparation of the Council's decisions, they sometimes have competences to decide on some issues. Secondly, the committee may include the citizens of the community from outside the make–up of the Council, which is expected to affect a better recognition of the issues presented to the committees for their better knowledge of the nuances of the particular matter.

As far as the executive power of communities is concerned, there is a far–going constitutional variety. The function of an executive organ may most often be exercised by a monocratic organ coming from general elections: a mayor (Burgenmeister), but it also may be an 'over–mayor' (Oberburgenmeister) or a 'first mayor' (Erste Burgermeister). The executive organ may also be collegial. Then it is the community managing board (Stadtvorstand or Gemeindevorstand) or the municipality (magistrate). Among the executive organ's tasks are managing the community administration as well as managing current community affairs, and actions connected with the functioning of the legislative organ, i.e. preparation of projects and implementation of the community Council's resolutions.

Currently, two models of community local government system function in the FRG: the most popular, the definitely dominating South–German model and the municipality model, which occurs in Hesse.[45] In the former there are two organs: the Council and the Mayor, whereas their constitutional statuses equilibrate for both come from general elections. A distinctive property is also the fact that in the pure South–German model (Bavaria) the mayor is simultaneously a chair of the Council, whereas in the modified version (Mecklenburg) these functions are separated. In the municipality system the decisive organs are: the Council from general elections as an legislative organ, and the municipality as an executive organ presided by the mayor, also from general elections, managing the current affairs of the community[46].

In most of German communities additionally occur auxiliary units, which are usually orsteile (a village or a group thereof), or, in cities–federal Lands (Berlin, Bremen, Hamburg) districts (Bezirk).

Determination of the legal nature of the county may seem quite complicated. This results from the fact that, first, counties are

45 In the 1990s two other models, North–German and mayor model, vanished. See: F. Hendriks, P. Tops, Between Democracy and Efficiency: Trends in Local Government Reform in the Netherlands and Germany, Public Administration 1999, vol. 77, no. 1, p. 140 and next.

46 See also: H. Wollmann, Reforming Local Leadership and Local Democracy: The Cases of England, Sweden, Germany and France in Comparative Perspective, Local Government Studies 2008, vol. 34, no. 2, p. 288 and next, S. Kuhlmann, Reforming Local Government in Germany: Institutional Changes and Performance Impacts, German Politics 2009, vol.18, no. 2, pp. 226–245.

administration units of double nature, since they exercise the functions of both local self–government and government administration, second, in the scope of local government they are simultaneously territorial corporations of legal personality as well as associations of communities, and third, the Land legislation usually distinguishes land counties (Landkreise or Kreise) and town counties (Stadtkreise lub Stadtfreie Städte).[47] German counties, however, make a homogenous organisation structure, which, however, does not mean that there are no differences within their systems.

The central figure in each county is the Landrat playing the role of a government administration organ, and being an organ of local government. He/she is chosen in general elections for the term of the county Council.[48] Within the county local government he/she is an executive organ: he/she implements the Council's resolutions and is accountable for the county administration. Besides, the organs which are exclusively local governmental are: the county Council and, in some federal Lands, a county Board. In spite of the double role of the Landrat the common quality of the system of all German counties is the privileged status of the county Council (Kreistag). It is a chief county organ elected in accordance with the guidelines of the Basic Law in general elections for a five–year term.[49] It works as a legislative organ, e.g. passes local law and budget. If, in a particular Land, there occurs the third organ of county local government, the county Committee (Kreisausschuss),[50] it is either a legislative organ, substituting the county Council in certain situations, or a collegial administrative organ of the county, or, finally, is the most important committee of the county Council and in this case its role is the most limited, as its tasks are reduced to preparation of the Council's resolutions as well as coordination of other committees' works. Depending on whether in the particular federal Land there is a county Council in the county, and on what constitutional role the Landrat plays, the German literature of

47 By principle a town county is in the case of towns of more than 100 thousand inhabitants.
48 In Brandenburg and Baden–Württemberg the Landrat is elected by the county Council.
49 In Bavaria it is elected for 6 years, and in Hessen and Schleswig–Holstein for 4 years.
50 Brandenburg, Lower Saxony, Mecklenburg, North Rhine–Westphalia, Saarland.

the subject distinguishes currently two basic constitutional models: the South–German system and the system of the county committee.

In some Lands there are also multi–county administration units. They are empowered for tasks vested in them by Land laws, usually exceeding the capabilities of counties. They may be:

a) self–government regional unions (Landschaftsverbande), North Rhine–Westphalia,

b) districts (Bezirk), Bavaria, are of double nature: they are both local government units and units of government administration,

c) regencies (Regierungbezirke), Hessen, of the nature of government administration units,

d) administration districts (Direktionsbezirk), Saxony, established in place of former regencies as a result of the administration reform of 2008,

e) regions (Regionen), Baden–Württemberg, units of special division, organised for, for instance, needs of town and country planning.

Part 4

DEVOLUTION IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. Historical context of the process of devolution in the United Kingdom

The United Kingdom of Great Britain and Northern Ireland is an object of this chapter for strong historical determinants and the original constitutional solutions in the territorial organisation of the state called devolution.

First events of importance for present day autonomies of different parts of the United Kingdom occurred as early as before the common era. The territory of Britain was settled by masses of Celtic tribes which had arrived from the continent of Europe. The present day inhabitants of these lands are largely their descendants. Culturally and technologically surpassing the native inhabitants of these lands, the Picts, they dominated their community. As a result of the combination of these peoples a new ethnic group arose: the Brits, whereas the Picts living in the north of the island preserved their separate identity.

Further significant facts took place after Christ's birth and were connected with the invasion of the Roman Empire on the territory of Britain; having taken control over nearly the whole island they stopped at the border of Caledonia, present day Scotland. Because for almost a century they did not manage to conquer those lands, in accordance with the Empire's strategy of the time, they built fortifications along the borderline called the Hadrian's Wall and the Antonine Wall (the 2nd century A.D.) At the beginning of the 5th century the Celtic peoples, taking advantage of the geopolitical situation of the Empire pushed the Romans out of Britain. In 410 A.D. Emperor Honorius confirmed in

his letter that from then on this territory ceased to be Rome's object of interest.

From the 5th century on stormy vicissitudes of the territory of Britain connected with migrations and conquests of other peoples: from Ireland migrated Irish Celts, from the territory of present day Germany Saxons, from modern Holland Frisians, and from the Jutland Peninsula Jutes and Angles. This demonstrates the strong ethnic diversification of Britain and shows that the population inhabiting Great Britain today is of heterogenic origins. The raids of the above–mentioned Germanic tribes, which began in the 5th century, ended with the seizure of the territory of today's England by Anglo–Saxons, where later several tribal states appeared, which later on were reduced to seven, these being East Anglia, Essex, Kent, Mercia, Northumbria, Sussex and Wessex. This political network made up by these states is called the Heptarchy.[1] The period (the 5th century) is recognised as the beginning of the English statehood.

The Anglo–Saxon expansion over further territories was impeded in the 11th century by the invasion of Vikings from the territory of present day Denmark, who conquered a significant part of England creating there a state called Danelaw. The Danes were defied by Alfred the Great of Wessex and his state may be considered the beginning of the continuous English statehood. In 1016 England was conquered by King Canute the Great of Denmark and Wessex rulers did not regain the throne until the Danish dynasty expired. The last of the Wessex dynasty, Edward the Confessor, promised his succession to Duke William of Normandy, who, after Edward died and the throne was assumed one of Anglo–Saxon aristocrats, Harold Godwinson, justifying the invasion with alleged succession rights, defeated the Anglo–Saxons at Hastings (1066). He began a new era in the history of England by which the population of present day Great Britain was reinforced by another ethnic group: the French–speaking Normans possessing considerable territories on the continent.

1 B. Zientara, Historia Powszechna Średniowiecza, Warszawa 2006, p. 72–73.

Simultaneously, on the territories of Wales, Scotland and Ireland developed small states separate from England ruled by the Normans. Later on the subsequent dynasties Plantagenets and Lancasters carried out the policy of their subdual. First Wales was conquered; in 1282 the final annexation of Wales too place. Soon, King Edward I granted his son, Edward II the title of Prince of Wales, which was to underline the connections between Wales and England, yet at the same time reminded about the separateness of the annexed territory. From that time on the title of Prince of Wales is vested in the oldest son of the British monarch. The Welsh identity did not vanish, which was reflected in the anti–English uprising and liberation of the territory of Wales from the English in 1400. The situation of the Welsh improved not after the uprising stifled after ten years but in 1485 when Henry VII Tudor, who came from Wales, became king of England. The next Tudor, Henry VIII united England and Wales by the formal Union in 1536.

The conquest of Ireland began in the 12th century. Within a few dozen years England took control over the almost whole territory of this country, which until then was divided into several kingdoms and duchies reigned by rulers, out of whom one could be their overlord. From the 13th century on, in the period of the so–called gaelic recovery, the English were almost completely pushed away from the Irish territories. In the mid-15th century only Dublin and its surroundings remain under the control of the king of England. Along with Tudors coming to power, however, the process of gradual subjugating of further Irish territories by England. In 1541 Henry VIII is recognised king of Ireland. From that time on the English held control, though from time to time successive uprising broke out, of not only national and liberation but also religious nature (Roman Catholics vs. Protestants). In 1801 Ireland was tied with Great Britain by the Act of Union, which is the beginning of the United Kingdom of Great Britain and Ireland. However, the Irish people incessantly took actions for Home Rule, further uprisings broke out and further national organisations appear. A chance of liberation did not occur until after the First World War. Another uprising broke out, which was called the Irish War of Independence and which took largely form of guerrilla war conducted by the Irish Republican Army, to which the British responded with acts of terror. Finally in 1921 the

Treaty proclaiming the Irish Free State, including 26 southern counties, of the status of a British condominium. Formally the head of state was still the British monarch. In 1937 the state was renamed Ireland, and in 1949 the constitutional system was changed, Ireland became a republic, ultimately breaking its ties with Great Britain. The other six Irish counties, which belonged to one of the four historic provinces, Ulster[2], remained with Great Britain. In contrast to the Roman Catholic Ireland, the protestant population dominated there, mostly descendants of Scottish and English immigrants.

These counties assumed the name of Northern Ireland and were included into the United Kingdom of Great Britain and Northern Ireland. The division of the "Emerald Isle" has been evoking emotions and conflicts up till now. The IRA have never reconciled themselves with the division of Ireland until now having carrying out action, including acts of terror, for the unification of Ireland.

The territory of present day Scotland resisted the neighbours' invasions the longest. It is worth reminding that even the Roman Empire had not managed to take control over this territory, which, as historians and anthropologists point out, had great effect on the cultural otherness of this land (backwardness in a way). There were independent kingdoms there, first Dalriada, then Alba, which were predecessors of Scotland. The name Alba began to vanish at the beginning of the last millennium in favour of the new name, Scotland. The Scots managed to repulse the raids of Vikings, Danes and Anglo–Saxons from Northumbria. However they did not succeed in defying King Edward I of England, the same who had subjugated Wales before. Edward I took advantage of the dynastic situation in Scotland. After King Alexander III of Scotland and his successor Margaret, 13 pretenders claimed the throne in 1290 and a civil war threatened Scotland. Edward I proclaimed himself Lord Paramount of Scotland and, through the marionette King John appointed by himself, actually ruled Scotland. However, soon the war between England and Scotland broke out, which resulted from, among other factors, the alliance of Scotland with France, England's enemy. England was victorious, Scotland was conquered and looted. However,

2 These provinces are Connacht, Leinster, Munster and Ulster.

a year later the anti–English uprising broke out led by William Wallace. After initial successes and liberation of Scotland, the insurgents were defeated and Edward I again subjugated Scotland. The Scots made yet several attempts at anti–English rebellions, of which the one of 1307 under Robert Bruce was successful. In 1328 England formally recognised the independence of Scotland.

During the reign of James VI (James I in England) the personal Union between Scotland and England began. As the king of Scotland he ascended the throne of England in 1603 and took further steps towards durable union of the two states. This came into effect on 1 May 1707 on passing the Articles of Union with Scotland by the parliaments of the both states. The countries were tied with a real union, and instead of the two states, the Kingdom of England comprising, as we know, Wales, and the Kingdom of Scotland, the new state arose, the United Kingdom of Great Britain. From that moment on one monarch and one parliament in Westminster functioned, where 15 Scottish lord were co–opted to the House of Lords and 45 members of parliament to the House of Commons.

As already mentioned, by force of the Acts of Union of 1800, on 1 January 1801 the Kingdom of Ireland was included into the state, and the name of the state changed for the United Kingdom of Great Britain and Ireland. In 1927 once again the name of the state was corrected, when the United Kingdom changed its name for the United Kingdom of Great Britain and Northern Ireland.

2. An outline of the government system of the United Kingdom: executive, legislative and judicial institutions

The United Kingdom is a parliamentary monarchy functioning within the framework of the parliament and cabinet system shaped over centuries. This system has become of the models, which at present function in democratic states, though often in a modified form.

What is characteristic of this system is the lack of a uniform written Constitution. The Constitution considered the foundation of the legal order consists of common law norms, the so–called constitutional conventions as well as several acts of law. As elements of the binding constitutional order traditionally such documents are recognised as the Magna Carta Libertatum (1215, 1297) or the Bill of Rights (1688), as well as newer acts such as: the Human Rights Act (1998), the Ministers of the Crown Act (1975 or the House of Lords Act (1999). The British constitutionalism has a long tradition then, as well as a evolutionary nature, which results in the generally conservative approach to constitutional reforms and the highest standards of political culture of the British elites. The constitutional system of the United Kingdom is based on three fundamental constitutional principles, determining the government system of this state. They are: rule of law, division of powers, and the supremacy (control) of the parliament. The **principle of the rule of law** is understood as binding all entities by law and subjecting this to judiciary control. The **principle of the division of powers** functions in the organisational aspect and consists in distinction between the organs of legislative, executive and judicial powers, although there is no separation but far–going interdependence and cooperation. The **principle of supremacy** of the parliament indicates the subject of the superior power, yet provided that the parliament consists of three elements: the monarch, the House of Commons and the House of Lords and is the emanation of all Her Majesty's subjects"[3]. In the context of the above–mentioned understanding of the principle of division of powers there is no domination of one power over the others, as the parliament is the source of the government (the principle: the government comes from the parliament) and holder of the judicial power; the House of Lords is formally the supreme organ of the judiciary. Thus, any power has its source in the will of the people electing their representatives, and the Parliament is their embodiment.

The structure of the highest authorities of the United Kingdom reflects the constitutional assumptions enumerated above. The head

3 W. Funnel, The Reason Why: The English Constitution and the Latent Promise of Liberty in the History of Accounting, Accounting, Business & Financial History 2007, vol. 17, no. 2, p. 275–277.

of state is the **monarch**, whose rights to the throne, as well as the whole ruling House of Windsor, result from the Act of Settlement establishing the order of succession, generally based on primogeniture, and additionally allowing women. Despite the fact that the monarch is the representative of "the Crown" or the personification of the state power, in truth only representative functions are vested in her, which is reflected in the rule: "the King/Queen reigns but not rules" (*rex regent, sed non gubernat*). The constitutional status of the monarch was first limited in favour of the parliament and then the cabinet, which make the most important political decisions. The role of the monarch in this process is reduced to "King/Queen–in–Parliament", although is increases along with the charisma of the current ruler, as theoretically he/she is still endowed with a broad range of prerogatives, such as, for example:

a) appointing the Prime Minister and, on his/her application, other members of the government,

b) summoning, proroguing and dissolving parliament,

c) granting legislative approval,

d) appointing life peers (House of Lords),

e) concluding and renouncing international agreements.

Their performance, however, the monarch vests in the **cabinet**, in accordance to the rule "the King can't do alone", which obliges the monarch to act by advice and consent of his advisers. This manifests in the institution of counter–signature: the monarch's acts require the minister's co–signature, whereas in fact the constitutional praxis resulted in ministers' appropriation of these prerogatives, reducing the model idea of counter–signature to the most important prerogatives only. In other cases ministers usually act alone.

The consequence of this takeover is also the government's takeover of political accountability to parliament (the King can do no wrong). The monarch does not bear this accountability, nor does he/she bear the so–called constitutional accountability implemented in the form of impeachment. Impeachment has not been now applied in the United Kingdom since 1806. Moreover, it was never used towards a monarch.

The constitutional position **of parliament** manifests even in the two above–mentioned constitutional principles: the division of powers and the supremacy of parliament, which were nowhere expressed normatively but were constructed by a law doctrine on the basis of observations of the entirety of constitutional solutions and praxis of the functioning of the United Kingdom. Parliament consists of two chambers: the House of Commons and the House of Lords, although it is important to remember that formally also the monarch is a component of the British parliament, and to make a decision Parliament needs consent of its all three components.

The **House of Commons** comes from general, direct and equal elections (in formal aspect).[4] Now it consists of 646 members of parliament (MPs), including 532 from England, 59 from Scotland, 40 from Wales and 18 from Northern Ireland. Since 1885 they have been elected in first–past–the–post voting, which means that the winner in a constituency is the one with simple majority of votes. This electoral system resulted in shaping the two–party system, in which real political powers, at the principle of political pluralism preserved, are two parties: the Conservative Party and the Labour Party.

The establishment of the composition of the **House of Lords** looks completely different. There are no traditionally understood elections but a kind of designation. After passing the House of Lords Act (1999), this system was reformed[5] and now consists in the principle that the hereditary peers, hitherto sitting in the House of Lords as holders of particular aristocratic titles, elect from among their circle 75 members of the House of Lords sitting there for life, and 15 exercising particular functions in this Chamber.[6] The role of the remaining Lords is reduced to the by–elections in the event of vacancy in the Chamber.

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4 These elections are equal in the formal aspect, as the division into constituencies which differ by the number of electors, does not allow to implement completely the principle of equal elections in the substantial aspect.

5 See: M. Russell, House of Lords Reform: Are We Nearly There Yet?, The Political Quarterly 2009, vol. 80, no. 1, p. 119 and next.

6 This election is held in four teams of lords: members of the Conservative Party, the Labour Party, the liberale and non–partisan lords.

Moreover, since 1958 there have been also the so–called life peers in the House of Lords, i.e. people appointed 'barons' by the monarch for special merits. Among this group Law Lords (20) are distinguished. Until recently (2009) they played the role of the supreme court as the Court Committee of the House of Lords. Other members of the House of Lords are bishops of the Church of England, the so–called spiritual lords (26) and the royal family members (5).

The constitutional nature of parliament also manifests in the functions exercised thereby[7]. Parliament exercises, of course, the legislative function, whereas what is worth noting is the fact of this organ's "legislative omnipotence", which manifests, inter alia, in the fact that, as P. Sarnecki writes, "there are no objective borders for its legislative activity; there is also no substantive notion of statute, which results in the situation where a statute (act) is any regulation which the British parliament wants to treat as such."[8] Parliament may also delegate its competence of making law to any other organs and in any areas, which is at its discretion.

The legislative procedure, simplifying, consists in the following course of events: a law proposal brought in by the government or a Member of Parliament, should be passed by the two chambers (in any order), and then is presented to the monarch in order to be granted a Royal Assent, which in fact is done by the Prime Minister. In the event of conflict of opinions between the two chambers, the utter decision is made by the House of Commons. Some differences occur in reference to financial acts (for example, the initiator may be only the Government) and private laws (they may be proposed in the so–called petition procedure, not necessarily by parliamentarians).

The control function of parliament is exercised almost exclusively by the House of Commons, in which the chamber, and especially

7 See: D. Lipsey, What the House of Lords is Really for?, The Political Quarterly 2009, vol. 80, no. 3, p. 400 and next.

8 P. Sarnecki, System konstytucyjny Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej, Warszawa 2009, p. 22–23. Moreover, the author points at the fact that laws (acts) may be both normative regulations of general and abstract nature called "public laws", as well as the acts addressed to individual entities or regulating only one concrete event, called "private laws". There also may be "mixed laws" of both public and private nature. A special category of laws are "financial laws".

"Her Majesty Royal Opposition", has at its disposal several control mechanisms usually manifesting as a parliamentary debate on a particular issue, e.g. on the "throne speech" or the government programme, which is held in both chambers, and which in fact is a form of annual vote of confidence granted to the government; a budget speech prior to the budget resolution, on the budget report or any other issue brought in for debate by the government of the opposition. Important control instruments are also committees, including investigation committees, which are entitled, for example, to demand explanation, to hear any persons or to demand a production of documents. The position of the committee in a given issue may include suggestions for the government which is obliged to assume an attitude towards them. Moreover, MPs exercise interpellation procedures which manifest in various forms of enquiries directed to the government. In its control function parliament is supported by the National Audit Office and the Parliamentary Commissioner for Administration, functionally connected with the House of Commons, though organisationally separate control organs.

The executive power in the United Kingdom is exercised by the **government**, which is understood very broadly. It embraces all executive functionaries on the central level holding "political" positions, which means affecting the directions of state policies in particular sectors of public life.[9] A number of categories of persons makes the government, and there is a peculiar hierarchy of these positions. They are: Prime Minister and First Lord of the Treasury, secretaries of state, ministers of state, secretaries, ministers, Lord President of the Privy Council and the Leader of the House of Commons, Lord High Chancellor of Great Britain (or minister of justice), Chancellor of the Exchequer (or minister of finance), Chancellor of the Duchy of Lancaster (minister without portfolio), the so–called law ministers: Attorney General (the highest legal advisor for the Government), Lord Advocate (the highest legal representative) and Solicitor General (legal consultant), as well as parliamentary secretaries (links between each department with the parliamentary chambers).[10] The scope of power of particular members

9 *Ibidem*, p. 34

10 Civil service, or professional officials performing tasks vested in them by law, remains outside the Government.

of the government results from an attributive regulation issued by the cabinet. It is a collegiate structure at the top of the government, including the Prime Minister and his/her closest co–workers. The entry to the Cabinet is a result of the monarch's appointment of a given person for the Privy Council, which occurs on the Prime Minister's motion, who is an actual head of this board and, through it, the government. Undoubtedly, another constitutional convention affects it, namely the one according to which a Prime Minister becomes the leader of the winning party.

The government is strictly connected with parliament, which can be seen in the above–mentioned tasks of parliament in control, and allows to state that the government is accountable to parliament, but also other constitutional mechanisms, such as, for example, a constitutional convention, in accordance with which members of the government can be just members of parliament[11].

The scope of constitutional tasks of the British Cabinet is accurately observed by P. Sarnecki, who writes that its constitutional role is analogous to the role of a central link of the executive power in all democratic systems: it should deal with all more important political issues, develop a position therein, inform the public opinion thereof, and take steps in order to implement the decisions. Therefore it should appropriately manage the work of particular departments. When the cabinet considers it indispensable to gain new opportunities for the implementation of its policy, it should bring in proposals of adequate laws, especially of budget in an appropriate shape. When the cabinet thinks the monarch should work for the same purpose, it should express appropriate motions ("recommendations"), which, in accordance with the existent conventions, the monarch should implement. This is particularly about a motion to dissolve the House of Commons. The cabinet may also issue legal regulations itself in the framework of the so–called delegated legislature.[12]

11 About relationship between prime minister and parliament see: G.P. Thomas, United Kingdom: The Prime Minister and Parliament, The Journal of Legislative Studies 2004, vol. 10, no. 2/3, p. 4–37.

12 P. Sarnecki, System konstytucyjny…, *op. cit.*, p. 36.

In contrast to the organs of legislative and executive powers, whose jurisdiction, excluding cases delegated by devolution, embraces the whole territory of the United Kingdom, the organisation of the **judiciary** is quite diversified. There occur separate models: the first in England and Wales, the second in Scotland and the third in Northern Ireland. In some English cities, including London, a particular organisation of judiciary has survived. Moreover, on the territory of the United Kingdom there are still a great number of special courts, often with very narrow specialisation.

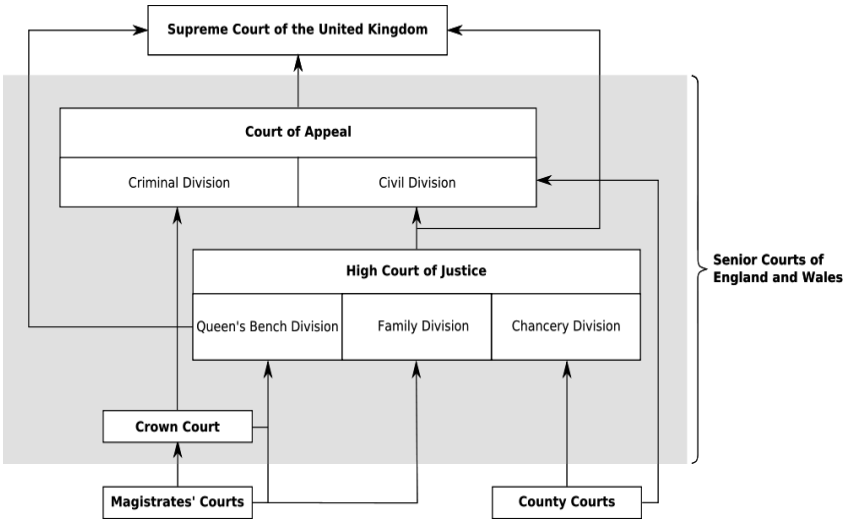
Besides, two other qualities of the British judicial system are worth noting. First, there occur separate courts proper in civil cases and criminal cases, and, second, courts and judges themselves enjoy an exceptional prestige in society, which stems from, among other things, high legal culture and the conception of the profession of judge called "the crown of legal professions". It is also worth bearing in mind that in this system there is no constitutional court and there are no separate administration courts. Their role is performed by common courts.

Courts in England and Wales are called Her Majesty's Courts of Justice of England and Wales. They fall into two categories: Senior Courts of England and Wales and Subordinates Courts. The second group are, in principle, courts of the first instance, among which we may distinguish County Courts as courts proper for civil cases, and magistrates courts, proper in criminal cases as well as youth courts proper in juvenile criminal cases. There are frequently also family proceedings courts by magistrates courts, proper for such cases as custody and adoption. Among Senior Courts of England and Wales, which are courts of appeal, and also, exceptionally, courts of first instance, are Court of Appeal, High Court and Crown Court. High Court is proper in civil cases, whereas Crown Court[13] in criminal cases. If these courts adjudicate as first instance in the most serious cases, appeals are considered by the Court of Appeal. Until the constitutional reform they were called Supreme Court of England and Wales, but along with the reform and establishment of the Supreme Court of The

13 Crown Court replaced, in 1971, several other courts, such as Assizes courts and Quarter Sessions courts.

United Kingdom, the old name was restored: Senior Courts of England and Wales.

Until 1 October 2009, the highest tier of the judiciary remained the Judicial Department of the House of Lords, working as the Appellate Committee, including law lords. Currently the competences of the House of Lord have been taken over by the Supreme Court of The United Kingdom,[14] which consists of the previous Law Lords and considers appeal measures against decisions of the Court of Appeal, and, in some cases, also against decisions of the High Court. What is important, this court is also the highest appeal instance in devolution cases.



The structure of courts in England and Wales. An analogous structure occurs in North Ireland. Graph by Dave Dunford.

In the **judiciary structure in Scotland**, Sheriff Courts function as courts of first instance, both for civil and criminal cases. In petty criminal cases Disctrict Courts adjudicate as courts of first instance,

14 The first substantive case was heard on 5 October 2009 by President Lord Phillips. The case known as A, K, M & G v. HM Treasury involved the freezing of assets of the individual appellants; their case was supported by a public interest intervention by Justice.

which are gradually being replaced by Justice of the Peace Courts, whose power has been extended. This results from the rights granted to the Scottish Government, Scottish Ministers, in the process of devolution. Specialised courts dealing with civil or administration cases vested in them are various tribunals, for example Employment Tribunal or VAT and Duties Tribunal. Courts on higher levels are separate for civil and criminal cases. The Court of Session is the supreme civil court. It is both a court of first instance and a court of appeal. The court of first instance is known as the Outer House, the court of appeal the Inner House. Similarly, in criminal cases a court of first instance as well as a court of appeal is the High Court of Justiciary. For civil cases the highest instance is the Supreme Court of The United Kingdom. In criminal cases appeals to this court has been reduced to cases connected with devolution.

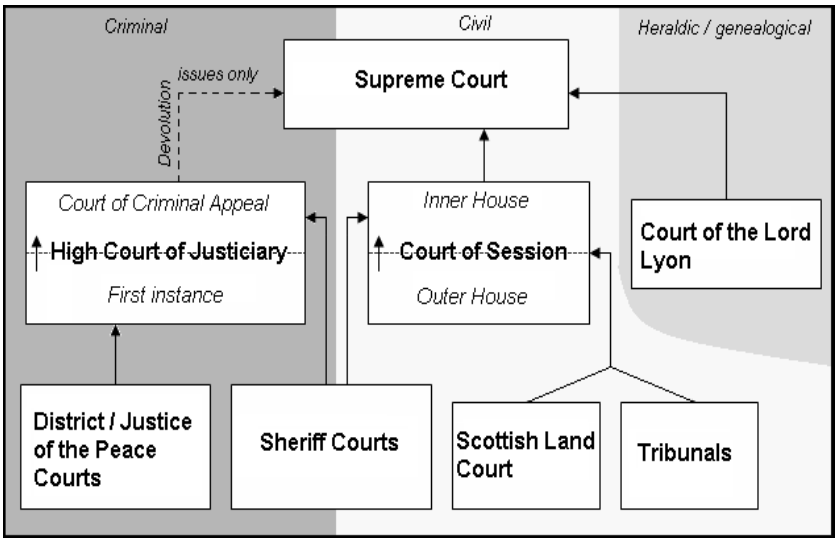


Diagram of the Courts of Scotland, source: Wikipedia Commons.

In **Northern Ireland** the organisation of the judicial system is very close to that in England and Ireland. What should be borne in mind, however, is that despite the same names, they are separate courts. As

the first instance in civil cases county courts, whereas in petty criminal cases magistrates courts are adequate. A court of higher instance is the Court of Judicature of Northern Ireland.[15] It consists of the following courts: The Court of Appeal, The High Court and The Crown Court, whose distribution of properties is approximate to the nominally corresponding English courts. The highest instance considering appeal measures from the Court of Appeal is The Supreme Court of The United Kingdom.

3. Institutional forms of devolution in Scotland, Wales and Northern Ireland

One of the qualities of the process of devolution, pointed at in the first subchapter, is the delegation of power to the elected organs of parliamentary and governmental nature, in contrast to "ordinary" legislative and managerial organs, with which we deal in the case of the local government. In different parts of the United Kingdom it takes another form, and that is why it requires a separate approach to each of them.

The strongest manifestation of devolution is Scotland, which reflects the strongest separate national identity of the Scottish. Scotland, on the basis of the Scotland Act 1998, was granted the right to its own parliament and government, which are called, respectively: Scottish Parliament and Scottish Government.[16]

Scottish Parliament is one chamber and comprises 129 MSPs (Members of the Scottish Parliament), elected in general election by means of the mixed electoral law: 73 MSPs are elected in single seat constituencies in accordance with the rule 'first past the post', and 56 in eight seven–seat constituencies where the proportional system is applied. Members are elected for four–year terms. The seat is Holyrood

15 It is constituted by the Judicature (Northern Ireland) Act 1978. Until 1 October 2009 its name was the Supreme Court of Judicature.

16 Following the 2007 Scottish Parliament election, the term Executive was changed to Government by the new Scottish National Party administration.

area of the capital, Edinburgh and hence the informal name of Scottish Parliament: Holyrood.

The competences of Scottish Parliament result, of course, from the Scotland Act, which sets out its powers as a devolved legislature. The Act delineates the legislative competence of the parliament – the areas in which it can make laws – by explicitly specifying powers that are 'reserved' to the Parilament of the United Kingdom. The scope of rights of Scottish Parliament was limited by article 29 of the Scotland Act as well as two appendices: no 4 and no 5. For example, among the reserved matters are counted:

a) the Crown, including succession to the Crown and a regency,

b) the Union of the Kingdoms of Scotland and England,

c) the Parliament of the United Kingdom,

d) the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal,

e) the continued existence of the Court of Session as a civil court of first instance and of appeal,

f) the registration and funding of political parties,

g) international relations, including relations with territories outside the United Kingdom, the European Communities (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co–operation,

h) the Civil Service,

i) the defence of the realm, the naval, military or air forces of the Crown, including reserve forces.

All matters that are not explicitly reserved are automatically the responsibility of the Scottish Parliament. The most important devolved matters are:

a) health and social work,

b) education and training,

c) local Government and housing,

d) justice and police,

e) agriculture, forestry and fisheries,

f) the environment,

g) tourism, sport and heritage,

h) economic development and internal transport.

It is important to bear in mind that it is still the competence of the Parliament of the United Kingdom to extend or reduce the scope of competences of the Scottish Parliament, which results in the situation that, despite devolution, the Parliament of the United Kingdom at Westminster continues to constitute the supreme legislature of Scotland.

In accordance with articles 31–33 of the Scotland Act, Scottish Parliament passes laws in the procedure of 3 stages, and bills may be proposed by: the Scottish Government or a committee of the parliament. A member of the Scottish Parliament can introduce a bill as a private member; or a private bill can be submitted to Parliament by an outside proposer. On passing the law, it must gain the Royal Assent, which occurs in 4 weeks, during which the British Advocate General for Scotland or the Attorney General, as well as the Scottish Lord Advocate, may propose a motion concerning the conformity of the law passed with the scope of legislative competences of Scottish Parliament. The motion is considered and finally decided upon by the Judicial Committee of the Privy Council.

The most important, beside legislature, function of Scottish Parliament is the appointment of the Government (articles 46–48 of the Scotland Act). The party, or parties, that hold the majority of seats in the Scottish Parliament forms **the Scottish Government**. As a rule, like in Westminster, the head of Government, called First Minister, becomes the leader of the major party, who is formally nominated by Parliament and appointed by the monarch. The First Minister, by the consent of parliament, turns to the monarch for the appointment of the other ministers. The government also includes the Scottish Advocate General and his deputy appointed by the monarch on joint application of the First Minister and Scottish Parliament. They are collectively known

as the 'Scottish Ministers'. Outside the cabinet remain Junior Scottish Ministers, appointed in the same way, whose work is to assist proper ministers in the responsibilities vested in them. The government is basically appointed for the parliament's term, unless the First Minister files his/her resignation, which he/she should do if parliament decides that the government does not enjoy the confidence of parliament (motion of no confidence).

The basic function of the Scottish Government is exercising executive power in the cases which, according to the Scotland Act, were subject to devolution. Passing the competences on the plane of executive power resulted in the situation in which part of tasks are implemented independently by the Scottish Government instead of the Crown ministers. The Scotland Act (article 56) enumerates also cases in which a Scottish minister of a Crown minister (shared powers) is proper. What is also important, the members of the government have substantial influence over legislation in Scotland, putting forward the majority of bills that are successful in becoming acts of the Scottish Parliament.[17]

Devolution in **Northern Ireland**, although eventually took the form similar to that in Scotland, had, apart from its ethnic genesis, also religious background, and, although the devolution law was also passed in 1998 (The Northern Ireland Act 1998), its provisions remained a dead letter until 2007 as a result of conflicts entailed thereby. The parliament of Northern Ireland is called **the Northern Ireland Assembly**, and the government the Northern Ireland Executive. The Assembly is a unicameral and democratically elected for four years term. Elections of 108 Members of the Legislative Assembly members are based on the "single transferable vote" system (STV – votes are initially allocated to an elector's most preferred candidate and then, after candidates have been either elected or eliminated, any surplus or unused votes are transferred according to the voters' stated preferences). The election was conducted in 18 six–seat constituencies, each of which corresponds to a UK parliamentary seat. The Northern Ireland Assembly sits at parliament buildings at Stormont in Belfast.

17 http://www.scottish.parliament.uk/business/bills/index.htm

The division of Northern Irish society is also reflected in the fact that members of the Legislative Assembly, before they start their functions, may file a declaration of affiliation with the Unionists, the Nationalists or the others. The assembly has two primary mechanisms to ensure effective power–sharing: appointing ministers to the executive, cross–community support which is a form of voting in listed matters, that requires the support of both communities in Northern Ireland, in other words majority of unionists and the majority of nationalist members of the assembly[18].

The functions of the Northern Ireland Assembly focus on two issues: legislation and appointing the government. The assembly has authority to legislate in a field of competences known as 'transferred matters'. They are defined as 'any matter which is not an excepted or reserved matter'. In connection with such a construction, like in Scotland, also in the Northern Ireland Acto 1998 we find rather a list of the matters as for which the legislation remains in the hands of the UK Parliament. They are two groups of matters: reserved matters which are outlined in Schedule 3 of the Northern Ireland Act 1998 and excepted matters which are outlined in Schedule 2. Excepted matters are permanently reserved to the British Parliament, while reserved matters may be, in the future, forwarded to the Northern Ireland Assembly. For example, among excepted matters are: the Crown, Parliament, international relations, defence and national security, immigration and nationality, taxation, elections, currency.

Reserved matters are for example: civil aviation, postal services, import and export controls, external trade, units of measurement, telecommunications, broadcasting, internet services, human genetics, consumer safety in relation to goods, financial services. As aforementioned there is therefore no full listing of transferred matters. but the responsibilities of the Northern Ireland Executive ministers can be helpful. They deal with:

18 Any vote taken by the Assembly can be made dependent on cross–community support if a "Petition of Concern" is presented to the Speaker.

a) agriculture and rural development,

b) culture, arts and leisure,

c) education,

d) employment and learning,

e) enterprise, trade and investment,

f) environment,

g) finance and personnel,

h) health, social services and public safety,

i) justice,

j) regional development (including transport),

k) social development (including housing).

The legislative procedure is approximate to the Scottish procedure, so also requires the Royal Assent, but only the British Secretary of State may apply for it to the monarch. If the Secretary of State believes that a bill violates the constitutional limitations on the powers of the assembly, the Secretary of State will refuse to submit the bill to the monarch for assent. Moreover, the Attorney General for Northern Ireland may report to the Judicial Committee of the Privy Council his/her reservations about the admissibility of issuing a particular law.

The **Northern Ireland Executive** is an example of a consociationalist government, which means that it is a form of government involving guaranteed group representation, and is often suggested for managing conflict in deeply divided societies. Enacting the government is based on the principle of power–sharing under the D'Hondt method to ensure that Northern Ireland's largest political communities, the unionist and nationalist communities both participate in governing the region. The executive consists of a First Minister and deputy First Minister (a diarchy) and other ministers with scheduled areas of responsibility (education, justice, etc.).[19]

19 In Northern Ireland, The Northern Ireland Office represents the UK government on reserved matters and represents Northern Irish interests within the UK government. The Northern Ireland office is led by the Secretary of State for Northern Ireland, who sits in the Cabinet of the United Kingdom.

The First and deputy First Ministers were initially elected on a cross–community vote, although this was changed in 2006 and they are now appointed as leaders of the largest and second largest assembly parties. However the remaining ministers are not elected but rather chosen by the nominating officers of each party, each party being entitled to a share of ministerial positions roughly proportionate to its share of seats in the assembly (d'Hondt system). They formally act on behalf of the Queen. The activity of the government is subject to the control from the Assembly, which is also entitled to raise the motion of no confidence. The functions of the Northern Ireland Executive are reduced to the execution of transferred matters, yet in the event of the act issued by the Northern Ireland Executive going into excepted or reserved matters, the British Secretary of State may lift such acts.

Along with devolution acts for Scotland and Ireland, the Government of **Wales** Act 1998 was passed[20]. This law, however, did not transform competences on the same scale as in Scotland and Northern Ireland. Although the National Assembly for Wales was brought into existence, the scope of its competences was significantly limited. This assembly did not have the right to making law. The only thing it could do was issue executive acts for laws issued by parliament in Westminster. As P. Sarnecki writes, the main role of the Welsh authorities was, however, the role of the body with which the British Government consulted acts concerning this territory and which was capable to address the government with non–binding proposals. It is worth mentioning, that there was no legal or constitutional separation of the legislative and executive functions, since it was a single corporate entity.ble of addressing this government with unbinding proposals.[21]

The situation changed remarkably in 2006, when a new devolution law for Wales was passed: the Government of Wales Act 2006. The Act creates a system of government with a separate executive drawn from and accountable to the legislature, and what is most important – it gives to **the Assembly** legislative powers. These powers are

20 About Welsh devolution processes see: B.H. Toszek, E. Kużelewska, Od wizji do rzeczywistości. Dziesięć lat dewolucji w Walii, Warszawa 2011.

21 P. Sarnecki, System konstytucyjny…, p. 47.

limited by Government of Wales Act 2006 and known as Assembly Measures. New matters and fields can be devolved by Acts of the UK Parliament or by orders of council (Legislative Competence Orders – must be approved by the Assembly, the Secretary of State for Wales, both Houses of Parliament, and then the Queen in Council). There are 20 "Fields" outlined in Schedule 5 of the Government of Wales Act 2006, which list devolved matters. Those fields are (e.g.):

a) agriculture, fisheries, forestry and rural development,

b) culture,

c) economic development,

d) education and training,

e) environment,

f) health and health services,

g) highways and transport,

h) local government,

i) public administration,

j) social welfare,

k) welsh language.

The differences in devolution are generally justified with the fact that whereas Northern Ireland and Scotland has never been incorporated into England, preserving quite significant separate qualities in their legal systems, Wales, since 1563, has been part of England and accepted its legal solutions.

The legislative procedure in these domains is analogous to those on the other territories embraced by devolution, so it is like in Scotland and Northern Ireland. The British Attorney General for Wales is entitled to block these laws through his/her exclusive right to apply for the Royal Assent for them.

The National Assembly for Wales consists of 60 members. They are elected in general elections based on the mixed electoral system: 40 are elected in one–seat constituencies by first–past–the–post system,

whereas the other 20 in 5 four–seat regional constituencies by the proportional (d'Hondt) system.

The **Welsh Assembly Government** is the Welsh executive. It is now not just an executive body (committee) of the National Assembly for Wales, like it was in 1999–2007. The separation between the legislature (National Assembly for Wales) and the executive (Welsh Assembly Government) took effect under the Government of Wales Act 2006. Some of the National Assembly's functions, including those of making subordinate legislation, were transferred to the government. Like in Scotland and Northern Ireland, the members of the government, exercising their functions of the executive, act on behalf of Her Majesty.

The Welsh Assembly Government consists of First Minister, Welsh Ministers, Deputy Welsh Ministers and the Counsel General. The First Minister is nominated by the Assembly and then appointed by the monarch. The First Minister will subsequently appoint the Welsh Ministers and the Deputy Welsh Ministers, with the approval of Her Majesty. There is also a new organ – Counsel General for Wales, responsible for legal advice to the Welsh Assembly Government. The Counsel General is appointed by the monarch, on the nomination of the First Minister, whose recommendation is approved by the National Assembly. The maximum size of the Welsh Assembly Government is 14. The National Assembly scrutinises the Assembly Government's policies and decisions and hold Ministers to account[22].

4. Regions in England and the West Lothian question

So far there has been no devolution in England yet, which is usually explained with the dominating role of England in the historical process of the UK shaping, as well as with the current geopolitical position of this part of it, manifesting in, for example English demographic and economic potential England does not

22 B.H. Toszek, E. Kużelewska, *op. cit.*, p. 83–116.

have its separate parliament or government like the other parts of the UK then, and is ruled by the Parliament and the Government of the UK. This gave rise to the West Lothian question, first post on 14 November 1977, by Tam Dalyell, Labour Member of Parliament for the Scottish constituency of West Lothian. During a British House of Commons debate over Scottish and Welsh devolution he asked:

"For how long will English constituencies and English Honourable members tolerate ... at least 119 Honourable Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics while they themselves have no say in the same matters in Scotland, Wales and Northern Ireland ?"[23]

Currently, the idea of devolution in England and creating an English parliament enjoys rather moderate support in English political elite circles. Alternatively, they propose solutions based on regional assemblies on the territory of England. Another solution might be the dissolution of the United Kingdom leading to some or all of the constituent countries, England, Northern Ireland, Scotland, and Wales, becoming independent sovereign states or abolishing the devolved bodies. These solutions have definitely lower political support and are, for now, scarcely real.

In the territorial organisation of England there is no devolution in the form observed in Scotland, Northern Ireland and Wales. We can talk, however, about its certain particular manifestation in reference to the London metropolis, where operates the **Greater London Authority**.

The authority was established in 2000, following a referendum, and derives most of its powers from the Greater London Authority Act 1999 and the Greater London Authority Act 2007.It is the top–tier administrative body for Greater London, which covers the City of London and the 32 London boroughs (including the City of Westminster). Its area also forms the London region of England. The Greater London Authority consists of a directly, elected executive, Mayor of London, and adirectly elected 25-member London Assembly

23 The name "West Lothian question" was coined by the MP Enoch Powell in his response to Dalyell's speech: "We have finally grasped what the Honourable Member for West Lothian is getting at. Let us call it the West Lothian question."

with scrutiny powers. The Greater London Authority is a strategic regional authority, with powers over transport, policing, economic development, fire and emergency planning.

Beside the capital region functioning on separate constitutional bases, until 2010 there were regional assemblies created by the Regional Development Agencies Act 1998. **Regional assemblies** were consultative bodies proper for regional development issues. Their members were elected in indirect elections; they consisted of persons pointed at by lower administrative bodies as well as regional interest groups. Their tasks were taken over by Regional Development Agencies, created by the same law. Following the abolition of the regional assemblies, there were established **Local Authority Leaders' Boards** for each region. These Boards took over responsibilities for scrutiny of Regional Development Agencies.[24] It is worth, however, bearing in mind that the situation in the structure of regional authorities in England is quite dynamic. Particular political forces present different proposals of future solutions. This is strongly connected with the aforementioned West Lothian question.

5. Local government in the UK

Local government in the UK has a relatively long historical tradition, and the fact that it has been shaped in the period when separate political beings functioned on the territories of present day England, Scotland, Wales and Ireland, significantly affected the differences, sometimes very serious, between local government systems in different components of the present day UK[25]. Overally, there are 433 local authorities in the UK: 353 of these are in England, 32 in Scotland, 26 in Northern Ireland, and 22 are in Wales.

The most complicated local government structure occurs in **England**. The highest tier of administrative division is **regions**, but, as already mentioned, except for the capital metropolis, their authorities

24 Local Democracy, Economic Development and Construction Act 2009.
25 About history of British local government in short form see: H. Wollmann, Local Government Reforms..., *op. cit.*, p. 643 and next.

are not elected and they themselves are created for statistical and consultative needs in regional development. Thus, they are not entities of local government.

Below this level there are two basic models of local government: **two–tier and unitary**.

In the former the higher tier is a **county**, where the decision–making body is the county council, among whose competences are such issues and education, waste management and strategic planning within a county. The lower tier is **districts** (also known as boroughs in some areas), making up a county, where the most important body is the district council responsible for such services as housing, waste collection and local planning. Both county and district councils are elected in general elections. A variation of this model is metropolitan counties which each cover large urban areas, and are each divided into several metropolitan districts, also known as boroughs. After 1986, a significant majority of the competences of metropolitan counties were passed to metropolitan districts, which made them de facto divisions closer to the second model. This resulted in the elimination of the elected county councils and replacing them with special bodies proper in sparse remaining competences of counties (joint bodies such as Passenger Transport Authorities, and joint fire, police and waste disposal authorities). The other entities, counted among the two–tire model non–metropolitan counties (known as shires), with their subdivisions: non–metropolitan districts. Also in this case one can see the tendency towards reforming into unitary entities.

In the **unitary model**, there is only one tier of local government. The unitary authorities of England, which are areas where a single local authority is responsible for a variety of services for a district that elsewhere are administered separately by two councils. This model mostly occurs in bigger cities and small counties, where the subdivision into districts would be impractical. Most of them were established in the 1990s and a further tranche were created in 2009. Unitary authorities usually resulted from the transformation of the hitherto prevailing county–district structure. Consequently, there are basically two types: **County** gained district functions and **District** gained county

functions. This is of no practical meaning but demonstrates that the functions of unitary authorities are a sum of the previous functions of local government tiers in the two–tier model. Also in the new divisions the most important bodies are councils.

In both models the role of executive is usually played by the cabinet elected by the council, the head of which is a council leader. There are also other solutions, for example with a mayor elected in direct elections or a cabinet elected by the council and led by the mayor. In general, traditional English solution, in which the only organ was a council operating through its committees, is replaced by a model where two organs work: legislative and executive (Local Government Act 2000)[26].

In some areas there is a lower tier of government, **civil parishes**, with limited functions. They are alternatively known as a towns, villages, neibourhoods or communities. One of these names can be made by the resolution of its parish council. There is also a limited number of cases, when parish has a city status granted by the monarch. Most civil parishes are in rural areas – they cover only part of England corresponding to 35% of the population.

Every civil parish has a parish meeting, consisting of all the electors of the parish but larger civil parishes may have a parish council which exercises various local responsibilities given by statute.[27] Alternatively several small parishes can share a common parish council, or even a common parish meeting. In unparished areas, the administration of the activities normally undertaken by the parish becomes the responsibility of the district or borough council.

The **Welsh model** of local government corresponds with the English model of **unitary authorities**. The territory of Wales is divided into 22 unitary authority areas. All of them are regularly called **counties** in the Welsh media, but officially they are variously styled: there are nine as counties, three as cities (two of which as City and County), and ten as county boroughs. Legal base of nowadays model

26 H. Wollmann, Reforming Local Leadership..., *op. cit.*, p. 284 and next.
27 Parish councils are run by volunteer councillors who are elected to serve for four years.

of Welsh local government is Local Government (Wales) Act 1994. In each division of this tier operates a council as a decision–making body, called respectively County Council, County Borough Council and, in cities, City Council (e.g. Newport City Council) or, in the case of cities being simultaneously counties the City and County Council (e.g. the City and County Council of Cardiff, the City and County of Swansea Council). All councils of this type are called principal councils in the Local Government (Wales) Act 1994. All unitary authorities and all principal councils have equal powers. They are responsible for the provision of all local government services, including education, social work, environment and roads services. They are democratically elected for a four–year term. There is no typical executive body. The councils operate through their committees, while some executive functions, particularly representative ones, are exercised by the mayor, who is usually the chairperson of the council. Other solutions are also possible. For example, in Vale of Glamorgan county, where the Council appoints the Corporate Management Team, which is made up of the Chief Executive and five directors.

All of the unitary principal authorities areas (counties) are fully divided into **communities**, but not all such communities have established community councils, sometimes called town councils[28]. If so, their members are elected, and perform a limited number of functions, such as providing local facilities, and representing their communities. Communities which are too small to have a council may have a community meeting. This is the lowest level of local government in Wales, equivalent of English parishes.

The legal basis of local government in **Scotland** is the Local Government (Scotland) Act 2004, which amended the Local Government (Scotland) Act 1994. Like in Wales, the system follows the English model of **unitary authorities**, though here this term does not occur in normative acts and serves the description of the system in the science of law. By the same token, they replaced the two–tier system, binding in Scotland in the period 1975–96, which consisted of

28 Two Welsh communities Bangor and St David's have city status and are therefore called 'City Councils'.

regions and districts. Nowadays, there are 32 unitary authorities areas called council areas.

The most important decision–making bodies are **councils** (e.g. East Lothian Council, Falkirk Council) which consist of councilors elected for a four–year term. Since the Local Government (Scotland) Act 2004 local elections have been held by the Single Transferable Vote (STV). Another organ of local government is created by the council itself. It is a so–called **convenor** or the Scottish chairman of the council. In the four major cities (Glasgow, Edinburgh, Aberdeen and Dundee) this function is referred to as Lord Provost, and the other councils are free in naming the office of their convenor, provost being quite a popular name. It is quite equivalent to that of mayor in other parts of the United Kingdom. Provost is a somewhat ceremonial office and has no significant administrative responsibility. Professional officers, who are administrative, non–political staff of the council, are responsible for execution of the council's decisions. The top ranking officer is the Chief Executive (city manager), though certain councilors enjoy executive authority and there is no clear division of powers.

The lowest tier of local government in Scotland is **communities**, although not all of them have community councils, which only exist if local residents are willing to stand for elections. The role of communities in political life is very diverse. In some regions they are perceived as an important element of the Scottish local government system. In a few they are seen downright as a tear of government. Community councils deal with petty affairs of local communities, mostly related to local infrastructure such as footpaths, parks, playgrounds etc.

Local government in **Northern Ireland** was established in 1973 by the Local Government (Boundaries) Act (Northern Ireland) 1971 and the Local Government Act (Northern Ireland) 1972. Today Northern Ireland is divided into 26 **districts**[29]. This system replaced the old one, with six administrative counties and two county boroughs, with various rural districts and urban districts in the counties. which was similar to the Republic of Ireland model. The decisive bodies in districts

29 There were some reforms planned creating 11 new districts. Disagreements among parties in the executive over district boundaries cancelled the reform in June 2010.

are councils. They are variously named: District Council, Borough Council, City Council and City and District Council. Councillors are elected for a four–year term of office under the single transferable vote (STV) system.

The competences of councils, in comparison with the rest of the UK, are restricted and do not embrace such issues as education or road construction. Instead, they deal with such issues as waste and recycling services, leisure and community services, building control and local economic and cultural development.

Districts are the only manifestation of local government, although they may be grouped in boards for the needs of particular issues. There are currently five education and library boards and there were four health and social services boards which were replaced by a single Health and Social Care Board in April 2009. There are also 6 **counties**, but since 1973 they have not been local governments but only entities of a special administrative division.

Part 5

THE ITALIAN REPUBLIC AS A REGIONAL STATE

1. Historical aspects of the formation of the territorial system of Italy

Although the history of modern Italy as a united state began in 1861, its current shape, especially in its territorial context, had been strongly influenced by events very prior to this date. The history of the Italian Peninsula is an account on various separate smaller states: kingdoms, principalities, republics and also territories under the influence of foreign powers. This political variety did not match a cultural and linguistic variety, since the territory of present day Italy was relatively coherent in this respect, which was definitely affected by the origins of political entities. The history of ancient Italy is foremost the history of Rome (kingdom, republic and empire) uniting Italian and Celtic tribes and conquering successive territories through military expansion. The Roman Empire whose origins are traditionally dated 753 B.C. had a permanent civilising effect on the history of not only Italy but also whole Europe. The collapse of the Roman Empire in 476,[1] preceded by invasions of the Vandals and the Visigoths on Rome (406–10 A.D.) and then the Huns on Gaul (451–5 A.D.), is recognised as the beginning of medieval Europe.

After the end of the Western Roman Empire, for a few years (until 493) Italy remained united under the rule of Germanic commander Odoacer. It was soon divided between several kingdoms, and did not reunite under a single ruler until the 19th century. In the following century the territory of the Italian Peninsula frequently changed its

1 In 395 the Roman Empire was divided into the Eastern Empire with the capital in Constantinople and the Western Empire with the capital in Rome.

rulers. Odoacer was defeated by the Ostrogoths ruled by Theodoric. In 552 the Ostrogoths were defeated by the armies of Eastern Roman Emperor Justinian (Gothic War). Soon the Lombards, a barbarous Germanic tribe, took control of Italy.

The following two centuries made the period of rivalry between the Lombards and the Byzantine Empire. With the Lombars' occupation of the Exarchate of Ravenna (751), the seat of popes supported by Byzantium, a gradual decrease in influence of the latter, although yet for a few centuries the Byzantines dominated in the southern part of Italy.

The next period in the history of Italy is connected with the Franks, called for help by the popes. In 756, the Frankish forces led by King Pepin the Short defeated the Lombards and gave the Papacy legal authority over much of central Italy. It was the origin of the Papal States. The Papal States comprised the territories under direct sovereign rule of the papacy, and at its height it covered most of the modern Italian regions of Romagna, Marche, Umbria and Lazio. The final victory over the Lombards was achieved by Charlemagne, who was crowned Imperator Augustus by Pope Leo III on 25 December 800. This originated the rule of the Franks in northern Italy.

Over the following centuries the political map of the Italian Peninsula was complemented with further small states. In the 9th century the Arabs conquered Sicily, which in the 11th century was taken from them by the Normans, who established there their independent kingdom. At the same time the era of brilliance in the politically independent commercial cities of Italy, the so–called Maritime Republics: Genoa, Venice, Amalfi and Pisa. Just at that time also many other cities (e.g. Milan, Florence, Verona, Ferrara and Genoa) in the north of Italy, taking advantage of the conflict between the Papacy and the Holy Roman Empire, won autonomy, making the northern part of the Italian Peninsula a political mosaic comprised of bigger or smaller city states (city republics). This system survived until the 19th century.

The era of Renaissance found Italy politically divided. The rich northern part was dominated by city–republics and principalities: Savoy, Milan and Modena, central Italy was under the formal control

of the Papacy being disintegrated into a multitude of feudal entities, and the poorer South was under foreign rule (Spain). In the 15th century, the most powerful city–states annexed their smaller neighbours: Florence captured Pisa, Venice captured Padua and Verona, while the Duchy of Milan annexed a number of nearby areas including Parma. It was a period of permanent conflicts conducted both on land and on sea, in which the major role was played by mercenaries known as condottieri. A significant state would soon become the Grand Duchy of Tuscany which emerged from the incorporation of Siena by Florence ruled by the Medici family (1557).[2]

The successive period of the history of Italy is associated with a growing influence of foreign powers. The Italian Peninsula became a witness of several invasions begun by France in 1494, and known as the Italian Wars. They were a series of conflicts from 1494 to 1559 that involved, most of the city–states, the Papal States as well as the most of the major states of Europe: France, Spain, the Holy Roman Empire, England, Scotland and even the Ottomans. The states of Italy, which had wielded power disproportionate to their size during the Middle Ages and the Renaissance, were reduced to second–rate powers or destroyed entirely.

The period that came after those stormy times is described as the period of foreign domination, of peace first guaranteed by Spain ruled by the Habsburgs and then, after the War of Spanish Succession from 1713 till the end of the 18th century Austria won remarkable political influence on the Italian Panninusla, which, with an interval for Napoleon Bonaparte's invasion (1796–1814), lasted until the Risorgimento.

The Risorgimento the social and political process that unified different states into the single state of Italy. The beginning of this process is conventionally dated 1815, when the Congress of Vienna was held, which established a new order in Europe after the period of Napoleonic wars. In Italy, the Congress restored the pre–Napoleonic order, now strongly influenced by the prevailing European powers, particularly Austria. Hence the unification movement was to a great degree aimed

2 E. Bojek, Doktrynalne determinacje włoskich koncepcji podziału terytorialnego państwa, Studia Erasmiana Wratislaviensis, Wrocław 2007, p. 147–149.

against Austra as the main political power interested in control over the states of the Peninsula. The revival of self–consciousness of the Italians as one people was inspired by two political movements. One was the radical "Young Italy" (La Giovine Italia) led by Giuseppe Mazzini, who sought to unite the state through a popular uprising. Among the most influential revolutionary groups were the Carbonari. The other political movement, more moderate, wanted to lead to the unification through creating a federation of the states ruled by Italian princes and dukes.[3]

The First Italian War of Independence (1848) between the Kingdom of Sardinia (Piedmont) having unification aspirations and Austria resulted in the failure of the Risorgimento, which was partly caused by the fact that the troops of the Pope and of Sicily withdrew for fear of the growing status of Piedmont. Charles Albert abdicated in favour of his son Victor Emmanuel, and a peace treaty was signed. Piedmont–Sardinia was forced to pay an indemnity to Austria.

Despite the failure, the unification tendencies remained vivid. The failure of Sardinia demonstrated that Austria could not be defeated single–handedly. This made Sardinia–Piedmont seek allies against Austria. King Victor Emmanuel II appointed Count Camillo Cavour Prime Minister, who as a goal set the leading position of Sardinia–Piedmont, as a reformed state, of the Italian unification movement. In 1858 Cavour found an ally in France, which allowed him to take another attempt at freeing Italy from the Austrian domination. The Kingdom of Sardinia–Piedmont successfully fought Austria in the Second Italian War of Independence, liberating Lombardy–Venetia from the Austrian rule. In 1859 a peace treaty was signed, by virtue of which Austria lost Lombardy, which France transferred to Sardinia taking Nice and Savoy in return. By Napoleon III's consent the territories of central Italy were also incorporated in the Kingdom of Sardinia.

Another prominent radical figure in the unification movement was Giuseppe Garibaldi, the Italian national hero. When the Sardinian forces were operating in the north, he led the Italian republican strife for unification in southern Italy. In 1860 Giuseppe Garibaldi began

3 Vincenzo Gioberti, a Piedmontese Triest, suggested a confederation of Italian states under the rule of the Pope.

organising an expedition whose aim was taking control ofver the Kingdom of the Two Sicilies, which embraced, beside Sicily itself whole southern Italy. Ultimately, the Expedition of the Thousand, called so after the number of Garibaldi's men (also known as the Expedition of the Red Shirts), resulted in a full and rapid success, which was possible due to support from the local people and indecisiveness of the Sicilian Army. In the plebiscite conducted in the meantime on the territories of the captured South, the people expressed their will of unification with the rest of Italy. Next Garibaldi passed the power into the hands of Victor Emmanuel II. At the turn of 1861 the Sardinian troops, annexing on the way part of the Papal State, reached Naples. In 1861 the United Kingdom of Italy was proclaimed and Victor Emmanuel II was crowned king of Italy.

The last unification acts were the incorporation of Venice in 1866 as a result of the Prussian–Austrian War, in which the Italians stood by Prussia (the Third Italian War of Independence), and the capture of the capital of the Papal State, Rome, in 1870 by the Italian troops.[4] Soon Rome was proclaimed by the Parliament the new capital of Italy. The process of unification was completed and shortly afterwards the United Kingdom of Italy manifested its colonial aspirations, which it fulfilled in Africa through the conquest of Eritrea, Italian Somali, Libya and Ethiopia.

The Italian part in World War I was limited and reduced to the war against Austria in Tirol. Although it belonged to the victorious states, their expectations for territorial acquisitions were not fully satisfied. According to the Treaty of Saint Germain, Italy was granted Alto Adige, Trento,Trieste, Istria, and the city of Zadar. In 1922 the control was taken by Benito Mussolini who introduced authoritarian government. Italy was ruled by fascism and statism.

As a result of World War II, Italy suffered from territorial losses, both on the continent and in the colonies. On the Italian territories embracing the north–western coast of the Istrian Peninsula and the city of Trieste. The Free Territory of Trieste, which was divided into

4 Pope Pious IX announced himself "prisoner of Vatican". The Vatican City is now, since the Lateran Treaty of 1929, an independent enclave surrounded by Italy, as is San Marino.

zone A administered by the USA and Great Britain, and from 1952 on also by Italy, and the zone administered by Yugoslavia. In 1954 the Free Territory of Trieste ceased to exist and was partitioned between Yugoslavia (Zone B) and Italy (Zone A). Italian East Africa, made by the Italians of the territories of Eritrea, Ethiopia and Italian Somali, fell into pieces: Ethiopia regained independence, Eritrea fell under British control (later Ethiopia, until 1993). Only Italian Somali returned under the Italian administration. However, already in 1960 along with British Somali it created the Republic of Somalia. Italy also lost Libya, which in 1951 proclaimed independence. After World War II Italy remained then a continental state.

Present day Italy (Repubblica Italiana) is a state of 301,230 square kilometres of surface area (70th position in the world) inhabited by over 60 million residents[5] (23rd position in the world, 3rd in Europe). The historical development of the state, the role of city–states, results in the situation that a great number of them live in cities. In Italy there are 148 towns/cities whose population exceeds 50 thousand and among the most populated ones are: Rome, Milan, Naples and Turin. Italy borders on France, Switzerland, Austria and Slovenia, and the total land borderline of Italy, due to its peninsular situation amounts merely 1932.2 kilometres. The Italian coastline is as long as 7,600 kilometres. It is surrounded by the waters of a few seas counted among the Mediterranean basin: the Ligurian Sea, the Tyrrhenian Sea, the Ionian Sea and the Adriatic Sea. Owing to its geographical situation and this very coastline, illegal immigration makes a serious problem for the Italian government. Each year arrive here thousands of immigrants from Africa, Asia (including Turkey and China) or Albania and the countries of former Yugoslavia.

Despite the increasing problem of immigration, Italy is still a relatively ethnically homogenous. Beside the Italians there are such minorities as: Sardinians (1.2 million), Friulians (500 thousand) or Tirolians (300 thousand). The official and dominating language is Italian, but it is worth noting that the Italians use a great number of its dialects. What is more, in Italy, as languages of minorities are

5 Data from the Instituto Nazionale di Statistica, Bilancio demografio mensile 2010.

recognised also such languages as Sardinian, Friulian, German or Occitan (13 altogether).

The Roman–Catholic religion dominates in Italy (88%). The faithful of other confessions definitely make minority. They are Muslims (2%), Orthodox Christians (1%), and Protestants (1%). About 6% declare themselves as atheists.

In the 1950s Italy became a member of NATO and, in 1957, Italy was a founder member of the European Economic Community (EEC). Since 1955, Italy is also a member of United Nations.

Italy belongs to the eight most industrialised and richest states of the world, G8. Its GDP in 2009 was over USD 2.1 trillion which secures them the 7th position in the world. Among the key sectors of economy are: ironworks, chemicals, machinery (including automotive and shipbuilding industries) and food–processing (1st place in the world in wine production). Italian textile and clothing industries enjoy the world popularity. A serious economic yet also social problem is the uneven level of development of particular regions of the country: the North is definitely more developed than the South, which, despite huge expenditure, is still less developed. Tourism also plays an important role; Italy is one of the most frequently visited countries of the world.

2. The constitutional bases of the Italian Republic

Military operations unfavourable for Italy during World War II led to the collapse of fascism, the symbol of which was King Victor Emmanuel III dismissing Mussolini's government and arresting the Duce. Marshal Pietro Badoglio became the head of a new government. This government, issuing successive decrees with the force of law (decretti–legge), gradually deconstructed the fascist system. On the king's withdrawal from political life and resignation of Pietro Badoglio's government appointed by him, a new government was nominated with support from political parties. Its head became Ivanoe Bonomi. The successive decrees with the force of law provided for the method with which the Italian people was to decide on the future constitutional form of the state. The constitutional bases were to be

enacted by the democratically elected Constitutional Assembly, and the selection of the state system between monarchy and republic was to be made by the people alone in general referendum. It was already before the referendum, 9 May 1946 that King Victor Emmanuel III abdicated in favour of his son Umberto II.[6]

The referendum and the elections were held on 2 June 1946. The people in referendum decided on the republican form of the state.[7] On 18 June 1946 the Italian Republic was proclaimed, which is commonly recognised in the constitutional literature of Italy as the beginning of the fourth basic period in the constitutional history of this state.[8] The Constitutional Assembly elected on 22 December 1947 passed the Constitution of the Italian Republic, which came into force on 1 January 1948. The present text of the Constitution differs, however, from the original because despite the fact that formally recognised as inflexible, it has been changed several dozen times. It is also worth noting that the statutes of ordinary regions and regions of special autonomy along with their successive amendments as well as constitutional statutes are also recognised as elements of the Italian constitutional order.

According to Z. Witkowski, the Constitution was a result of compromise among the Italian political forces. Undoubtedly the factor that united all the forces represented in the Constitutional Assembly from the very beginning was their critical attitude towards the political past of the country, and thus also the preparedness to draw conclusions from the errors of the past, which also referred to the hitherto prevailing solutions and constitutional forms. In the works on the Constitution particular emphasis was put on seeking for and adapting constructions providing the state and the society a really democratic system with several real institutional constitutional guarantees. Thanks to all that the Italian Constitution is cogently counted among democratic Constitutions referring to the historical tradition of American and great European Constitutions of the 18th and 19th centuries. The constitutional discourse on the future of the territorial structure of

6 T. Słomka, O niektórych analogiach ustrojowych między Polską a Włochami, [in:] T. Słomka (ed.): Współczesne Włochy. Państwo i społeczeństwo, Warszawa 2009, p. 18–19.

7 12,128,641 votes opted for republic (54,2%), 10,718,512 (45,7%) for monarchy.

8 Z. Witkowski, System konstytucyjny Włoch, Warszawa 2000, p. 14.

Italy also led to a compromise which allowed for the reaction to the centralism of the fascist regime and the greatest, in the scale of the Old Continent, ethnic and linguist diversity of the population.[9]

The text of the Constitution is opened by basic constitutional principles, then organised in parts, titles, chapters and articles. This peculiar introduction put in 12 articles was titled **Fundamental Principles** (Principi fondamentali). Among these provisions is, in accordance with the results of the referendum of 1946, the definition of Italy as a Democratic Republic, founded on Labour (article 1 para 1). This should be understood in the context of the next sentence of this article which states that sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution. These constitutional principles result in the participation (direct or indirect) of the Italian people in forming the compositions of the supreme constitutional organs of the state, as well as the supreme regional organs.

The aforementioned "labour" expresses a value characteristic of the Italian Constitution reflected in several provisions devoted to the legal situation of the individual in the sphere of his/her freedom as well as economic and social rights, which is also confirmed in article 4 which states that "[t]he Republic recognises the right of all citizens to work and promotes those conditions which render this right effective". A characteristic quality of the Constitution of Italy is a relatively extended regulation devoted to this sphere of functioning of the individual and society. Among the Principi fondamentali there are also provisions devoted to respect to rights of the individual by the Republic with a simultaneous requirement of them fulfilling their duties of political, economic and social solidarity (article 2), the principle of equality and ban of discrimination (article 3) as well as responsibilities of the Republic in development of culture and of scientific and technical research and safeguarding natural landscape and the historical and artistic heritage of the Nation (article 9). As constitutional principles were also recognised regulations concerning the separation of the

9 I. Pietrzyk, Polityka regionalna Unii Europejskiej i regiony w państwach członkowskich, Warszawa 2006, p. 229.

Church and the State (article 7) and establishing equal freedom of all confessions before the law (article 8: All religious denominations are equally free before the law). The fundamental principles also refer to international relations. In accordance with article 10, the Italian legal system conforms to the generally recognised principles of international law, and article 11 implies the principle of pacifism[10] and the so–called European clause allowing to limit sovereignty in connection with the functioning of the world order that ensures peace and justice among Nations.

To define the foundations of the territorial system of the State a key regulation is the one included in article 5, describing Italy as the one and indivisible **Republic**, which recognises and promotes local autonomies and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Constitution in this provision makes the Republic adapt the principles and methods of its legislation to the requirements of autonomy and decentralisation. This regulation is a general systematic framework which is filled with concrete decisions included foremost in Title V of the Constitution, which will be discussed in the parts of this chapter dedicated to Italian regions and provinces, metropolitan cities and municipalities.

Outside the regulation included in the Principi fondamentali is the definition of the model of **government of the Italian Republic**. The entirety of the constitutional solutions implies that the constitutional system of the Italian Republic is based on the parliamentary–cabinet system, whose specific mechanisms will be presented in the next part of this textbook devoted to the organisation of central authorities.[11] Although the Constitution does not state explicitly the principle of separation of powers, reading the Constitution leaves no doubts that we have to do with this principle. The legislative power is exercised by the bicameral Parliament, the executive is exercised by the President

10 Article 11: Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes.

11 Assessment of the Italian political system is affected by the role of political parties whose elites actually appropriated the political space. This led even to calling the Italian system partitocrazia: I. Wawrzyniak, Transformacja ustrojowa we Włoszech, [in:] J. Trzciński, A. Jankowski, Konstytucja i gwarancje jej przestrzegania, Warszawa 1996, p. 505.

of the Republic, the Government and particular ministers, and the judicial power belong to common courts. Taking into consideration the regional nature of the state, it is worth complementing this division of powers with regional councils, which have, in certain limits, legislative competences and territorial executive organs functioning in the law–determined limits.

3. The central institutions and the judicial system of the Italian Republic

The system of central institutions of the Italian Republic is to a great extent determined by the constitutional premises discussed in the previous subchapter, especially the principles of the republican form of the state and democracy. Not of little importance for establishing the constitutional status of particular organs, their organisation and mutual relations remain also constitutional traditions of this state, especially the solutions of the Albertine Statute (Statuto Albertino), conceded by King Charles Albert on 4 March 1848 under the influence of the revolutionary movements of that year. Originally it was a Constitutional Charter of Sardinia, but then along with the process of unification of Italy, its force was extended over the whole territory of the united Italian Kingdom.

The system of institutions of the Italian Republic was established by the provisions of Part II of the Constitution: Ordinamento della Repubblica. The particular Titles into which this part is divided are dedicated to particular organs of power. They will be presented in short in this subchapter of the textbook in the order compatible with the constitutional taxonomy.

In accordance with the tradition of democratic republics, Title I was dedicated to the parliament. According to article 55 the parliament consists of the House of Deputies (Camera dei deputati) and the Senate (Senato). Papers on the system of republican Italy, discussing the construction of the parliament of Italy, cogently emphasise its bicameral structure and this bicameralism is characterised as perfect or symmetric (the Italians themselves refer to it as bicameralismo perfetto). This

means that Italy adapted the solution which grants the both chambers of the Parliament ideally equal status with equal rights. Simultaneously de facto the Italian parliamentary model works within the framework of a multi–party system,[12] and the position of even leading political parties does not allow any of them to create a government alone, which results in the rule of coalitional cabinets of centre–left (e.g. R.Prodi's government) or centre–right (e.g. S.Berslusconi's cabinets) nature.[13]

The **House of Deputies** consists of 630 deputies, of which twelve are elected by the constituency of Italians abroad, for a 5-year term.[14] The citizens over 18 are entitled to the active electoral rights whereas those over 25 to the passive electoral rights. The Constitutions envisages that the House of Representatives is elected by universal and direct suffrage. The distribution of seats among the constituencies is calculated by dividing the population of the last general census by six hundred and eighteen, and distributing the seats in proportion to the population of each constituency, based on the quotients and the largest remainders (article 56). The specific solutions concerning elections are provided by law: the electoral system (Legge electorale, sometimes called legge Calderoli), the content of which was finally established on 14 December 2005.[15] According to the provisions of this system, Italy is divided into 26 constituencies: Lombardy has three constituencies, Piedmont, Veneto, Latium, Campania, and Sicily each have two, and all other regions have one[16]. Each electoral constituency is assigned a number of seats proportionate to its total of the population of Italy. The seats are allocated among the parties that pass thresholds of the total vote on a national basis (10% for coalitions and 4% for parties). What is important is the context of the representations of minorities, parties representing regional linguistic minorities obtain seats if they

12 See: J. Rutkowska, M.P. Żukowska, Włoska scena polityczna po wyborach z 2008, [in:] T. Słomka (ed.): Współczesne Włochy, Państwo i społeczeństwo, Warszawa 2009, p. 27 and next.

13 Z. Witkowski, Konstytucja Włoch, Warszawa 2004, s. 17, D. Struska, Między unitaryzmem a federalizmem. Ewolucja współczesnej myśli i praktyki ustrojowej Włoch, Warszawa 2008, p. 20–22.

14 The term for each House may not be extended, except by law and only in the case of war (article. 60).

15 Legge 21 dicembre 2005, n. 270, Modifiche alle norme per l'elezione della Camera dei deputati e del Senato della Repubblica, GU n. 303 del 30–12–2005 – Suppl. Ordinario n. 213.

16 One deputy is elected in Aosta Valley.

receive at least 20% of the ballots in their constituency. The nationally victorious coalition or political party, in the event of not winning 340 seats jointly gains a special bonus: it is entitled to complete the number of seats by the number of seats missing to achieve the required 340. Inside each coalition, the seats are divided between the parties with the D'Hondt method and then assigned to each constituency to elect particular candidates.

The **Senate** is also elected for a 5–year term. There are 315 senators, part of them elected yet there are also life senators (senatori a vita),[17] who are former presidents of the Republic who have not resigned from this privilege, as well as five citizens of Italy nominated by the President of the Republic. They may be the citizens who have honoured the Nation through their outstanding achievements in the social, scientific, artistic and literary fields. The citizens over 25 are entitled to elect senators whereas only those over 40 are entitled to stand for a seat in the Senate.

In accordance with the Constitution the bases of Senate elections are the regions, so the constituencies correspond to the 20 regions of Italy, with 6 senators allocated for Italians living abroad. So the 309 Senators elected in Italy theoretically represent the regions, with smaller regions being effectively over–represented. 18 of the 20 regions have at least six Senators each (largest region, Lombardy , elects 47 Senators). However, the micro–regions of the Aosta Valley and Molise have respectively one and two Senators each. The thresholds apply on a regional basis and are different than those functioning in lower chamber elections: 20% for a coalition and 8% for any party not in a coalition. There is also a system of additional seats (55%) for a winning party, but it is applying on a regional level. The Senate's regionally–based electoral system rewards small parties with geographically–concentrated bases of support. Despite the strong regional impact on the results of the elections, the Senate, like the House of Deputies, remains a chamber of the representation of the Nation, and the members of the both chambers carry out their duties without a binding mandate (article 67). Thus,

17 As of 15 May 2009 there are seven life senators (of whom three are former presidents).

in contrast with second chambers in federal states, the Senate is not a chamber of regional representation[18].

The Parliament works in sessions: it shall be convened on the first working day of February and October. Each chamber may be convened in special session on the initiative of its President, the President of the Republic or a third of its members. When one chamber is convened in special session, the other chamber is convened automatically. The both chambers operate openly on the basis of the regulations enacted by themselves. The both chambers make decisions at the presence of the majority of their members by simple majority, save the situation where the law provides for qualified majority. The managing organ in each chamber is its President (Presidente del Camera dei deputati, Presidente del Senato). There are also committees as auxiliary bodies.

The fundamental function of each parliament is legislation. The legislative process in Italy is determined by the premises of equal bicameralism. The functions are always performed by the both chambers, and a bill is subject to an identical procedure in each of them. Legislation may be introduced to any chamber, by the government, by a Member of Parliament and by those entities and bodies so empowered by constitutional amendment law. The people also may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty–thousand voters. Each law must be passed in an identical form by the both chambers, and the bill rejected by one chamber cannot be introduced to it again but after six months. Laws are promulgated by the President of the Republic within one month of their approval (article 73). An original solution for legislation is provided for in article 75 of the Constitution: a general referendum may be held to repeal, in whole or in part, a law or a measure having he force of law, when so requested by five hundred thousand voters or five Regional Councils. As for legislation what is worth noting is the separation of legislative matters in which the Parliament of the Italian Republic is proper, and regional organs, which will be discussed in the next subchapter. This

18 About Italian Electoral system and elections see: P. Belluci, The parliamentary election in Italy, April 2006, Electoral Studies 2008, no. 27, p. 185 and next, M.J. Bull, J.L. Newell, The general election in Italy, April 2008, Electoral Studies 2009, no. 28, p. 337–342.

is one of the qualities characteristic of states with a complex territorial structure of the state.

The other functions are performed, depending on their type, either by one or the other chamber, or by the both chambers jointly. Among them essential ones are a controlling function, foremost connected with the operations of the Government, and a creative function, connected with personal nominations for certain offices. It is also worth mentioning that the "Parliament has the authority to declare the state of war" (article 78).

The Parliament meet in joint session only in cases established by the Constitution: elects the President of the Republic (58 regional delegates are added), five members of the Corte Costituzionale and one third of the Consiglio Superiore della Magistratura, votes to decide an accusation of high treason or violation of the Constitution against the President of the Republic (never occurred).

In the referendum the Italians opted for the republican form of the state, deciding that the head of state representing the national unity will the **President of the Republic** (Presidente della Repubblica).

According to Z. Witkowski, it is an organ of neutral power, apolitical and impartial, fulfilling guaranteeing and controlling functions towards organs of the state which determine basic directions of political operations. The aim of the President of the Republic's actions is maintenance of the whole constitutional system in balance. The President is a guardian of the Constitution, which means that he makes sure that its principles are obeyed and is an arbiter between the parties.[19] In this context it is worth bearing in mind that the constitutional reform of 2001 reshaped the system of government also in reference to the power of the President of the Republic as the head of state. As B. Caravita cogently notes, in the parliamentary system the head of state is a guarantor of balance between the majority and the opposition, whereas in the system of territorial pluralism he takes a new remarkable role of not only representative of the national unity but also a guarantor

19 Z. Witkowski, Konstytucja Włoch, *op. cit.*, p. 27.

of dynamic balance between the centre and the peripheries, also in reference to more complex phenomena of power dislocation.[20]

The Constitution dedicates him Title II of Part II. The President of the Republic is elected for seven year by parliament in joint session. To ensure that minorities are represented, three delegates from every region elected by the Regional Council participate in the election (Valle d'Aosta has one delegate only). The election of the President of the Republic is by secret ballot with a majority of two thirds of the assembly. After the third unsuccessful ballot an absolute majority is sufficient. Right to be elected is given to any citizen any citizen who has attained fifty years of age and enjoys civil and political rights. Among the President's competences the Constitution (Aarticle 87) counts, for example:

- authorisation the introduction to parliament of bills initiated by the government,
- promulgating laws and issuing decrees having the force of law, and regulations,
- calling a general referendum in the cases provided for by the Constitution,
- appointing state officials in the cases provided for by the law,
- accrediting and receiving diplomatic representatives, and ratifying international treaties which have, where required, been authorised by parliament,
- granting pardons and commute punishments,
- confer the honorary distinctions of the Republic.

The president is the commander–in–chief of the armed forces, presides over the Supreme Council of Defense, and makes declarations of war as have been agreed by parliament. The president also presides over the High Council of the Judiciary. As for the relations with the parliament, it is necessary to mention that beside promulgating laws, the President of the Republic may send parliament a reasoned opinion

20 B. Caravita, La Costitutione dopa la reforma del Titolo V. Stato, regioni e autonomie fra Repubblica e Unione Europea, Torino 2002, p. 30; quoted as in: D. Struska, Między unitaryzmem..., *op. cit.*, p. 157–158.

to request that a law scheduled for promulgation be considered anew. If such law is passed again, it shall be promulgated (article 74). Moreover, after consultation with the presiding officers of Parliament, the President may dissolve one or both houses of parliament (article 88).

The president is not politically accountable before the parliament, because each act of the president to be valid requires a co–called countersignature or a signature of the proper minister, who through this signature takes responsibility to the parliament for the act of the head of state. Some of the acts are countersigned by the President of the Council of Ministers. As it was aforementioned above, in such cases as high treason or violation of the Constitution, the president may be impeached by parliament in joint session, with an absolute majority of its members.

Another constitutional (Title III) organ of the Republic is the **Government** (Il Governo). It is made up of the President of the Council (Presidente del Consiglio dei Ministri) and the Ministers who together form the Council of Ministers (Consiglio dei Ministri). The President of the Republic appoints the President of the Council of Ministers and, on his proposal, the Ministers (article 92). What is characteristic of the parliamentary–cabinet system, they had to receive the confidence of both houses of parliament within ten days. the Government is also politically accountable to the both chambers of parliament, whose basic mechanism is motion of no confidence.

Article 95 of the Constitution vests a special role in the President of the Council, who conducts and holds responsibility for the general policy of the government, as well as ensures the coherence of political and administrative policies, by promoting and co–ordinating the activity of the ministers. The ministers are individually responsible for the acts of their own ministries, but collectively responsible for the acts of the Council of Ministers in corpore.

On the basis of the Constitution and the Act on the Council of Ministers,[21] Z. Witkowski enumerates five basic functions of the government.[22] They are:

21 Legge 23 agosto 1988, n. 400 Disciplina dell'attività di Governo e ordinamento della Presidenza del Consiglio dei Ministri, G.U. n.214. del 12 settembre 1988, S.O. n.86.

22 Z. Witkowski, Konstytucja Włoch, *op. cit.*, p. 30.

– outlining general directions of state policies and administration,
– taking actions in legislation,
– exercising competences connected with regions,
– solving competence conflicts between ministers,
– exercising its authority in controlling in supervision over the ministers' operations.

The Constitution also provides for **Auxiliary Bodies** (Gli organi ausiliari), classified as government sphere, but independent from the Government. These are: the National Council for Economics and Labour (Consiglio nazionale dell'economia e del lavoro), the Council of State (Consiglio di Stato) and the Court of Accounts (Corte dei conti). The National Council for Economics and Labour serves as a consultative body for parliament and the government on those matters and those functions attributed to it by law. It can initiate legislation and may contribute to drafting economic and social legislation according to the principles and within the limitations laid out by law. The Council of State is a legal–administrative consultative body and it oversees the administration of justice. The Court of Accounts exercises preventive control over the legitimacy of Government measures, and also ex–post auditing of the administration of the State Budget.

Functioning of the **justice administration** in Italy is described in Title IV of the Constitution (La Magistratura). The constitutional provisions refer foremost to the principles of the organization and functioning of the judiciary in Italy, defining it as autonomous and independent branch of government not subject to any other. The Constitution points at common courts (magistrali ordinary) as courts proper to exercise judicial power. The same title prohibits appointing extraordinary or special judges, which means that the burden of exercising judicial power rests on the common courts. By virtue of the constitutional provisions the organisation of the judicial power is complemented with a separate section of administrative judiciary, at the head of which the Constitution places the aforementioned Council of State (Consiglio di Stato), the Court of Accounts (Corte dei conti) and military tribunals (tribunali militari). The specific structure of the

judiciary is regulated by law.[23] The courts of the lowest tier are Justices of the Peace (Giudice di Pace), the courts of original jurisdiction for less significant civil and criminal matters[24].The courts of first instance (primo grado) for graver cases are Tribunals (Tribunale), which consider also appeals from adjudications issued by the Justice of the Peace. In this courts there are, operating as separate departments, the Labour Tribunal (Giudice del Lavoro) which hears disputes between employers and employees, Land Estate Court (Sezione specializzata agraria) which hears all agrarian controversies and Family Proceedings Court (Tribunale per i Minorenni) which hears all cases concerning minors. A court of first instance in the gravest criminal cases is the Court of Assizes (Corte di Assise). The judicial panel in this court consists of two professional judges, Guidici Togati, and six lay judges, Giudici Popolari, selected from the people.

A court of second instance (secondo grado) is the Court of Appeal (Corte di Apello) embracing with its property the territory of a region. It is a court to hear the cases heard by the Tribunals acting as a court of first instance. It is divided into three or more divisions, usually: labour, civil, and criminal. Appeals from adjudications issued by the Court of Assizes (as first instance) is heard by the Court of Appeal of Assizes (Corte di Assise di Appello).

The highest instance (ultima grado) of the common judicial system is the Supreme Court of Cassation (Corte Suprema di Cassazione). Its function is to "ensure the observation and the correct interpretation of law" by ensuring the same application of law in the primo grado and secundo grado courts. It is also arranged into divisions: penal, civil, administrative and military. This court only judges the correct application of the law in the lower courts, so if the Supreme Court of Cassation does not uphold the appealed sentence, it usually order a new trial.

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23 G. Verde, The Italian Judicial System, Official website of The Superior Council of the Judiciary, p. 60–61, http://www.csm.it/documenti%20pdf/SistemaGiudiziarioItaliano.pdf, accessed: 7.03.2011.

24 The court replaced the old Praetor Courts (Preature) and the Judge of conciliation (Giudice Conciliatore) in 1999.

The administration judicial system in Italy has two instances: courts of first instance are the Regional Administrative Tribunals (Tribunale Amministrativo Regionale, TAR). The second instance is the Council of State (Consiglio di Stato). Administrative courts have jurisdiction over lawful claims under administrative law and over civil–law claims against the public administration in matters defined by law (Article 103).

A constitutional organ of the judicial power is also the Superior Council of the Judiciary (Consiglio superiore della magistratura). It is not, however, an adjudicating body. Its responsibility is to uphold the independence of the judiciary. One of its crucial competences is an exclusive competence to appoint, assign, remove, promote and discipline members of the judiciary. Its members are the President of the Republic, the first president and the general public prosecutor of the Court of Cassation, as well as 20 members elected by particular categories of judges and 10 members elected by Parliament from among full professors of law and lawyers with at least fifteen years of practice.

An important element of the constitutional system of the Italian Republic, especially in the aspect of protection of the constitutional status of the regions, is the Constitutional Court (Corte Constituzionale). In accordance with the constitutional taxonomy it is not counted among the judicial bodies; a separate section of Title VI was dedicated thereto. The Constitutional Court is made up of fifteen judges; one–third of them are appointed by the President of the Republic, one–third by the two Houses of Parliament sitting in a joint session, and one–third by the highest–instance courts in the administrative and non–administrative sectors (Article 135)[25].

According to article 134 of the Italian Constitution, the Constitutional Court is competent to decide on the following:

– controversies on the constitutional legitimacy of laws and enactments having force of law issued by the state and regions;

25 About Italian Constitutional court see also: M. Santoni, F. Zucchini, Legislative output and the Constitutional Court in Italy, Constitutional Political Economy 2006, no. 17, p. 165–187.

– conflicts arising from allocation of powers of the State and those powers allocated to state and regions, and between regions[26];
– charges brought against the President of the Republic and the ministers, according to the provisions of the Constitution.

Review of the constitutionality of laws may be initiated either by the entities that are specifically entitled to do so (state, regions, autonomous provinces) or in the form of an incidental question raised by a judge in the course of a proceeding, if the judge wishes to establish whether the law applicable to the specific case is constitutional[27].

4. Regions

In the territorial structure of the Italian Republic regions are the highest units of administrative division of the state and components of the Republic, for, according to article 114, "The Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State."[28] The Italian constitution–giver established **ordinary regions** governed by ordinary statutes and **special regions** based on special statutes and enjoying particular forms and conditions of autonomy. The Constitution enumerates these special regions as follows: Friuli–Venezia Giulia, Sardinia, Sicily, Trentino–South Tyrol (Trentino–Alto Adige/Südtirol), and the Aosta Valley. They were singled out for historical, ethnic, linguistic, geographical and economic reasons. Moreover the government wanted to prevent their secession from Italy after the end of the Second World War. There are fifteen ordinary regions, which are enumerated in the Constitution, hence their number and names, as well as their legal status, are constitutionally protected. The Constitution names the following ordinary regions: Piemonte, Lombardia, Veneto, Liguria, Emilia–Romagna, Toscana,

26 About this function of Constitutional Court see: A. Breton, A. Fraschini, Vertical competition in unitary states: The case of Italy, Public Choice 2003, no. 114, p. 65–72.

27 G. Verde, The Italian Judicial System, Official website of The Superior Council of the Judiciary, p. 59–60, http://www.csm.it/documenti%20pdf/SistemaGiudiziarioItaliano.pdf, accessed: 7.03.2011.

28 For differences between the current and the previous formula see: D. Struska, Między unitaryzmem *op. cit.*, p. 157.

Umbria, Marche, Lazio, Abruzzo, Molise, Campania, Puglia, Basilicata, and Calabria. Currently, potential changes on the map of the Italian regions are determined by article 132, in accordance with which, the existing regions may be merged or new regions may be created, by means of a constitutional act and after consulting the regional councils, provided the population of any new region is at least one million, when it is so requested by as many municipal councils as represent at least one third of the population involved, and when the proposal has been approved by the majority of the involved population in a referendum.

The Constitution of 1948, dividing the state into regions, abandoned a strongly centralised territorial system of Italy, based on districts.[29] First the five special regions were created, whose history, geographical idiosyncrasy (insular situation), linguistic distinctions and separatist tendencies were strongest stressed. In the period 1946–8, this status was granted to Sicily, Sardinia, Aosta Valley and Trentino–South Tyrol, and in 1963 Friuli Venezia Giulia was rcognised as the last special–statute region.[30]

The resultant regions became territorial units entitled to a remarkable range of political autonomy. The implementation of the constitutional promises concerning the other regions took actually place, however, only in the 1970s, as before there was a fear of a victory of the communist opposition, strong in some parts of Italy (the so–called red belt of Emilia–Romagna, Tuscany, Umbria and Marches) in regional elections[31]. Another date significant for the constitutional status of the regions is 2001, when the Constitution was amended with extension of regional autonomy. The very presence of the regions in the Constitution results in their existence and constitutionally determined scope of their competences being constitutionally protected, which means that any changes thereof require changes in the Constitution.

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29 For further information on regionalizm being a compromise between the centralistic and federalistic tendencies see: T. Skrzypczak, Regionalizm we Włoszech. Studia Prawnicze 1986, no 3–4, p. 369 and next, J. Zakrzewska, Państwo i regiony we Włoszech, Państwo i Prawo 1972, no. 8–9, p 178 and next.

30 I. Pietrzyk, Polityka regionalna…, *op. cit.,* p. 229.

31 About pubic administration reforms in Italy see: G. Gario, Intergovernmental relations in Lombardy: provinces, regions and cities, Political Geography 1995, vol. 4, no. 4, p. 419–428, also: A. Breton, A. Fraschini, Vertical competition in unitary states: The case of Italy, Public Choice 2003, no. 114, p. 65 and next.

The bases of the functioning of particular regions are their statutes, which will be referred to as regional Constitutions. The Constitution of the Republic dedicates them article 123, according to which statute is determining the form of government and the fundamental principles of the organization and the functioning of the region in accordance with the Constitution. Each statute is adopted and amended by the regional council by a law approved twice by a majority of its members; votes being taken within an interval of no less than two months. Within thirty days of its publication, the central government may challenge the constitutionality of a regional statute before the constitutional court. The statute has to be submitted to a popular referendum when, within three months of its publication, a request is made by one fiftieth of the electors of the region or by one fifth of the members of the regional council. The statute submitted to referendum may not be promulgated unless approved by a majority of valid votes. An element of the democratisation of the constitutional system of Italy is a requirement of article 123 para 1 that the statute determine the exercise of initiative and of referendum on regional laws and regional administrative decisions and the publication of regional laws and regulations. Similarly, article. 123 para 4 requires that every statute provide for a council of local governments, which function as a body for consultations between the region and local authorities[32].

In addition to the aforementioned requirements, articles 121 and 122 of the Constitution of the Republic establish certain general frameworks of the constitutional forms determined by particular statutes. It is these frameworks that the systems of particular regions must fit in.

In accordance with article 121 **regional organs** are: the regional council (Consiglio regionale or Assemblea Regionale Siciliana in Sicily or Consiglio della Valle in Aosta Valley), the regional cabinet (Giunta) and its president (Presidente). The regional council exercises

32 Prior to the constitutional reform of 2001, the statutes required parliamentary approval. On the nature of such approval and on the legal nature of those statutes see: T. Skrzypczak, Regionalizm we Włoszech, Studia Prawnicze 1986, nr 3–4, p. 376 and next. Prior to the constitutional reform of 2001, statutes had to be approved by the parliament. On the nature of this approval and on the legal nature of those statutes see: T. Skrzypczak, Regionalizm we Włoszech, Studia Prawnicze 1986, nr 3–4, p. 376 and next.

the legislative powers granted to the region and all other functions conferred on it by law. One of the constitutional competencies is right to propose bills to the Republic parliament. The regional cabinet is the executive authority of the region. The president of the regional cabinet represents the region; he conducts and is responsible for the general policy of the regional cabinet; he promulgates regional laws and regulations; he conducts the administrative functions delegated to the region by the state in accordance with the instructions of central government.

The electoral system, the cases of ineligibility and incompatibility of the president and other members of the regional cabinet and the regional council are defined by the regional laws. The Constitution envisages that the president of the regional cabinet is elected by universal and direct suffrage and then he appoints and dismisses the members of the regional cabinet (assesori). The Constitution reserves, however, a possibility of another decision on this question in the statutes of the regions. This rights has been used in two cases, these being: Aosta Valley and Trentino–South Tyrol, where president is chosen by the Regional Council[33].

Trentino–South Tyrol is also special because of further organizational specifics determined by the fact, that this region itself is nearly powerless and the powers granted by the region's statute are mostly exercised by the two autonomous provinces within the region, Trento and Bolzano–Bozen. The Regional Council is composed by the joint session of the two Provincial Councils of mentioned provincies. The Regional President is one of the two Provincial Presidents. In this case, the regional institution plays a merely synchronizing role.

The constitutional reform of 2001 significantly extended the range of competences of the regions. According to article 117, legislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations. The Constitution defines three categories

33 See also: N. Fiorino, R. Ricciuti, Legislature size and government spending in Italia regions: Forecasting the effects of a reform, Public Choice 2007, no. 131, p. 119–121.

of legislative matters. First, they are **exclusive state powers**. Among them such matters are counted as:

a) foreign policy and international relations of the state; relations of the state with the European Union;

b) defence and armed forces; state security;

c) money, protection of savings, financial markets; protection of competition; currency system; state taxation system and accounting; equalization of regional financial resources;

d) state organs and their electoral laws; state referenda; election to the European Parliament;

e) organization and administration of the state and of national public bodies;

f) law, order and security, aside from the local administrative police;

g) citizenship;

h) jurisdiction and procedural laws; civil and criminal law; administrative tribunals;

i) social security;

j) electoral legislation, local government and fundamental functions of municipalities, provinces and metropolitan cities.

The second category of legislative matters are **concurrent powers**. In the matters of concurrent legislation, the regions have legislative power except for fundamental principles which are reserved to state law. The Constitution also enumerates the matters of this type: they are, for example: foreign trade; protection and safety of labour; education, health protection; food; sports regulations; harbours and civil airports; major transportation and navigation networks.

The third category of legislation is the matters in which the region is proper. According to article 177 para 4, the **regions have exclusive legislative power** with respect to any matters not expressly reserved to

state law. The legislative competences make the region differ from the other Italian units of local government[34].

The power to issue by–laws is vested in the state regarding all matters where it has exclusive legislative power, insofar as it does not devolve such power to the regions. The power to issue by–laws is vested in the regions in any other matters.

An important competence constitutionally granted to the regions is the right to establish agreements with foreign states and understandings with territorial entities that belong to a foreign state, in the cases and forms provided for by state law and within its field of competence.

The Constitution modifies the aforesaid rules in relation to the aforementioned special regions (Friuli–Venezia Giulia, Sardinia, Sicily, Trentino–South Tyrol, Aosta Valley), enabling them to function on the basis of special statutes adopted by constitutional law, in which particular forms and conditions of autonomy are established.

The Constitution also guarantees the regions, like the other territorial units, financial autonomy regarding revenues and expenditures. The regions may use independent sources of income: they establish their own taxes and revenues. They also receive a share of the proceeds of state taxes related to their territory. Regions have their own assets, assigned to them according to general principles established by state law. They may only contract loans in order to finance investment expenditure.

In the case of the special regions, the financial autonomy goes the furthest. They keep between 60% (Friuli–Venezia Giulia) and 100% (Sicily) of all levied taxes. In return they have to finance the health–care system, the school system and most public infrastructures by themselves. Sicily benefits from additional resources from the Italian state in order to finance all services.

In Italy there is also the equalisation fund, whose is to provide benefits for the areas the fiscal capacity per inhabitant is reduced,

34 About categories of matters in Italy in context of UE see: Montanari M., Between European integration and regional autonomy: the case of Italy from an economic perspective, Constit Polit Econ 2006, no. 17, p. 277–301.

with no restrictions as to the allocation of its proceeds. This results from differences in development of the particular parts of the state, especially the already traditional division into the rich North and the poor South. This definitely does not mean that the state cannot take additional financial actions to promote the economic development of the poorer regions.[35]

Observing the direction of the changes in the territorial structure of Italy over the last few decades, a clear tendency to further decentralization of the state can be noticed. However, although the scope of regional autonomy is still growing, Italy is not a federal state, and its better definition seem to be a regional state. From the formally legal point of view, unless there are constitutional changes, especially an amendment of article 5 of the Constitution, which decides on the unity and the indivisibility of the Republic, a federation in Italy is impossible. The issues of federalism, however, appear quite frequently on the Italian political arena, and the statement that the territorial system of Italy evolves towards federalism seems justified.[36]

As D. Struska maintains, in Italy, the debate on the form of the modern state has become a kind of natural part of the debate included in a certain federalist perspective. The traditions of federalist ideas are very rich on the Peninsula. Their lush development occurred in the 19th century, especially during the unification of the state. It was then that federalism as the best solution of the future state was proposed by, for example, Vincenzo Gioberti, Carlo Cattaneo and a champion of integral federalism, Giuseppe Ferrari. Federalist ideas had their supporters also during the both world wars. During World War I, an ardent opponent of the unitarism introduced in Italy after the unification was, for instance, Oliviero Zuccarini, who pointed at the existence of obvious differences between the particular parts of Italy, which, in his opinion,

35 A new major change in the institutional organization of regions took place in 2008. In October 2008, the Council of Ministers approved the law on fiscal federalism, which defined the criteria and the timetable for the attribution of financial autonomy to the regions. Until 2011, the regions are expected to be fully autonomous in the definition of their expenses and financial resources.

36 For further Reading on Italy as a regional or quasi–federal state, see: M. Misuda–Rewera, Włochy. Republika autonomii, Lublin 2005, p. 62 and 174 and next, J. Iwanek, Europejskie standardy ustrojowe: samorząd, autonomia, federalizm, [in:] P. Dobrowolska, M. Stolarczyk, O. Szura (ed.), Proces integracji Polski z Unią Europejską, Katowice 2001, p. 174 and next.

naturally implied a necessity of introducing there a more "loose" form of state. During World War II, champions of federalism clustered in the movement Giustizia e Libertà, whose main animator was Carlo Roselli. After World War II the federalist thought disappeared for a time being and reappeared at the end of the 20th century not as much of an attempt to respond to the cultural, linguistic or economic differences of Italy as an attempt to provide an answer to the question on the direction of the present day state's evolution.[37]

The events of the last decade demonstrate, however, that Italian society is not ready for it yet. In 2005, the centre–right government[38] led by Silvio Berlusconi proposed a new reform of the Constitution that would have entailed greatly increasing the powers of all regions. In June 2006 the proposals, leading the way to a federal state, were rejected in a referendum by 61,3% to 38.7%. The results varied considerably from one region to another, ranging to 55.3% in favour in Veneto to 82% against in Calabria[39].

5. Local government in the Italian Republic: provinces, municipalities and metropolitan cities

As already mentioned in the previous subchapters, article 114 of the Constitution states that the republic consists of municipalities, provinces, metropolitan cities, regions, and the state. In accordance therewith, as well as with the principle of decentralisation established in article 5, beside the tiers of state and regional authorities described in the previous subchapters, municipalities, provinces and metropolitan cities function as further tiers of authorities. They are also units of local government (autonomia territoriale or autogoverno territoriale), and not only the units of administrative division. They are autonomous

37 D. Struska, Między unitaryzmem, *op. cit.*, p. 6–7. In Italy there is also the Movimento Federalisto Europeo, a national union of European federalists organised around the proposals of Mario Albertii. Its activists, however, concentrate on the plane of federalism understood as an idea of united Europe. F. Kinsky, Federalism – model ogólnoeuropejski, Kraków 1999, p. 156–157. For the origins and development of the federalist doctrine in Italy see: S. Bielański, Tradycje federalizmu we Włoszech, Kraków 2002.

38 The reform was initiated and then pushed by the regionalist party Lega Nord.

39 Results of the referendum as in: http://www.repubblica.it/speciale/2006/referendum/

entities with their own statutes, powers, and functions according to the principles defined in the Constitution.

Introduced by the constitutional reform of 2001, the provisions referring to provinces, municipalities and metropolitan cities crowned the 10–year–long process of decentralising reforms carried out on the level of both ordinary and constitutional laws. The act making a sort of completion of the reforms of the 1990s was the legislative decree, still bounding, titled: The Uniform Text on the Local Government System No 267 of 28 October 2000 (Testo Unico degli Enti locali). In this decade the whole system of public administration was intensely reconstructed, including its territorial dimension. The conception of "administrative federalism" was formed, which implies transferring of most functions and administrative responsibilities on the bodies of local government.[40]

The second–tier units of local government are **provinces**, established in 1848 for the centralised Kingdom of Italy with a considerable elements of French solutions. Like the French departments, the provinces were to serve as a level of decentralisation of state administration with the prefect as a representative of the central government coordinating the work of the administration in the province.

Nowadays, provinces (provincia) are composed of many municipalities, and usually several provinces form a region – the only exception is region of Aosta Valley which has no provinces: the administrative functions corresponded to provinces in other regions, are provided by the regional government which is responsible for all the tasks but municipalities tasks. The region of Lombardy has the most provinces – 12. Totally, there are 109 provinces in Italy (2011), but this number has been steadily growing recently. New provinces may be established by virtue of the law of the Republic on initiative of

40 The Uniform Text on the Local Government System No 267 of 28 October 2000 amended and reassumed the hitherto binding regulations concerning territorial self–governments. This decree was subject to changes introduced through Act 448 of 28 December 2001, DL no 50 of 31 March 2003, DL no 80 of 29 March 2004, DL no 44 of 31 March 2005, DL no 203 of 30 September 2005, DL no 152 of 3 April 2006, Act 244 of 24 December 2007, DL no 92 of 23 may 2008; I. Bokszczanin, Samorząd terytorialny w Republice Włoskiej, [in:] Samorząd terytorialny w Europie Zachodniej, Warszawa 2010, p. 57–58.

the concerned municipalities and on consulting the council of the given region.

The framework of the political system of the province are close to the political system of the region. The legislative and controlling body is a provincial council (consiglio pronvincionale). The winning party gains bonus mandates; it always takes the three fifths of the council's seats. The number of the councilors depends on the population of the particular province.

The executive body is the provincial board (giunta provincionale), which is chaired by a president (president della provincial), who appoints other members called assessori. The president is also elected by the resident citizens (together with the members of the council) by absolute majority of votes. The president is a central figure among the provincial organs. His term lasts also 5 years.

The constitutional status of the provinces and their scope of responsibilities and competences changed over the last century. Their importance was reduced in favour of the regions. However, the constitutional reform of 2001 stopped the process of their depreciation granting them a new constitutional status and maintaining them as an important element of the territorial landscape of Italy

The province is a legal entity and enjoys a statutory, organisational, administrative, financial and tax autonomy in the local scope. According to I. Bokszczanin, "indeed, various responsibilities have been vested in the province, especially the mission of 'coordinating' local entities' actions, supporting and arranging the development of the municipalities on its territory. It is qualified to carry out all administrative tasks which, in accordance with the constitutional (article 118) criteria or subsidiarity, responsibility and differentiation, cannot be attributed to the municipality."[41] In the scope of the responsibilities of the province, traditionally there are two categories: the province's own tasks and delegated tasks. Among the former, connected with the functioning of a given community, are, for example, local transport, environment

41 I. Bokszczanin, *ibidem*, p. 67. This constitutional provision was specified in Act 131 of 2003 (the so–called La Loggia Law).

protection, local police and fire services, and local planning. Among the delegated tasks are the issues connected with record and supervision in construction and transport, some questions concerning energy sector, industry and education.

Representatives of state administration are also active on the level of province. These are the prefect (prefetto), who is a political representative of the central government and the quaestor (questore), who is responsible for enforcing law as the head of the state police (polizia di stato) in the province.[42] The constitutional status of these offices diminished along the process of decentralisation and growth in the authority of the provinces as the units of autonomia locale.

The **municipalities** are the basic Italian administration division. The municipalities are distinguished from the other local government units by the fact that, while the provinces and the regions were created by the central government, the municipalities are natural communities that formed themselves over hundreds of years. Hence very rare changes of borders of particular municipalities, especially in comparison with the already signalled changes in the borders of the provinces. Establishing a municipality requires a regional law issued on consulting the population concerned. Like the provinces, they are constitutionally established legal entities with statutory, organisational, administrative, revenue and expenditure autonomy in the local scope.

There are over 8,100 municipalities in Italy, of various areas and populations. The largest and the most populated municipality is Rome, which has an area of 1,285.30 km² and a population of 2,726,539. The smallest ones are Fiera di Primiero (Trento province) with the area of only 0.15 km², and Morterone (Lecco province) with the population of only 33 inhabitants. The municipalities usually consist of a town being its capital and seat of the authorities (capoluogo) after which the municipality is named, and the surrounding territories (frazioni) embracing smaller towns and villages. There are councils of frazioni

42 There is also a province police depending on local government: Polizia Provinciale.

(consiglio di frazione) as collegiate bodies representing the interests of these communities but their competences are very limited.[43]

The legislative body which also supervises the administration of this unit of local government is the municipality council (consiglio comunale). The members of the municipality council are elected in general elections by majority of votes for the term of five years. There may be 12–60 councilors depending on the population. The executive body is a municipal board (giunta comunale) presided by a mayor (sindaco) who is also elected for 5 years in general elections. Then the mayor appoints other members of the giunta called assessori, whose number is determined by the statute of the municipality (up to 16). The mayor, beside chairing the work of the executive, is simultaneously an organ of the state territorial administration responsible for the implementation of the tasks vested in the municipality by the provisions of state and regional laws. In the last decade, in some municipalities, especially those bigger, there appeared a city manager, a professional official managing the current affairs of this unit and supporting the municipality board with his professional qualifications.

The basic responsibility of the municipalities is care of the interests of the population making the local community. Operations in this scope should certainly fit the limits of the competences established by law. In this case it is worth noting that the municipal bodies consider all cases which are not reserved for the other organs of authorities. As already signalled, the municipalities may also fulfil the tasks delegated to them by the provisions of state and regional laws. The comune provides many of basic civil functions. They are responsible for traffic control, health, education and family matters. Many of them have a municipal police (Polizia Municipale). They also may issue local regulations.

In connection with the aforementioned diversity of the size of municipalities, some solutions rationalising the functioning of the largest ones were sought for. In the course of decentralising and

43 There are also exceptional cases of municipalities without capoluogo, with only some frazioni. They are then called sparse municipalities (comune sparso). The frazione which houses the town hall is called „sede municipale".

modernising reforms of the 1990s, a new type of territorial units was established: **metropolitan cities** (citta metropolitane).

By virtue of amending the Constitution of 2001 these units were included into the system of constitutional entities making up the Republic (article 5). The metropolitan cities are made in the major agglomerations in place of provinces. Currently there are 9 in the ordinary regions (Bari, Bologna, Florence, Genoa, Milan, Naples, Rome, Turin and Venice and 5 in the special regions (Cagliari, Catania, Messina, Palermo and Trieste). This regulation was preceded by appropriate laws: first Act 142 of 1990 on the local autonomy system, and then by the binding Uniform Text on the local government system No 267 of 2000.[44] Thus, it is a new entity in the constitutional territorial structure of Italy, referring to the tradition of the medieval city–republics. Like the other entities, they enjoy the similar scope of autonomy. The new construction assumes cooperation between the major cities (citta metropolitane) and the surrounding areas (area metropolitane). The conglomerates of this type fulfil the functions which somewhere else are vested in provinces and other functions delegated to them by the regions.[45] Among the typical responsibilities of the metropolitan cities are: transport, spatial planning, urban infrastructure, culture and commerce.

The constitutional reform of 2001 abolished the state supervision over administrative acts of local government units (including regions and the other local units). This resulted in abolishing the office of the Government Commissioner. Also the supervision of the regions over the acts of local units was abolished. The supervision over the regions was reduced to a potential questioning regional laws, like state laws, before the Corte Constituzionale. Moreover, according to article 120, the government may act as a substitute for regional, metropolitan city, provincial, or municipal authorities whenever those should violate international rules or treaties or community law, whenever there is a serious danger for the public safety and security, and whenever such substitution is required in order to safeguard the legal or economic

44 I. Bokszczanin, Samorząd terytorialny..., *op. cit.*, p. 55.

45 For further reading on the functions and the process of forming metropolitan cities see: Z. Witkowski, Ustrój konstytucyjny współczesnych Włoch w aktualnej fazie jego przemian 1989–2004, Toruń 2004, p. 440 and next.

unity of the nation, and particularly in order to safeguard the basic standards of welfare related to civil and social rights, irrespective of the boundaries of the local governments.

Part 6

THE KINGDOM OF SPAIN: THE STATE OF AUTONOMOUS COMMUNITIES

1. The Spanish way towards regionalism: history and present day

Spain as a state originated in 1479 as the result of the union of two states which had been formed in the course of fights against the Arabs (Moors) for the Iberian Peninsula, Castile and Aragon. By that time Spain had just a geographical territory and not a state. From 711 on, when the Arab invasion on the Christian state of Visigoths began, the Iberian Peninsula was a buffer between the worlds of Christianity and Islam. However, Muslims never managed to take control over the whole territory of modern Spain. The reconquista, or gradual pushing the Moors away by Christians from the continent of Europe, which was possible also thanks to the internal problems of the Muslim countries, lasted nearly 700 years. Over this period on the regained territories rose Christian states such as: Asturias, Leon, Galicia, Catalonia, Valencia, Portugal, Navarra, and aforementioned Castile and Aragon. With the course of time the last two grew in importance subduing smaller state beings. It is worth mentioning that during the Reconquista, wars between the Christian kingdoms were almost as frequent as those against the Muslim states (taifas).

The characteristics of the period of Reconquista was not only political division but also religious fragmentation, which resulted from the fact that along with the movement of the Christianity's borderline southwards, a significant part of Muslim and Jewish populations, unwilling to leave their place of residence, enforced the demographic and economic potential of the Christian kingdoms, which manifested

extended tolerance towards them, securing them freedom of confession and retention of property (they had to, however, pay taxes higher than those paid by Christians). Medieval Spain was a place where many races, religions, cultures and languages crossed. However, in the 14th century the authorities' polices reoriented, which brought about the dismantling of this tolerant society, which resulted in mass emigration of Muslim and Jewish population in the next century. Those who chose to stay had to accept the Catholic faith.[1]

From the era of the so–called "Catholic Monarchs", Ferdinand and Isabella, whose marriage led to the uniting of the Kingdom of Spain, the unification of the state began, which manifested in, beside the aforementioned religious sphere, the introduction of a tax system and economic reforms. The turn of the 16th century is the beginning of the Spanish Empire, which even in the 17th century, despite subsequent economic and political crises, gradual deterioration and loss of successive territories, was still one of the most powerful states of the world.

Undoubtedly, French models had influence on the administration and territorial organisation of Spain of that period, as from 1700 on the Spanish throne was occupied by the Bourbons ruling also in France. The French influence concerned, for example, the territorial division. In 1833 Spain was divided into 49 provinces organisationally corresponding with French departments and generally reflecting the historical traditions of the Iberian Peninsula. The French influence did not, however, dominate the Spanish administration to the extent that would let us call it a blueprint of the French administration. The development of Spanish institutions followed its own path, by which the present day administration models in the two countries are remarkably different.

In the history of Spain, apart from the republican period, in vain would one search for democratic forms. After the independence war, in 1814, the Bourbons restored the absolute monarchy, and after the civil

1 Francisco Jiménez de Cisneros, the Spanish cardinal and archbishop of Toledo (1436–1517), described the situation with significant words: „there is now no one in the city who is not a Christian, and all the mosques are churches".

war (1936–39), Spain experienced the period of dictatorship of General Francisco Franco Bahamonde (1936–75), when its official name of the Spanish State (in 1947, the Kingdom of Spain was formally restored). However, neither absolutism nor Francoist rule based on the principle of "unity, totalitarianism and hierarchy", debilitating regional tendencies in Spain, did not result in the disappearance of Spanish diversity, which has formed itself over centuries. Regionalism could revive after General Franco died in 1975, when the control was taken over by, appointed heir by him, Prince Juan Carlos of the Bourbons and Spain entered the way of democratic transformation

Present day Spain is a state with the surface area of 504.6 thousand square kilometres, and almost 47 million of population,[2] most of whom live in towns and cities. The neighbours of this biggest state in the Iberian Peninsula are: Portugal, France, Andorra and Great Britain (Gibraltar). Through Ceuta and Melilla Spain borders with Morocco and the state territory includes also islands: the Baleares in the Mediterranean Sea, the Canary Islands in the Atlantic Ocean. as well as other hardly inhabited small islands in the Mediterranean Sea (e.g. Islas Chafarinas, Isla de A Alborán). A curiosity is the community Llívia, being a Spanish enclave on the territory of France.

Spain is a country where several official languages are used: Castilian (or Spanish, the established state language), and regional languages: Bask, Galician, Catalan, and in the province of Lleida also Aranese. Moreover, on the territory of Spain several other languages are used, which, however, do not have the status of official languages: Aragon, Asturian, Extremaduran, Cantabrian, Leonese and Valencian (variation of Catalan).

Spain is nowadays a state economically counted among the high developed ones (GDP, the 9th place in the world in 2009[3]), and its fast development was possible due to the swiftly developing tourism, which attracted foreign investors. Broad scale investments are also connected with Spain's accession to the European Communities. Currently what is characteristic of Spain is big disproportions in economic development

2 Data for 2010, according to the Instituto Nacional de Estadistica.
3 Data from the World Bank available at: www.worldbank.org

of particular regions, which also affects decentralisation processes. The most economically developed regions of Spain are: Madrid, Catalonia and the Baleares, whereas the least developed are Extremadura, and Castile: La Mancha and Andalusia.

2. The principles of the constitutional system of the state

The constitutional model of contemporary Spain was formed after the death of General Francisco Franco (20 November 1975). The socio–economic crisis of 1976 forced the post–Francoist authorities to introduce constitutional reforms passed by the Cortes and confirmed in the referendum. They resulted in the parliamentary election held in 15 June 1977. Immediately, on 25 July 1977 the work on the new Constitution commenced. The were concluded with passing, by the two chambers in separate voting sessions, the final text on 31 October 1978. On 6 December the nation accepted the Constitution in the referendum (87.9% votes for), on which the King signed the Constitution of 27 December 1978.

The Constitution of Spain meets the standards of a modern democratic state. It is not a completely new, original creation, but a basic law referring to Spanish historical experiences, which is expressed clear distance from the solutions typical of both the Francoist dictatorship and the Second Republic. Moreover, the Constitution uses the proven models of other countries, especially Germany, Portugal or Italy. T. Mołdawa points at the goals which were set for the new Constitution. These aims are securing in practice political democracy and respect for the rights of an individual, and, on the other hand, stability of governance and functional efficiency of the parliament. In addition, he draws attention to the fact that the goals remain in harmony with the recognition of, expressed in the Constitution and repressed under Franco, aspirations of nations and historical regions of Spain to shape their own existence on the basis of broad internal autonomy, yet

preserving the unitary nature of the state.[4] This combination resulted in the development of the territorial organisation of the state called regionalism, and Spain, in the context of the territorial organisation, is called a regional state. Basis constitutional principles are included in the preliminary title of the Constitution prior to the successive numbered titles.

As a result of the Constitution, in accordance with the regulation included in article 1 para 1, Spain constitutes itself into a **social and democratic state of law**, which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order. Sovereignty of the people was taken as a basis, stating that national sovereignty belongs to the Spanish people from whom emanate the powers of the state (article 1 para 2), and simultaneously determining the political form of the Spanish state as the parliamentary monarchy (article 1 para 3).

The Constitution of 1978 lifted all the sources of the previous legitimation serving the head of state, simultaneously giving him new and much broader democratic legitimation, solemnly regulating it in the Constitution and recognising the reigning dynasty in person of the present monarch. Article 57 para 1 explains: "The Crown of Spain is hereditary for the successors of H.M. Don Juan Carlos I of Borbon, legitimate heir of the historic dynasty". In this way the **principle of sovereignty of the people** with the **principle of monarchism** were combined in the constitutional system. Through the constitutional act the people of Spain, the only subject of the national sovereignty and the only source of legitimation, recognises that the head of state will not be appointed in elections but through heredity regulated in the Constitution. Sovereignty of the people is expressed as equal rank in the fact that the system of succession of the head of state may be altered by a new act of the constitutional authorities, i.e. by a reform of the Constitution on the basis of principles provided for in article 168.[5]

4 T. Mołdawia, Konstytucja Hiszpanii, Warszawa 2008, p. 16.
5 J.S. Tura, M.A. Aparicio Perez (tłum. A. Łabno), Kortezy Generalne w systemie konstytucyjnym Hiszpanii, Warszawa 2003, p. 12–13.

The content of the aforesaid principle of sovereignty of the people, beside pointing at the sovereign, is also the way of exercising this power. In accordance with article 23 citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage. The basic form of direct democracy is the institution of referendum, which in Spain may concern various issues. For instance, the Constitution enumerates the referendum on political decisions of particular significance (art. 92), the referendum concerning creating autonomous communities as well as resolving and altering their statutes (articles 151–2) and the referendum ratifying changes in the Constitution (article 167). The other form of direct democracy in Spain is the so–called popular initiative or the right of 500 thousand voters to propose laws (article 87 para 3). Taking into consideration faults of referendum, the basic form of exercising sovereignty by the people is to take resolutions through elected representatives, on the national level (the Cortes), on the level of autonomous communities (community legislatives), provinces (provincial deputations) as well as municipalities (municipal managements). Of special importance is the **principle of representation**, according to which "the Parliament represents the Spanish people and is formed by the House of Representatives and the Senate (Article 66 para 10).[6]

One of the major constitutional principles of Spain is the **principle of pluralism**, already mentioned in article 1. This strong stress on pluralism should be seen in the context of Spain's authoritarian experience. Of basic importance is in this matter the freedom of starting and operating of political parties, which, in accordance with article 6 of the Constitution, express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation. In the further part of this regulation, the

6 In accordance with the principle of representation, an institution is representative if meets two conditions. First, it reflects, in various proportions, elements making up the pluralistic system of various options existent in the society which created it. This representativeness is, in a way, an equivalent of pluralism occurring in society. Second, an institution is representative if the persons constituting it were elected, regardless of the method of election, by majority of this society members, for whom this institution was created. J.S. Tura, M.A. Aparicio Perez (tłum. A. Łabno), Kortezy Generalne w systemie konstytucyjnym Hiszpanii, Warszawa 2003, p. 13.

Constitution requires from them that 'their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic'.

The principle of pluralism is also reflected in the reference to trade unions. The union pluralism was guaranteed by the provisions of article 7.[7] The principle of pluralism is also particularly important from the point of view of territorial organization, as it is also the basis of cultural and linguistic variety of the peoples and nationalities residing in Spain as well as their rights to organize themselves in autonomous communities. In this context, of a special importance is article 2, which states that the Constitution is based on the indissoluble unity of the Spanish nations, the common and indivisible homeland of all Spaniards, and recognises and guarantees the right to autonomy of the nationalities and regions which make it up and the solidarity among all of them. The recognition of the territorial plurality affects also the regulations concerning the official language and the flag.

In accordance with article 3 para 1, Castilian is the official Spanish language of the state and all Spaniards have the duty to know it and the right to use it. However, the Constitution also allows to recognise other languages as official, stating in article 3 para 2 that 'the other languages of Spain will also be official in the respective autonomous communities, in accordance with their Statutes'. Moreover, due to article 3 para 3 the richness of the linguistic modalities of Spain is a cultural patrimony which will be the object of special respect and protection. In reference to the flag, beside the Spanish flag, the Constitution allows recognition of flags and ensigns of the autonomous communities, which are used beside the flag of Spain on their public buildings and in their official acts (article 4).

The aforementioned authoritarian experience also affected the status of individual, which justifies placing already in article 1 such

7 As T. Mołdawia observes, in this context significant is also the provision of Article 28 para 1 of the Constitution, according to which 'nobody can be obligated to join a trade union'. Union freedom is then also a freedom of remaining outside any union organisations. The already mentioned provisions of the Constitution is fully expressed only in confrontation with the situation under Franco, when participation in vertical syndicates was obligatory. T. Mołdowa, Konstytucja Hiszpanii, Warszawa 2008, p. 17.

values as: liberty, justice and equality. The Constitution dedicates title I, Basic Rights and Duties, to the legal status of an individual. It is one of the most developed and specific parts of the Constitution, which is characteristic of the states which overcame undemocratic systems. The Constitution also establishes several guarantees of rights and liberties of institutional and procedural nature (Defensor del Pueblo, a grievance submitted to the Constitutional Tribunal about the protection of rights, a special procedure before court 'habeas corpus' (article 17 para 4 of the Constitution).

The last article of the preliminary title is dedicated to the **principle of state of law** mentioned in article 1. Determining the content of this principle the Constitution included both components of its formal aspect, i.e. the principle of legality (the citizens and public powers are subject to the Constitution and the legal order) as well as the normative order, guaranteed by the Constitution, the publication of the norms, the non–retroactivity of punitive provisions which are not favourable to, or which restrict individual rights, legal security, and the prohibition against arbitrary actions on the part of the public authorities (article 9 para 3). The Spanish interpretation of the principle of state of law embraces also responsibility of the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life (article 9 para 2).

3. The constitutional order: institutions of the Kingdom of Spain and regionalism

As mentioned in the previous subchapter, Spain is a parliamentary monarchy, and its constitutional system combines the **principle of sovereignty of the people** with the **principle of monarchism**. The political system is a **parliamentary–cabinet system**, which indicates that the axis of the system of government is relations between parliament and the government. However, in the constitutional taxonomy, taking

into consideration the aspect of tradition, the first title concerning the machinery of power was dedicated to the monarch. It is Title II The Crown. Article 56 opening this chapter determines the position and constitutional responsibilities of the monarch. According to it, **the King** is the Head of State, the symbol of its unity and permanence. He arbitrates and moderates the regular functioning of the institutions, assumes the highest representation of the Spanish State in international relations, especially with those nations belonging to the same historic community, and exercises the functions expressly conferred on him by the Constitution and the law. It is worth reminding that the Crown is hereditary in accordance with the rules determined in article 57. The Crown is inherited by the ruler's oldest son (primogeniture), but the Constitution also envisages other situations such as a woman's succession or lack of legal successors. In the last situation the parliament shall provide for the succession to the crown in the manner which is best for the interest of Spain. The Constitution also provides for a procedure in the event of the heir's minority as well as incapacity, which is the institution of Regency. The monarch assuming the throne takes an oath, whose credo, proclaimed before the parliament includes, beside obedience to the Constitution and the law, also respecting the rights of citizens and the autonomous communities.

The Constitution enumerates the Monarch's competences in article 62. Among the most important rights named in this provision are:

a) to sanction and promulgate the laws;

b) to summon and dissolve the Cortes Generales and to call elections;

c) to call a referendum;

d) to propose a candidate for President of the Government and appoint him or remove him from office;

e) to appoint and dismiss members of the Government on the proposal of its President;

f) to issue the decrees agreed upon by the Council of Ministers, to confer civil and military positions and award honours and distinctions;

g) to exercise supreme command of the Armed Forces.

Furthermore, the Monarch has competences in international relations enumerated in article 63. The King accredits ambassadors and other diplomatic representatives and the foreign representatives in Spain are accredited before him. The King expresses the consent of the State to obligate itself internationally through treaties in conformity with the Constitution and the laws. It is also incumbent on the King, after authorization by the parliament, to declare war and make peace. The King bears no accountability for his actions, which is taken upon themselves by the President of the Government and proper ministers through countersigning all Acts of the Monarch.[8]

The **Parliament of Spain**, Las Cortes Generales, is two–chamber and is formed by the House of Representatives (Congreso de Diputados) and the Senate (Senado). Despite the fact that article 66 para 1 indicates that the parliament represents the Spanish people, the method of election and the characteristics of the chambers are slightly different, which makes them, to a certain degree, similar to the system of federal states[9]. The **House of Representatives** is composed of minimum 300 and maximum 400 Deputies elected by universal, free, equal, and direct suffrage and secret ballot. Currently, the number of the deputies amounts 350. The electoral district is the province.[10]

The number of seats for a province depends on its population, but it is minimum 2 seats.[11] The votes are calculated into seats in each of the 52 provinces separately with d'Hondt's method. The electoral threshold is 3% in the scale of a constituency. The House of Representatives is elected for four years.

As far as the **Senate is** concerned, it is defined by the Constitution as the chamber of territorial representation, which determines the

8 The nomination and appointment of the President of the Government and the dissolution provided for in Article 93 shall be countersigned by the President of the House of Representatives.

9 F. Requejo, Cultural pluralism, nationalism and federalism: Are vision of democratic citizenship in plurinational states, European Journal of Political Research 1999, no. 35, p. 270 and next.

10 The cities of Ceuta and Melilla shall be represented by one deputy each.

11 Two seats are given to each of the 50 provinces and one each to Ceuta and Melilla, and the remaining 248 are then allocated proportionally to population. In practice, this system overrepresents smaller provinces.

method of elections of senators. In each province four senators are elected by general, free, equal and direct suffrage and secret ballot.[12] Moreover, the autonomous communities also designate one senator and one additional senator for each million inhabitants in their respective territories. The designation shall be made by the legislative assembly, or in its absence, by the higher collective body of the autonomous community pursuant to the provisions of the statutes, which, in any case, shall insure adequate proportional representation. The Senate is elected for four years, too.

The members of the both chambers exercise free mandates, enjoy the parliamentary immunity (i.e. both irresponsibility for their actions as parliamentarians and criminal immunity). The rule of incompatibiltas is also applied, which means that no one may be a member of the two chambers simultaneously nor be a member of an autonomous community Assembly and a Deputy to the House of Representatives at the same time (article 67 para 1). Members of Cortes may also be other persons, e.g. the members of the Constitutional Court, the Defender of the People, Magistrates, Judges and Public Prosecutors in service.

Both chambers meet annually in two ordinary periods of sessions, the first from September to December and the second from February to June. They could also meet in extraordinary periods of sessions. In order to adopt agreements, the chambers must be in a regular session with the attendance of the majority of their members. In order to be valid, such agreements must be approved by the majority of the members present, without prejudice to the special majorities which may be established by the Constitution or the organic laws or the regulations established by the chambers for the election of persons. An example of such a situation is the procedure of passing organic laws. Organic laws are those relative to the exercise of fundamental rights and public liberties, those approved by the statutes of autonomies and the general electoral system, and the others provided for in the Constitution. The approval, modification or

12 In the island provinces, each island or grouping of them with a representation or insular council is a voting district for the purposes of the election of senators, three of them going to each of the major islands – Grand Canary, Mallorca, and Tenerife – and one each to the following islands or groupings: Ibiza–Formentera, Menorca, Fuerteventura, Gomera, Hierro, Lanzarote, and La Palma. The cities of Ceuta and Melilla elect two senators each.

repeal of organic laws shall require an absolute majority of the House of Representatives in a final vote on the entire bill (article 81).

Article 66 enumerates the functions of the parliament. According to it the parliament exercises the legislative power of the state, approves of its budgets, controls the action of the government, and has other competences assigned by the constitution.

The Spanish bicameralism does not provide equal status of each chamber. The House of Representatives plays a dominating role, although the Senate also participates in the legislative process and exercises control over the government. In addition, the Senate, as the chamber of territorial representation, takes part in the process of decision making concerning Autonomous Communities, in particular independently grants the government its consent for taking indispensable measures in the event of a particular community failing to fulfil the responsibilities imposed upon it. However, in an ordinary legislative process, in the case of differences between the chambers, the ultimate decision belongs to the House of Representatives.

The executive power is exercised by the **Government** (Gobierno de Espana). The government directs domestic and foreign policy, civil and military administration, and the defence of the state (art. 97). The government is composed of the President of the Government, Vice Presidents, the ministers and sometimes other members may be established by law like Secretaries of State (Junior Ministers). The president directs the actions of the government and coordinates the functions of the other members of it without prejudice to their competence and direct responsibility in their activity (article 98). In Spain the term Council of Ministers (Consejo de Ministros) also is in use and it is a constitutional (as well as the term the government) name of the Cabinet (the Cabinet of Spain), which includes the aforementioned persons.

The method of making the goverment, as well as its constitutional status, is characteristic for parliamentary–cabinet systems. The government is elected after each renewal of the House of Representatives and in the other cases provided for by the Constitution. The King after consultation with the representatives designated by the political

groups represented in parliament, and through the president of the House of Representatives, proposes a candidate for the presidency of the government. The proposed candidate, submits to the House of Representatives the political program of the government he intends to form and seeks the confidence of the chamber, which is granted by an absolute majority of its members. If the confidence is granted, the King appoints the president. If said majority is not obtained, the same proposal is submitted to a new vote 98 hours after the former, and confidence is voted once again. This time, confidence is granted by a simple majority. If within two months from the first voting for investiture no candidate has obtained the confidence of the House of Representatives, the King shall dissolve both chambers and call for new elections with the concurrence of the President of the House of Representatives (article 99). The other members of the government are appointed and dismissed by the King at the proposal of its president.

As aforementioned, the government directs public administration, which serves the general interest with objectivity and it acts in accordance with the principles of efficiency, hierarchy, decentralization, and coordination while fully complying with the law and legality.

In accordance with the rules of the parliamentary–cabinet system, the government in its political conduct is collectively accountable before the House of Representatives. It is a basic manifestation of the control function of the parliament, which may concern, beside the government, also any authority of the state and the autonomous communities. The control instruments, which may be used by the both chambers, embrace: request for the information and assistance, requirement of the presence of the members of the government, and interpellations or queries. The heart of the control function is, however, the procedures of vote of confidence and vote of no confidence (articles 112–4). The President of the Government, after deliberation by the Council of Ministers, may pose before the House of Representatives the question of confidence on his program or on a declaration of general policy. Confidence is taken as granted when the absolute majority of the deputies vote for it. The House of Representatives may require political responsibility from the government by means of the adoption by an absolute majority of a motion of censure (vote of no – confidence). The motion of censure

must be proposed by at least one–tenth of the deputies and must include a new candidate for the president. A decision unfavourable for the government in any of these votes results in the dismissal of the whole government.

An instrument strengthening the position of the government is its relations with the parliament is dissolution of parliament (article 115) – "The President of the Government, after deliberation of the Council of Ministers, may propose the dissolution of the House of Representatives, the Senate, and the Parliament, which shall be decreed by the King." There are two restrictions in the application of this mechanism: the proposal for dissolution may not be presented when a motion of censure is in process and no new dissolution may take place before a year has passed since the previous one.

The members of the government are also subject to criminal responsibility implemented in a special mode: before the Criminal Division of the Supreme Court. If the charge is treason or any crime against the security of the State in the exercise of their functions, it could only be brought against them through the initiative of one–fourth of the members of the House of Representatives and with the approval of the absolute majority thereof (article 102).

In the Kingdom of Spain, the exercise of **jurisdictional power** in any type of processes passing judgments and having judgments executed belongs exclusively to the Courts and Tribunals (Juzgados y Tribunales). The courts and tribunals are independent of all authority or people in the exercise of jurisdictional power. The Constitution indicates a connection between the judicial power and the principle of the sovereignty of the people. According to article 117, justice emanates from the people and is administered in the name of the King by Judges and Magistrates (Jueces y Magistrados). Other constitutional rules determining the functioning of the judicial power are the principles of independence and impartiality of judges, openness, the principle of oral examination, free proceedings within borders defined by the law. The basic organizational principle is the principle of jurisdictional unity. It results in the uniform judicial system on the whole territory of Spain.

The Spanish judiciary is based on a few tiers of territorial organization. The basic units are judicial districts (partidos judiciales), which cover one or several municipalities. Higher levels are: provinces, autonomous communities and the state. Another quality is the division into five jurisdictions, labour or social jurisdiction and military jurisdiction. Each employs a separate procedure.

In every judicial district there are Courts of First Instance (Juzgados de Primera Instancia), i.e. basic courts of the civil jurisdiction and Courts of Inquiry (Juzgados de Instrucción) or basic courts responsible for the inquiry of all criminal cases. Sometimes, usually in the smaller districts First Instance and Inquiry Courts are usually unified. There are also Peace Courts (Juzgados de Paz) assigned to a municipality that is not the capitol of a judicial district and they are headed by a Justice of the Peace. Their responsibilities relate to the criminal and civil orders in minor cases.

On the level of province adjudicate Social Courts (Juzgados de lo Social) or basic courts related to labour law, and Contentious–Administrative Courts (Juzgados de lo Contencioso–Administrativo) responsible for all cases corresponding to appeals for National and Autonomic bodies not assigned by the Constitution to other courts as of the appeals to resolutions issued by municipal bodies. There are also Criminal Courts (Juzgados de lo Penal) – responsible for judging, less serious crimes and misdemeanours, as well as acting as second instance courts for Peace Courts. On the provincial tier adjudicate also Commercial Courts (Juzgados de lo Mercantil), Penitentiary Courts (Juzgados de Vigilancia Penitenciaria) as well as Juvenile Courts (Juzgados de Menores).

All aforementioned courts are called as the “unipersonal courts”, which means that those courts are controlled by one judge contrary to the rest of the superior courts controlled by judge panels.

The highest court on the level of province is Audiencia Provincial, the court responsible for civil and criminal jurisdictional orders. They consist of Civil Halls responsible for appeals against the decisions of the courts of first instance, and Criminal Halls responsible for judging severe criminal cases.

On the level of each autonomous community the adjudication belongs to the High Courts of Justice (Tribunales Superiores de Justicia). They consist of three halls covering four jurisdictional orders, these being: the First Hall or Civil and Criminal Hall, the Second or Administrative–Contentious Hall and the Third or Social Hall.

Courts which embrace with their jurisdiction the whole territory of the state are the Supreme Court (Tribunal Supremo), the National High Court (Audiencia National) as well as the Central Court for Young Offenders (Juzgado Central de Menores), the Central Criminal Court (Juzgado Central de lo Penal), the Central Court for Preparatory Proceedings (Juzgado Central de Instrucción) and the Central Social Court (Juzgado Centrales de los Social).

The National High Court consists of the following four chambers: Criminal Chamber, which is competent in certain types of serious crimes such as terrorism or genocide, and hears appeals against rulings of the Central Criminal Court, Appeals Chamber, which hears appeals against rulings of the Criminal Chamber, Administrative Chamber, which exercises judicial review of some administrative decisions and Social Chamber, which hears appeals against resolutions of the Central Social Court (Juzgado Centrales de los Social) regarding industrial disputes of nation–wide scope.

The Supreme Court, with jurisdiction all over Spain, is the highest jurisdictional organ in all orders, except in matters concerning constitutional guarantees. It is composed of five halls, which cover all the jurisdictional orders. Its rulings cannot be appealed, except to the Constitutional Court when one of the political parties considers its constitutional guarantees have been infringed.

Particularly constitutional organ of the judicial power is the General Council of the Judicial Power (Consejo General del Poder Judicial). It is not only a jurisdictional body but also a goveerning body of the Spanish Judiciary, which, for example, oversees and inspects the activities of judges and courts and naminates judges and, with the assessment of the Minister of Justice, the Magistrates of the Supreme Court. Among other functions, it is also obligated to report on all the

laws and legal decisions of the State and the autonomous communities on judiciary questions.

Title VI, dedicated to the judiciary, does not include the Constitutional Court (Tribunal Constitucional de España), which is described in Title IX. The court is the "supreme interpreter" of the Constitution, but formally the court is not a part of the rest of the spanish judiciary[13]. The Constitutional Court is composed of twelve members, nominated by the House of Representatives, the Senate, the government, and the General Council of the Judiciary. They are appointed by the King, for a period of nine years and shall be renewed by thirds every three years. According to art. 161 the Constitutional Court has jurisdiction over the whole of Spanish territory and is competent to hear:

a) appeals on the grounds of unconstitutionality against laws and regulations having the force of law;

b) appeals against violation of the rights and liberties (recurso de amparo);

c) conflicts of competence between the State and the Autonomous Communities or between the Autonomous Communities themselves.

Moreover, the government may contest before the Constitutional Court the provisions and resolutions adopted by the organs of the autonomous communities. It is worth mentioning, that apart of the President of the Government, the Defender of the People, fifty Deputies, fifty Senators also bodies of autonomous communities can lodge an appeal of unconstitutionality[14].

13 O. Cabrero, A Guide to the Spanish Legal System, http://www.llrx.com/features/spain.htm 2002

14 Another competence is given by art. 163: If a judicial organ considers, in some action, that a regulation with the status of law which is applicable thereto and upon the validity of which the judgment depends, may be contrary to the Constitution, it may bring the matter before the Constitutional Court in the cases, manner, and with the consequences which the law establishes, which in no case shall be suspensive.

4. The key to the Spanish regionalism: autonomous communities

In view of the facts established in part I, the Spanish parliamentary monarchy is difficult to classify as a federation (e.g. Germany, Switzerland) or a unitary state (e.g. France, Poland). It is an in–between form: a regional state, which, in the case of Spain, may be called a **state of autonomous communities** (el Estado de las Autonomias). In accordance with the binding Constitution (Article 137), the State is organised territorially into municipalities, provinces and the Autonomous Communities which may be constituted. All these entities enjoy autonomy for the management of their respective interests. The aforementioned article 2 establishing the principles of national unity and regional autonomy is crucial for the determination of the territorial system of the state and the role of autonomous communities. In compliance with this provision, the Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards, and recognizes and guarantees the right to autonomy of the nationalities and regions which make it up and the solidarity among all of them.

The largest territorial units are 17 **regions or autonomous communities** (las Comunidades Autónomas), which enjoy large independence. These are: Andalusia (Andalucía), Aragon, Asturia (Asturias), the Balearic Islands (Islas Baleares), Estremadura, Galicia, Cantabria, Castile La Mancha (Castilla La Mancha), Castile–León (Castilla León), Catalonia (Catalunya), the Basque Country (País Vasco), La Roja, Madrid, Murcia, Navarra, Valencia, and the Canary Islands (Islas Canarias). Not all of them, however, have been granted an autonomous status immediately after the constitutional transformation.

The Constitution classifies the possible autonomous communities into two groups, each of which has a different route to recognition and a different level of power and responsibility. The three regions that had voted for a statute of autonomy in the past–Catalonia, the Basque provinces, and Galicia–were designated “historic nationalities” and permitted to attain autonomy through a rapid and simplified process. Catalonia and the Basque Country had their statutes approved in

December 1979 and Galicia in April 1981. The other regions were required to take a slower route, although Andalusia was designated as an exception to this general rule. It was not a "historic nationality," but there was much evidence, including mass demonstrations[15], of significant popular support for autonomy. As a result, a special, quicker process was created for it. According to art. 143[16] and art. 151, by May 1983 the entire country had been divided into 17 autonomous communities[17]. In 1995 two autonomous cities, Ceuta and Melilla, were added[18].

There were also differences between the "historic nationalities" and the other communities in the extent of the powers that were initially granted to them. For the first five years of their existence, those communities that had attained autonomy by the slow route could assume only limited responsibilities[19]. The transfer of powers to the autonomous governments has been determined in an ongoing process of negotiation between the individual communities and the central government. In the 1990s the idea of "two ways" was abandoned and the process of passing increasingly broader competences to autonomous communities was unified. However, significant differences still occur, which results in a peculiar symmetry in the territorial composition of Spain. In the case of many regions, there occur, even nowadays, a tendency to further extension of the range of competences (Catalonia, the Basque Country)[20]. The process of granting competences to the regions is sometimes compared with the process observed in the United Kingdom, and hence is also called the Spanish devolution.

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15 Over a million and a half people demonstrating in the streets on 4 December 1977, which led the creation of a special quicker process for autonomy for that region.

16 Art. 143 par. 1: In the exercise of the right to autonomy recognized in Article 2, bordering provinces with common historical, cultural, and economic characteristics, the island territories, and the provinces with a historical regional unity may accede to self–government and constitute themselves into autonomous communities in accordance with the provisions of that Title and the respective statutes.

17 Madrid was granted autonomy "in the nation's interest" through the art. 144.

18 A. Shubert, V. Rodriguez, Spain, Regional government, Encyclopaedia Britannica Online Accessed February 2011.

19 They had control over the organization of institutions, urban planning, public works, housing, environmental protection, cultural affairs, sports and leisure, tourism, health and social welfare, and the cultivation of the regional language (where there was one).

20 See: R.D. Congleton, A. Kyraciou, J. Bacaria, A Theory of Menu Federalism: Decentralisation by Political Agreement, Constitutional Political Economy 2003, no. 14, p. 169.

Autonomous communities are not sovereign entities, and, what follows, they have no constitutional rights, which is one of basic differences in comparison with the entities making a federation. Each of the communities acts on the basis of its own statute, which determines the scope of legislative and executive autonomy of the particular region. These statutes are acts of the public law, establishing the specific division of competences between the central administration and the local authorities. They are resolved and changed by regional assemblies and affirmed by organic laws passed by the General Cortes. The approval, modification, or repeal of organic laws requires an absolute majority of the House of Representatives in a final vote on the entire bill (art. 81). The statutes are the basic institutional norm of each autonomous community and the State recognizes them and protects them as an integral part of its juridical order. Due to art. 147 par. 2 the statutes of autonomy must contain:

a) the name of the community which best corresponds to its historical identity.

b) the delimitation of its territory.

c) the name, organization, and seat of its own autonomous institutions.

d) the competences assumed within the framework of the Constitution and the bases for the transfer of the corresponding services to them.

As M. Keating says, the division of powers in Spain is rather confusing. There is a list of powers reserved to the state, a list of powers to be devolved under individual statutes, and a list of powers that can be devolved. This means that the centre retains the residual powers, although there is a constant argument as to what these constitute. In practice there is a large overlap since even in devolved fields the state can pass framework laws laying down the general principles of policy within which the regions could make their own policies. Central

governments, especially that of the Popular Party under José María Aznar, have been accused of abusing this power to recentralize[21].

Powers reserved to the state are enlisted in art. 149. According to that article, the state holds exclusive competence over the following matters (e.g.): nationality, immigration, emigration, alienage, and the right of asylum, international relations, defence and the Armed Forces, administration of justice, system of customs, tariffs, and foreign trade, monetary system (there are 32 matters enlisted in art. 149).

As it was aforementioned, according to art. 150 par. 1, the parliament, in matters within the competence of the State, may grant to all or one of the autonomous communities the authority to dictate for itself legislative norms within the framework of the principles, bases, and directives established by a state law.

The autonomous communities may assume competences (devolved powers) in the following (e.g.): organization of their institutions of self–government, alterations of the municipal boundaries contained within its area, woodlands and forestry, activities in matters of environmental protection, social assistance, health and hygiene (there are 22 matters enlisted in art. 148).

The Constitution also envisages solutions for financial (article 156) and taxation (article 157) autonomy of the autonomous communities, as well as includes a regulation concerning state subsidies in favour of the regions. Article 158 constructs also the Compensation Fund (Fondo de Compensación), to correct inter–territorial economic imbalance and implement the principle of solidarity. Resources of that fund are distributed by the parliament among the autonomous communities and the provinces.

Autonomous communities have their own assemblies, governments and administration. Article 152 of the Constitution forms requirements concerning the constitutional form of the regions.

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21 M. Keating, Federalism and the Balance of Power In European States, Paper prepared for Sigma, Paris 2007, p. 22–23.

According to this article, the government of all autonomous communities must be based on a division of powers with a parliamentary form of government. There are legislative assemblies in every region, elected by universal suffrage in accordance with a system of proportional representation which assures, moreover, the representation of the various areas of the territory[22]. They may have names peculiar to the community, like Consell de la Generalitat Valenciana, Junta de Andalucía, Cortes de Castilla–La Mancha, Parlamento de Cantabria. The term of the legislative assemblies, as well as the executives, is 4 years.

There is also a Governing Council with executive and administrative functions, and a president elected by the Assembly from among its members and appointed by the King. The president directs the Governing Council, which constitutes the supreme representation of the respective Community as well as the State's ordinary representation in the latter (art. 152 par. 1). The president and the members of the Governing Council are politically responsible before the Assembly. There are also peculiar names, like Gobierno de Cantabria, Junta de Castilla y León, Xunta de Galicia.

As mentioned in the previous chapter, there is also a High Court of Justice in every autonomous community, which is the head of the Judiciary within the territorial area of the region.

According to art. 152, control over the activity of the organs of the autonomous communities is exercised by:

a) the Constitutional Court, in matters relative to the constitutionality of its normative provisions having the force of law;

b) the Government, after the handing down by the Council of State of its opinion, regarding the exercise of the delegated functions;

c) the jurisdiction in administrative litigation, with regard to autonomous administration and its regulatory norms;

22 About electoral systems in Autonomous Communities see: I.L. Penas, Cleavages and thresholds: the political consequences of electoral laws in the Spanish Autonomous Communities, 1980–2000, Electoral Studies 2004, no. 23, p. 30 and next.

d) the Court of Accounts, with regard to economic and budgetary matters.

Also central administration bodies function in each autonomous community. A delegate appointed by the Government directs the administration of the State in the territorial area of each Autonomous Community and coordinates it, when necessary, with the Community's own administration.

A far–going mechanism of intervention in the autonomous communities' actions is the possibility of applying necessary means (las medidas necesarias) envisaged in article 155. This may occur if an autonomous community does not fulfill the obligations imposed upon it by the Constitution or other laws, or should act in a manner seriously prejudicing the general interest of Spain. In such a circumstances, the government, after lodging a complaint with the president of the autonomous community and failing to receive satisfaction therefor, may, following approval granted by an absolute majority of the Senate, adopt the means necessary in order to oblige the latter forcibly to meet said obligations, or in order to protect the above–mentioned general interest. The government may give instructions to all the authorities of the autonomous communities to implement such a measures.

In the context of directions of the evolution of the Spanish regionalism as well as the constitutional position of the regions article 145 is worth noting, since it allows to conclude agreements between the autonomous communities, which concern administration and services provided by them, although the cooperation taking a form of federation is clearly forbidden.

It is worth mentioning, that there are formal mechanisms for co–operation through sectoral conferences but, apart from European affairs, these meetings do not appear to have been very influential. Instead, deals are brokered through the political parties. Spain is unusual in having both strong regional parties (especially in the three historic nationalities) and strong statewide ones[23]. This allows for an articulation

23 See: I.L. Penas, Cleavages and thresholds: the political consequences of electoral laws in the Spanish Autonomous Communities, 1980–2000, ElectoralStudies 2004, no. 23, p. 23–43.

of both regional and Spanish interests and has tied territorial politics to the national political system[24].

5. Local government: provinces and municipalities

Local government in Spain is based on a three–tier structure. Beside the autonomous communities, which determine the regional nature of the state (they constitute the third and highest tier of local government), local government functions on the level of province (provincias) and municipalities (municipios). The basis for this organisation of territorial authorities is, already mentioned, article 137 of the Constitution, in accordance to which the state is organized territorially into municipalities, provinces, and the autonomous communities which may be constituted. In addition, the provision guarantees them self–governance providing that „all these entities enjoy autonomy for the management of their respective interests". In addition, the provision guarantees them self–governance stating that: „all these entities enjoy autonomy for the management of their respective interests".

The division of Spain into **provinces** has its historical roots reaching the year 1833. It was carried out by the force of the royal decree of 20 November 1833 (by regent Maria Christina). The actual author of this division was Javier de Burgos, the secretary of state for development secretario de estado de Fomento). His division included 49 provinces.

Javier de Burgos took as his model the departments of France. The province was, in fact, designed with the centralizing aim of coordinating the peripheral organization of the state and, more importantly, of breaking the regional Spanish mould of traditional kingdoms and distinctive regions[25]. Each province had a governor (jefe politico – political chief) appointed by the central government and a Deputations (Diputacion)

24 M. Keating, Federalism and the Balance of Power In European States, Paper prepared for Sigma, Paris 2007, p. 23.

25 L. Moreno, Ethnoterritorial Concurrence and Imperfect Federalism in Spain, Instituto de Estudios Sociales Avanzados (CSIC), Working Paper 93–10, p. 12.

as a deliberative body[26]. While many of the borders and inclusions in the provinces may at first appear arbitrary from a historical and geographical point of view, Javier de Burgos was operating under a set of rational criteria: area (it was intended to be possible to travel between the capital and any point in the province in a single day – the same as creating departments in France), population (populations between 100,000 and 400,000), and geographic coherence[27]. Each of Spain's municipalities falls within a single province. The provincial division consolidated rapidly and nearly all of the present – day provinces retain borders proposed by Javier de Burgos, although five provinces have changed their names to reflect local languages other than Castilian Spanish and three to match the name of a coterminous autonomous community – Oviedo became Asturias, Logroño became La Rioja, and Santander became Cantabria[28]. The only major change of provincial borders since that time has been the sub–division of the Canary Islands into two provinces rather than one. Nowadays, any alteration in the provincial territories must be approved by the Parliament by means of an organic law.

It is worth mentioning, that the same decree that created the provincial division grouped the provinces into "historic regions" (regiones históricas). However, these were merely honorary and classificatory: there was no level of administration between the central government and the provinces. These "historic regions" had no powers, no administrative organs, no common jurisdiction over the provinces grouped within them.[29] Observing modern territories of autonomous communities we notice that, to a great degree, they cover the division introduced in 1833.

The Constitution of 1978 defines provinces as a local entity with its own legal personality determined by the collection of municipalities and territorial division for the fulfillment of the activities of the state (article 141 para 1). The provinces are of dual nature. On the one hand, they are territorial units functioning to implement tasks of the State, e.g. they are

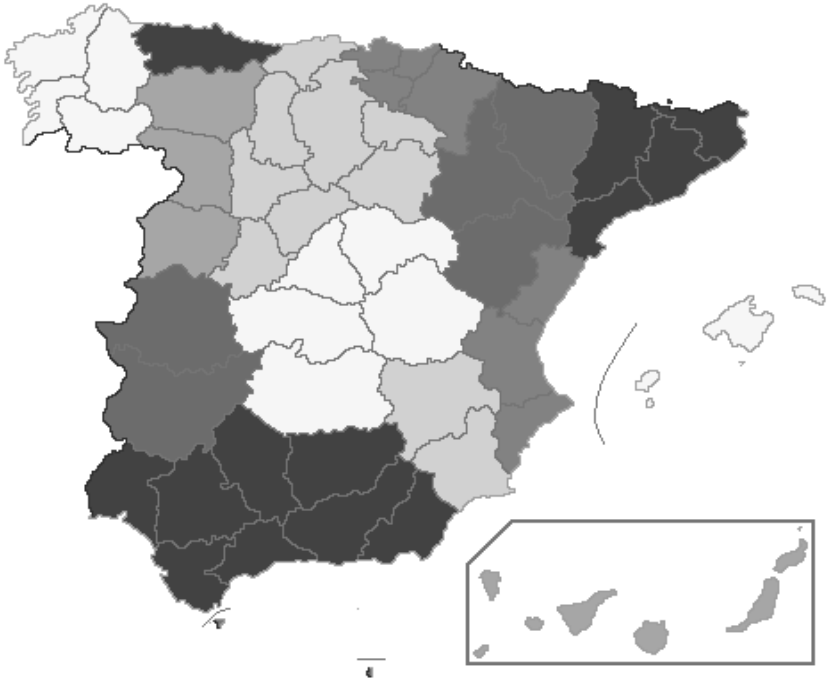
26 In 1925, the jefes políticos were replaced by civil governors (Gobernador Civil), and eventually (1952) by delegates of the central government.

27 J. Pérez, Historia de España. Barcelona 1999, p. 464.

28 D. Conversi, The Spanish Federalist Tradition and the 1978 Constitution, Telos 1998, New York, p. 137.

29 M.G. Clavero, Fuerzas políticas en el proceso autonómico de Castilla y León: 1975–1983, 2002 doctoral thesis, University of Valladolid, Faculty of Philosophy and Letters, p. 60. Accessed online 2011–02–25, Biblioteca Virtual Miguel de Cervantes.

electoral constituencies in parliamentary elections. On the other hand, they are entities of local government performing their own responsibilities. The government and autonomous administration of the provinces is vested in Deputations (Diputación) or Corporations (Corporación) of a representative nature. The executive body is the chairperson of the Deputation/Corporation. In the archipelagos, each island has their own administration in the form of Cabildos or councils. The importance of the provinces, their scope of responsibilities and competences decreased dramatically after the autonomous communities were created, for they assumed a significant part of their tasks. It is worth emphasizing that the regions, endeavouring after permanent extension of their influence spheres, imitate centralistic practice and create themselves organs of administration subordinate to them, on the level of both province and municipality.



Source: Map by Javitomad. http://en.wikipedia.org/wiki/File:Map_Spain_1833.png

Each province consists of **municipalities**, although the Constitution reserves a possibility of other groupings of municipalities. Currently there are eight thousand municipalities in Spain. They make the basic level of Spanish local government. The Spanish Constitution guarantees the autonomy and full legal personality of the municipalities. According to art. 140, their government and administration is the responsibility of their own city governments which are made up of the mayors and councilmen. The city government is (the governing body of municipality) is called the ayuntamiento, a term which is often also used to refer to the municipal offices or "town hall". Ayuntamiento consists of the mayor (Alcalde), deputy mayors (Teniente de alcalde) and plenary assembly (pleno) of councilors (concejales). The mayor, as a executive body, is elected by the councilors (more often) or by the residents. The councilors are elected by the residents of the municipality in universal, equal, free, direct, and secret suffrage for a 4-year term. The number of the councilors (dependent on the number of residents) fluctuates from 5 councilors in municipalities of below 250 inhabitants to 25 councilors in municipalities of below 100, 000 residents. In cities above 100,000 residents the council is extended by one councilor for each 100,000 inhabitants. Many ayuntamientos use a governing commission (comisión de gobierno) system, which is obligatory for municipalities of more than 5000 inhabitants. Members of the governing commission are nominated by the mayor from among the councillors. The governing commission assists the mayor between meetings of the plenary assembly. In small Spanish municipalities until today has the municipality assembly (consejo abierto) survivied, being a form of direct democracy.

The precise organization of the municipalities is governed by the Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local[30] and respective statutes of autonomy of the various autonomous communities. They also contain provisions concerning the relations between the municipalities and the autonomous governments. The authorities of autonomous communities are also responsible for alterations of the municipal boundaries contained within its area,

30 B.O.E. 3–04–1985, n. 80.

and in general the functions which belong to the state administration concerning local corporations and whose transfer is authorized by the state legislation (article 148 para 2).

The scope of the responsibilities of municipalities is generally proportional to the size of their populations. Part of the tasks are implemented by each municipality, and successive tasks are imposed municipalities if they have an appropriate number of residents, e.g. the municipalities of more than 50 thousand inhabitants are responsible for public tasks connected with local transport. Municipalities may also implement the tasks delegated by the state or autonomous communities, which is subject to control for legality and expedience. In general, municipalities enjoy a large degree of autonomy in their local affairs. The Spanish Constitution determines (article 142) that budgets of municipalities and provinces should administer such resources that would enable to implement their tasks to finance themselves from their own taxes, as well from the share in the taxes of the state and the autonomous communities.

Some autonomous communities are divided into **comarcas**. This has its roots in local traditions. Some of comarcas are formally units of territorial division, and comarcal council functioning there have limited self–governing competences. The other comarcas are of traditional importance, which is often connected with geographical or historical factors. The comarca is known in Aragonese as redolada, in Galician as bisbarra, and in Basque as eskualde. In some comarcas municipalities have resorted to organizing themselves in mancomunidad (Tierra de Campos, Manchuela and Ilercavonia) They are free association of municipalities, which exists for a particular period of time to achieve a concrete goal or can exist indefinitely. They are required to set a clear goal, create management bodies distinct from those of the individual municipalities, and provide the mancomunidad with its own budget.

Part 7

THE FRENCH REPUBLIC AS A UNITARY STATE

1. The historical development of the present day territory of France

The first mentions of the territory of modern France appeared c. 600 BC and are connected with the colonies founded there by the Greeks. The crucial ancient events affecting modern France are, however, the invasion of the Gauls (hence the name of the country: Gaul) in the 5th century BC, and the conquest of Gaul in the 50s AD by Julius Caesar. From that time on a rapid development of civilisation as well as latinisation of the inhabitants of Gaul could be observed. A few hundred years of relative peace under the Roman Empire provided for a civilisation jump of the territories of Gaul. Further significant events took place as early as the 4th century AD and are connected with the influx of Germanic tribes, collectively called the Franks, onto the territory of Gaul. Within a hundred years, the Franks, united by Clovis I, defeated the army of the Roman governor as well as other tribes inhabiting Gaul: Alamanni, Visigoths, Burgundians and Ostrogoths. Meanwhile (496 AD) Clovis was baptised, and towards the end of his life established Paris as his capital.

The state of the Franks, ruled by the Merovingian dynasty, originated by Clovis, was a typical patrimonial state whose ruler styled himself King of the Franks and treated the lands of this kingdom as his personal property (patrimonium), for which he divided them at his own discretion among his sons and lease them to those whom he wanted to reward.

The kings appointed magnates to be comites (counts), burdening them with administration, defense and the judgment of disputes. The

counts had to provide armies, which were subject to the king's call for military support. However, annual national assemblies of the nobles and their armed retainers decided on major policies of war making and also acclaimed new kings by raising them on their shields.

The weakest point of the state was the very division into smaller kingdoms among the late monarch's sons, carried out several times in compliance with the customary law of the Franks. Thus, on Clovis's death the state was divided among his four sons. It was already then that the basic division into regions: Neustria (western part), Austrasia (south–eastern part), Burgundy (centre) and Aquitaine (south–west). The administration division of the state of the Franks was based on civitates inherited from the Roman Empire, which were renamed lands (pagi).

The rule of the Merovingians as well as the successive Carolingian dynasty involved attempts at unification of the state interwoven by its further divisions among the sons of the late ruler. In 771, after his brother's death, Charles, later called Charlemagne, begins his independent reign over the state of the Franks. His rule was abundant in numerous war campaigns, which resulted in remarkable extension of the territory of the state. The Kingdom of the Franks embraced the territory from the River Ebro in Spain to beyond the River Rhine. Within the borders of the Empire were also Bavaria, until then independent, as well as northern and central Italy. Also Slavic tribes on the River Elbe had to accept Charles's supremacy. The culmination of his reign was the title of emperor bestowed on him by Pope Leo III. After the next Carolingian, Louis the Pious died, the conflict between his three sons led to the treaty of Verdun, by force of which the Empire of the Franks was divided: Lothair was granted the central part, a strip of land spreading from Frisia through Latium; Charles most of modern France, whereas Louis German lands. After his brothers died, however, part of these lands (including Italy) returned under Charles's control. The West France experienced serious internal and external problems. It lacked internal coherence. Particular counties sought independence from the king, while Celtic Bretagne in the North and Visigothic Aquitaine in the South constituted separate political entities. Simultaneously, the Franks had to cope with the Saracens' raids on Italy, the Normans' on

the northern and western coasts and Magyars' on the south–eastern part of the state. On Charles's death there were two rulers: West–Frankish magnates elected Count Odo of the Robertians king in recognition of his merits in the fights against the Normans, which was defied by the supporters of the Carolingians appointing Charles III the Simple king in 892. The rivalry between the Carolingians and the Robertians lasted as long as a hundred years, sometimes taking form of civil war. A significant event was Charles the Simple's conclusion of peace with the Normans, who settled on the Contentin Peninsula on the English Channel, building there the Duchy of Normandy.

In 987 Hugh Capet, from the Robertians, received the crown, and originated the Capetian dynasty, which reigned France between 987 and 1328, and through sidelines: de Valois, Bourbons and Orleans, with breaks, until 1848. Their descendents still reign in Spain and Luxembourg. It was a very hard time for the state of the Franks. Part of its territory practically came off the Kingdom, vassals constituted independent duchies to the extend that the Capetians were not able to impose their superiority upon them. Initially, the Capetians possessed and really controlled only a small territory around Paris and Orleans, as well as a few counties, abbeys and bishoprics dispersed all over northern France.

In the 12th century a potential threat from the Plantagenet dynasty appeared, when Count Henry II Plantagenet of Anjou inherited the possessions of the Norman dynasty, whose dukes, after the conquest of England by Duke William the Bastard (Conquerer) of Normandy, were simultaneously kings of England. On marrying Eleonor of Aquitaine he also became duke of Aquitaine and Gascony, which made the Plantagenets lords of whole western France. It was King Philip II August of France who managed to regain these territories. He took back all the French lands from the English but Gascony.[1]

1 The first French–English conflict, sometimes called "the first hundred years war" (1154–1259) resulted in the Treaty of Paris of 1259, signed on Louis the Saint's initiative, giving the English Gascony as a fief and committing the both parties to recognise the state of possession of the other party.

Owing to this, and as a result of a favourable geopolitical situation, the Capetians' rule was the period of strengthening the royal power and uniting French lands. Also administration and constitutional reforms were carried out (including the Estates General were first convoked in 1302). Charles IV the Fair's childless death resulted in the end of the Capetians' reign in France[2] and ensued the longest in history war of succession: the hundred years war between England and France which commenced in 1337.

The successive House of Valois continued the process of unification of the French lands, which faced resistance of the Duchy of Burgundy, which, being formally the French king's fief, was practically independent and had their own policies, standing by the English in the hundred years war (in 1435 they shifted sides). The hundred years war ended in favour of the Valois, who pushed the English away of the French lands (1453). It was simultaneously an opportunity to introduce serious constitutional transformations, which occurred at that time and in the following century. As a result of the growth in importance of cities, which were the king's allies, as well as changes in the social status of peasants, the power of magnates, hitherto functioning as power centres in the state, had shrunk. Defeating the feudal lords enabled Louis XI and his descendants to exercise unlimited power, which began to take form of absolutism. Decision making processes became strongly centralised. At the same time, in the years 1480–1536, Provence, Burgundy, Bretagne and Savoy were annexed to France, and subsequently, as a result of the so–called Italian wars the bishoprics of Toulon, Metz and Verdun.

After Henry III's death, the Bourbon dynasty took the power (1589) and continued strengthening absolutism. France of that time was a united and strongly centralised country of extending royal administration.[3]

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2 The last kings of the Capetian dynasty are referred to as the condemned kings, because Philip IV the Fair imprisoned Pope Boniface VIII and ordered to burn on stake the Grand Master of the Knights Templar, Jacques of Molay, who cast upon Philips and his offsrpings a curse. Philip's all four sons died childless.

3 During Cardinal Jules Mazarin's rule, the Fronde of parliaments, aristocracy and noblemen rebelled against the absolute government. In the period 1648–53 there were also popular riots. The collapse of the Fronde broke the resistance of nobility and aristocracy, who, obtaining the king's concessions and benefits, reconciled themselves with absolutism.

Further territorial acquisitions: Alsace, was brought by the Thirty Years' War (1618–48). The symbol of the French absolute monarchy became Louis XIV's phrase: "I am the State" (l'État c'est moi). Free from internal fights, France experienced the period of prosperity. Simultaneously, it became a European power, waging victorious wars against the Habsburgs and England. At the same time the French fleet develops and the colonial trade thrives. France acquires, for example, lands in India, Africa, Canada, Louisiana and the Antilles.

In the 18th century France is in a financial crisis, suffers from defeats in the War of the Austrian Succession and the Seven Years' War. From the mid-18th century on, the bourgeoisie, ousted from influential positions, found themselves in the opposition to the monarchy, emerging as the political leader of the whole Third State. The American Revolution (1776–83) strengthens liberation aspirations. Finally, the Enlightenment ideas result in the French Revolution (1789–99). In this period, the constitutional system of France transforms several times, beginning with constitutional monarchy, through republic and the rule of the Directory. The territorial division of the country introduced in this period, has practically survived until now. The previous division was quite obscure and heterogeneous. The territory of France consisted of many areas singled out geographically, demographically or for the needs of particular authorities' jurisdiction, e.g. metropolises, dioceses, principalities, baronies, gouvernements, districts, general districts (généralités), lands of states (pays d'états), lands of elections (pays d'élection), bailiwicks (baillages), areas of parliaments' jurisdiction (parlements). Often, these institutions were followed by names of a given region.

Then departments were created, as territorial units so small that a horse rider could reach the seat of power from the most distant edge of the department, settle his affair in the office and return home within one day. At the same time there appeared French communities, later on cantons and arrondissements.

The difficult internal situation, the political and economic chaos as well as the Directory's failures were used by General Napoleon Bonaparte, who staged a staged a coup d'état and seized power.

Henceforth he ruled France and in 1804 assumed the title of emperor. The Napoleonic period was the return of monarchic rule based on the strong executive branch. However, this did not meant the return to the feudal order. Having assumed power, Napoleon reformed, extended and unified the machinery of State, introducing a centralised system of state administration. He appointed prefects (heads of departments) and judges, who, in turn, appointed officials of lower rank. He also reformed the fiscal system, which in the course of time improved the financial situation of the state. Napoleon also codified civil law in the so–called the Napoleonic Code, cancelling completely feudal legislation. The reformed secondary and tertiary schools were subordinated to the state. The police system was extended.

Simultaneously, Napoleon's rule is a permanent armed conflicts called Napoleonic wars. Almost whole Western and Central Europe fell under Napoleon's influence within his Great Empire. It was the Russian campaign that broke Napoleon's plans and the military power of France, which resulted in the revival of a successive anti–French coalition. After the lost battle of Leipzig, Napoleon was forced to abdicate. Louis XVIII returned from exile to Paris, restoring the rule of the Bourbons.4 As the result of peace treaties (1815) France lost most of its colonies to Great Britain and suffered territorial losses in Europe.

The restoration of the Bourbons did not mean, however, cancelling Napoleon's reforms. The administration, the Civil Code and other Napoleonic institutions were maintained. The state, functioning as a constitutional monarchy, experienced economic development, at the same time carrying out a policy of colonial expansion in North Africa. After three years of the Second Republic, Louis–Napoléon Bonaparte, Napoleon I's nephew, staged a coup and on 2 December 1852 pronounced himself Emperor of the French as Napoleon III. Economic development secured peace in the internal policy whereas in his foreign policy Napoleon III sought to overthrow the 1815 treaties

4 Napoleon did return from exile and attempted to regain power. This period, known as 'Napoleon's hundred days' ended with his defeat at Waterloo in 1815, which decided abort the future of the emperor deported to the island of St Helena, were he was imprisoned till the end of his life.

and to regain the territories lost by France or to return to the so–called natural borders, i.e. those in 1792. In this period France is involved in Asia and in reacquisition of Savoy and Nice in return for assistance in the unification of Italy. Having been defeated in the war with Prussia, France lost Alsace and Lorraine. Napoleon is deposed and in 1875 the Third Republic is proclaimed, which continues the colonial policy. France subjugated remarkable areas in Africa (Maghreb, French Equatorial Africa, French West Africa, Madagascar), Asia (Indochina) as well as numerous islands over all oceans, becoming the second, after Great Britain, world colonial power. At the turn of the 20th century it participates in the tripartite French–Russian–British alliance (Entente Cordiale or Triple Entente), which leaves World War I victorious, incorporating again Alsace and Lorraine. Both this victory as well as the part in World War II did not affect basically the changes in the territorial structure of France, while the Constitution enacted in 1946 opened the period of the Fourth French Republic with week presidency and the parliamentary system, referring to the tradition of the Third Republic. France, along with its overseas departments and territories, as well as with the so–called associated states, adopted the name French Union. Economically and financially weakened, France needed aid in the reconstruction of the country, which it obtained thanks to the Marshall Plan.

Soon after the end of World War II the decomposition of the French colonial system began, with which France did not want to reconcile and which entangled it in long imperial wars (Indochina, Algeria),[5] which, supported by the right wing as well as a remarkable part of army senior officers, divided French society, led to the disintegration of political parties and several government crises, which resulted in the collapse of the state authority. On 13 May 1958 the control was taken by General Charles de Gaulle and on 28 September the new Constitution was approved of in a referendum, giving rise to the Fifth French Republic.

France is one of the largest European countries, with 64.5 million inhabitants (21st place in the world), and its surface are, 675.417 square kilometres places it at 40th position among the modern world

5 In 1957 Morocco and Tunisia gained independence.

states. (the largest area in the EU). Beside the so–called metropolitan part in the continent of Europe, and for its shape is called by the French themselves l'Hexagone (hexagon), the territory of France also embraces the remnants of the French colonial empire, as in the years 1958–60 most of the colonies were granted independence. France still holds the overseas departments: Guadeloupe, Martinique, French Guyana and Reunion, as well as overseas collectivities (the new terminology appeared along with the amendment to the Constitution in 2003): French Polynesia (the only one which has a status of overseas country), New Caledonia, Wallis and Futuna, Saint–Pierre and Miquelon as well as Mjotta, which, as a result of the referendum, will become an overseas department in 2011. Also French Southern and Antarctic Lands belong to France and enjoy a special status of overseas territories. Having regained independence some of the former French colonies continue cooperating with France on many planes: political, economic and cultural within the framework of the French Community (French: Communauté française, which has replaced the French Union), as well as the Francophonie (La Francophonie). The French language is the main official language in most of these countries.

The French Republic is one of the most developed countries of Europe and the world in respect of constitutional traditions, economy, military (the third nuclear arsenal of the world), and culture. It is counted among the group of eight most influential states of the world: the G8 (beside Great Britain, Germany, Italy, Japan, the United States, Canada and, since 1997, Russia). France was one of the founding states of the European Communities as well as the founder–member of the United Nations (it belongs to the UN Security Council where it enjoys the right of veto). Beside the aforementioned Francophonie, France also belongs to the Latin Union, the organisation of nations that use Romance languages.

In spite of the fact that the private sector dominates in the economy of France, the influence of the state on strategic economic sectors (e.g. transport, energy, telecommunication) is remarkable. Approximately 20% of employees are employed in the public sector. France is distinguished for its system of social services (education, healthcare), public services (transport) and one of the lowest rates of

poverty. The main industries are motor industry, chemicals and food processing. It is worth noting that due to remarkable investments in agriculture as well as conducive geographical conditions, France is one of the major European producers and exporters of food (grain, milk and dairy, especially cheeses, pork, beef, poultry and wines, very well known all over the world). What is also characteristic of France is the government's energy policy, thanks to which the most of electric energy (appr. 75%) is produced in nuclear power plants and France is the major electric energy exporter in Europe.

The official language is French. The capital city is Paris. France has belonged to the euro zone since the euro replaced the French franc in 2002.

2. Bases of the political system of the French Republic

France is a state which has its record in the history of the world constitutionalism foremost for two reasons. Firstly, the Constitution of France of 1789 is recognised one of the first Constitutions of the world (disregarding here historical disputes on the understanding of the very term "Constitution"), and, secondly, this state has been an object of frequent and sometimes quite radical constitutional changes. As S. Bożyk writes, "the significant evolution of political and constitutional forms of this state manifests in the fact that the currently binding Constitution of the Fifth Republic of 1958 is the 16th Constitutional Act in the history of France". The present Constitution is the second, after the Constitution of the Third Republic, longest–lasting constitutional act of France (excluding here the Declaration of Rights)[6].

The constitutional vision of the Fifth Republic emerged as a response to the constitutional practice of the Third and Second Republics. Undoubtedly the political father of this Constitution was General Charles de Gaulle, which led to the situation in which beside classic constitutional principles, such as sovereignty of the people or

6 S. Bożyk, Konstytucja, Białystok 1995, p. 12.

separation of powers, the shape of the Constitution definitely reflected the views of remarkable strengthening the executive branch, within which the head of state, the President of the Republic, is of particular importance. M. Granat and K.J. Kaleta, writing about the Constitution of the Fifth Republic as a phenomenon of the European constitutionalism, emphasise, however, that although it was a response to current political needs, the ideas underlying it are of more universal nature[7].

J. Szymanek, analysing de Gaulle's programme premises for the Constitution, points at its four elements: the head of state as a real decision–making factor freed from the control of the parliament and political parties, strengthening the government so as it stop being just the parliament's managing committee, weakening the constitutional status of the parliament and "locating all the proposed solutions in a capable formula of democracy, which for de Gaulle was tantamount to remaining within the parliamentary regime, as well as, somewhat on the other hand, reaching for the institution of referendum"[8].

The Constitution was approved of by the people in the constitutional referendum on 28 September 1958. The very circumstances thereof were unusual. A. Jamróz reminds a situation of social rebellion of the French people "in defence of French Algeria" and a threat of military coup as the circumstances in which the power was taken on 1 June 1958 by Charles de Gaulle, as Premier (Prime Minister) of the Government of National Unity. Two days later this government, by force of the Constitutional Act, obtained the authorisation "to prepare the draft of the Constitutional Act" containing certain principles (the method of changing the mode of novelisation of the Constitution of the Fourth Republic aroused vivid controversies at that time). The Government's draft, prepared quite hastily, assessed by the Advisory Constitutional Committee and then by the Council of State, was approved by the Council of Ministers on 3 September 1958 and then put to referendum. A. Jamróz cogently asserts that the dominating role of the government

7 M. Granat, K.J. Kaleta, Fenomen konstytucji V Republiki Francuskiej, Przegląd Sejmowy 2008, no 6, p. 9 and next.

8 J. Szymanek, Aksjologia konstytucji V Republiki Francuskiej, Przegląd Sejmowy 2008, no 6, p. 45 and next, C.J. Friedrich, The new French Constitution in Political and Historical Perspective, Harvard Law Review 1959, vol. 72, no 5, p. 806 and next.

in the process of writing the Constitution of the Fifth Republic, broke up with the domination of the Parliament, "which led to the weakness of the executive power, instability of the regime, excessive strengthening of political parties' importance, and, consequently, generally to the constitutional instability of the Fourth Republic, which was a beneficial basis for radical constitutional changes". This resulted in the effect of these works, about which the same author writes as "a real break–up with the domination of the Parliament in the French political life"[9].

The Constitution enacted in 1958 included in its original version a preface and 15 chapters. As a result of twenty–four amendments, of which the most important took place in 1962, 1974 and 2008, this text written over sixty years ago, has been subject to many fundamental alterations (at present 17 chapters, 108 articles, among which there are ones with successive marks, e.g. Article 74–1, Article 75–1, Article 88–3). M. Granat and K.J. Kaleta, writing about the durability of the Constitution of the Fifth Republic, maintain that it is "to a remarkable degree a consequence of the fact that its authors managed to reconstruct the qualities of the national character of the French. The Constitution satisfied both the efforts to preserve the unity of the nation, and the respect for political pluralism, which has for ages been an element of the French identity. The pluralism of positions and worldviews of the French was to find its reflection in the National Assembly, whereas the President was to symbolise the unity of the French, the majesty of France and the durability of national values."[10] However, it is worth bearing in mind that the number, extent and depth of the amendments justify the cogent opinion on this aspect of the Constitution of the Fifth Republic expressed by W.Skrzydło, who referring to Article 28 of the Constitution of 1793, which contains the statement that: "one generation cannot enslave the future generation with their laws", writes that "although currently France still applies the Constitution of 1958, it

9 Jamróz A., Konstytucja V Republiki po 50 latach obowiązywania. Kilka refleksji, Przegląd Sejmowy 2008, nr 6, p. 16 and next. See also Friedrich C.J. The new French Constitution in Political and Historical Perspective, Harvard Law Review 1959, vol. 72, no 5, p. 800 and next.

10 M. Granat, K.J. Kaleta, Fenomen konstytucji V Republiki Francuskiej, Przegląd Sejmowy 2008, no 6, p. 11.

is not the same Constitution. Also social and political circumstances of its functioning have changed".[11]

The characteristics of the French Constitution includes also the fact that in France there is the so–called Constitutional Bloc: beside the Constitution of 1958, the Declaration of the Rights of Man and the Citizen, the preamble for the Constitution of the Fourth Republic of 1946, and the Constitutional Reform of 2008 added the reference to the rights and responsibilities resulting from the Charte de l'environnement of 2004.

The characteristics of the Constitution of the Fifth Republic is based on principles fundamental for the constitutional system, determining the French political system. Undoubtedly, they include the **principle of the republican form of government**, which, due to article 89, gained a special status of regulation which is not subject to change. M. Granat and K.J. Kaleta recommend to interpret the republicanism of France as not only the antithesis of monarchism but also read it in the context of the other constitutional principles referring to "the political philosophy based on absolute respect for the rights of the people, freedom of man and objection against any forms of authoritarian way of exercising power".[12]

Other principles are expressed foremost in article 2 of the Constitution, these being the principles of indivisibility, secularity, democracy and social state. **Indivisibility** means homogeneity of the French people regardless of the origins of its citizens. **Secularity** is understood in the aspect of the separation of church and state. Democracy is determined by mechanisms broadly involving the people in decision making concerning the people, and the formula of social France refers to the idea of welfare function of the state. The **principle of democracy** is also referred to by the constitutional principle of sovereignty of the people, which fulfils it through its representatives (the principle of representation) as well as referendum.

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11 W. Skrzydło, Największa nowelizacja konstytucji V Republiki (z dnia 23 lipca 2008 r.), (w:) Bożyk S. (red.): Prawo, parlament i egzekutywa we współczesnych systemach rządów. Księga poświęcona pamięci Profesora Jerzego Stembrowicza, Białystok 2009, p. 347–348.

12 M. Granat, K.J. Kaleta, Fenomen konstytucji V Republiki Francuskiej, Przegląd Sejmowy 2008, no. 6, p. 12.

3. Central authorities of the French Republic

The parliament of the French Republic is a bicameral parliament. It consists of two chambers: the National Assembly (Assemblée nationale)[13] and the Senate (Sénat)[14]. Both chambers are of representative nature, but in the case of the Senate, there is a record in the Constitution defining the chamber as a representation of territorial units of the Republic (Article 24 para 4). This is partly reflected in the French electoral system.

Elections to the **National Assembly** are common, direct, equal, based on majority (once, in 1986, they were proportional) and by secret ballot. In France there is the system of one–seat constituencies, determined on the base of the principle of material equality. The number of constituencies depends of the number of seats, and the latter is, as already mentioned, determined by the Organic Act (in each department there must be at least two constituencies). A seat is won by the candidate who gains absolute majority of valid votes, which make not less than 25% of the entitled to vote. When none of the candidates reaches such a result, in a week's time the second round is held, in which stand the candidates who in the first round obtained at least 12.5% of valid votes. In the second round, the seat is taken by the candidate with the best result.[15] Article 24 para 3 stipulates that the number of deputies (members) to the National Assembly cannot exceed 577[16].

Elections to the **Senate** are common, indirect, equal and by secret ballot. Despite the fact that the term of the senators lasts three years the elections are held every three years but only in 1/3 of departments where the same fraction of the Senate is elected. After three years, elections are held in another group of departments. As already mentioned, the elections are indirect: the senators (sometimes also their deputies) are

13 S.G. Lazardeux, The French National Assembly's Oversight of the Executive: Changing Role, Partisanship and Intra–Majority Conflict, West European Politics 2009, vol. 32, no. 2, p. 287–309.

14 P. Smith 300 Senators in Search of a Role: The French Senate as Chambre de la Décentralisation, Nottingham French Studies 2005, vol. 44, issue 1, p. 82–95.

15 An interesting solution is an obligation of each candidate to bring in a deposit, which is lost if he/she obtains less than 5% of valid votes.

16 See: H. Drake, All Change Here? The French Presidential and Parliamentary Elections of 2007, Mediterranean Politics 2007, vol. 12, no. 3, p. 43–429.

elected by department electoral colleges including deputies (members of Parliament), members of community and region councils as well as additional delegates selected by these councils (in the communities below a thousand residents only representatives of the council, above 9 thousand all members of the council, above 30 thousand all members of the council and extra delegates, one for each successive thousand of residents). If in a given department there are more than four seats, elections are by majority but also proportional. In the elections in which up to four senators are elected, the procedure is similar to the elections to the National Assembly: to obtain the mandate absolute majority of valid votes is required, which constitute not less than 25% of the entitled to vote. In the second round (which is held on the same day, if there is a need), the seats are given to the candidates with the best electoral results at the principle of simple majority. In the departments where more than four senators are elected, the proportional system is applied. Article 24 para 4 establishes that the number of senators cannot exceed 348.

Taking into consideration the whole of competences of the both chambers one may state that in France there is an unequal bicameralism, with the clearly marked superiority of the National Assembly. It is far, however, from a marginal role of the Senate. According to E. Gdulewicz, the status of the Senate is much stronger than its equivalents in the Third or Fourth Republics. The constitutional system of the Fifth Republic also envisages the institution of Congress, which is the two chambers summoned by the president for a joint meeting. This may occur exclusively in order to revise the Constitution[17].

The mode of the parliamentary work is based on a system of sessions. As a rule, there is one session a year beginning on the first working day of October and lasting until the last working day of June. During this time, there may be meetings of which there cannot be more than 120 (per session). Moreover, on application of the prime minister or the majority of the members of the National Assembly, the president may summon extraordinary sessions.

17 E. Gdulewicz, System konstytucyjny Francji, Warszawa 2000, s. 47 and next.

Functions of the parliament were determined in article 24 para 1 of the Constitution of the Fifth Republic. In accordance with this provision the parliament enacts laws (vote la loi), controls the actions of the government (contrôle) and assesses its policies (évalue les politiques publiques)[18].

Legislation in France was constitutionally divided among the people alone (referendum), the parliament, the president and the government[19]. Although the Constitution vests in the parliament the legislation only in the scope of named matters (article 34), and puts the Constitutional Council on guard of obeying this enumeration, in practice it turned out that as a result of the adjudication of this Council, currently, as E. Gdulewicz writes, this "constitutional division into (limited) matters of law and government legislature are today the past".[20] This transfer of emphasis onto the parliament in legislation weakens the role of the executive only colourably, as it is the government that gives the rhythm of legislative works of the parliament and the legislative procedures prefer government projects[21].

The control function of the parliament concentrates on the mechanisms for acquiring information about the functioning of the government (sometimes also other entities). This is achieved through such instruments as a government statement, which sometimes results in a plenary debate, interrogation procedures (connected with the vote of non–confidence), oral enquiries, written enquiries, the so–called "hour of questions", permanent and special committees, which can, for example, demand the presence or producing appropriate information, investigation committees (commissions d'enquête: article 51–2) and parliamentary delegations (of one or both chambers) monitoring the government implementing the laws. The reform of 2008 strengthened the government's control over the public finances, introducing, in article

18 S.G. Lazardeux, The French National Assembly's Oversight of the Executive: Changing Role, Partisanship and Intra–Majority Conflict, West European Politics 2009, vol. 32, no. 2, p. 287–309.

19 E. Kerrouche, The French Assemble´e Nationale: The Case of a Weak Legislature? The Journal of Legislative Studies 2006, vol. 12, no. 3–4, p. 336–365.

20 E. Gdulewicz, System konstytucyjny Francji, Warszawa 2000, s. 52.

21 J. Hayward, Parliament and the French Government's Domination of the Legislative Process, The Journal of Legislative Studies 2004, vol. 10, No, 2/3, p. 79–97.

47–2, an auxiliary role of the Court of Audit over the implementation of financial laws and on financing social insurances as well as assessing the government's policies in public affairs.

Beside the aforementioned instruments for information acquisition, the parliament has at its disposal also verifying mechanisms, e.g. approves legislative ordinances (normative acts equal to regulations normally reserved for the legislature), gives its consent to prolong the State of Emergency (or State of Siege) introduced by the Council of Ministers over 12 days (article 36), gives also its consent to the declaration of war (article 35) and controls international agreements enumerated by the Constitution (article 53, e.g. peace treaties and those concerning the status of an individual).

A solution typical of the parliamentary system, introduced in the Constitution of the Fifth Republic is accountability of the government to the parliament, which is a key mechanism of political responsibility for the control function. It is a solidary responsibility. A vote of non–confidence may result in the government' resignation tendered to the president.[22]

The parliament may be dissolved in the French Republic in the situation when it fails to give a vote of confidence or passes the motion of no confidence in the government. In this case, it is the Prime Minister's obligation to tender the resignation of the government to the president. The president faces an alternative, either to accept the resignation or, not accepting it, dissolves the National Assembly.

The central element of the system of government in the Fifth Republic is the institution of **President of the Republic** (Président de la République), often called in the literature of the subject a keystone of the system[23].

Presidential elections, since 1962, in compliance with articles 6 and 7 of the Constitution, have had a form of direct common vote. Every

22 So far such a case has occurred once. In 1962 a vote of non–confidence was given to G. Pompidou's government, as a result of which President Charles de Gaulle used his right to dissolve the parliament.

23 Furthermore see: R. Elgie, Duverger, Semi–presidentialism and the Supposed French Archetype, West European Politics 2009, vol. 32, no. 2, p. 248–267.

French citizen of over 23 years of age and enjoying all electoral rights, is entitled to the passive electoral right. The condition of taking part in the race for the presidency of the Republic is gaining a support from 500 citizens holding elective positions (parliamentarians, mayors, members of general councils, the Council of Paris or territorial assemblies of the overseas territories). Absolute majority is a decisive factor in the elections and in the event that in the first round none of the candidates reach such majority, a fortnight later, two candidates with the best results in the first round take part in the second round. The presidential term currently lasts 5 years (formerly 7 years), and one person cannot hold this office longer than two successive terms[24].

The responsibilities of the Head of State concentrate around three functions: protecting the Constitution, constitutional and political arbitration, guaranteeing national independence, integrity of the territory and obeying treaties. The way of implementing these tasks depends on a current configuration of political forces, a personal conception of presidency, as well as the way of using constitutionally determined concrete rights of the Head of State. Among the catalogue of the constitutional competences of the president there are, for example, ones demonstrating his constitutional status and influence on other organs of the state:

- nominating members of the Constitutional Council and its chairman,
- referring to the Constitutional Council for the scrutiny of constitutionality of statute laws and international agreements,
- initiating a referendum for constitutional changes,
- dissolving the National Assembly, opening and closing extraordinary sessions of the parliament, delivering an address (read out) to the both chambers of the parliament, as well as delivered in person in the Congress (after an address in the Congress there may be a debate over it, but in his absence and without voting),

24 See: H. Drake, All Change Here? The French Presidential and Parliamentary Elections of 2007, Mediterranean Politics 2007, vol. 12, no. 3, p. 43–429.

– nominating a Prime Minister and, on the latter's request, appointing and dismissing ministers; presiding the government's sessions,
– the constitutional reform of 2008 added to the Constitution of the Fifth Republic a record concerning appointing persons for civil and military positions which are not assigned by the Government, which contains an extra note, that in the event that the nomination concerns an office with influence on respect for freedom and rights of individuals or the economic and social sphere of the nation's life, it should be preceded by public consultations with statutorily proper permanent committee in each of the parliamentary chambers; where in the case of a negative opinion of 3/5 of voters in each committee, such a nomination becomes impossible,
– signing laws, ordinances and decrees with the force of law,
– legislative veto or a motion of preventive revision of a law,
– presiding the National Judicial Council (Conseil supérieur de la magistrature) and nominating its two members,
– granting pardons,
– supervising the armed forces, presiding councils and committees of national defence, as well as making decisions on using nuclear weapons (by virtue of the decree of 1964),
– negotiating and ratifying international agreements, nominating ambassadors and receiving representatives of foreign states.

The President of the Republic is not politically accountable, the only responsibility he bears is that constitutional. Until 2007 it was accountability for treason, the procedure of which may be initiated by the parliament which indicts the president before the High Court of Justice[25]. Since 2007 it has been constitutional accountability in which there is a political element: the Head of State bears responsibility for the infringement of his duties, which stands in flagrant contradiction with exercising his function. The accountability is exacted before the

25 C. Lageot, The Lack of Political Responsibility of the French President under the Constitution of 1958 and the Old Article 68, Vniversitas. Bogotá (Colombia) 2009, no. 118, p. 217–227.

parliament assembled as a High Court (Article 68, the requirement of the statutory majority of 2/3).

Typical political responsibility for part of the president's acts was transferred to the government through the institution of countersignature. Consequently, the president's official acts may be divided into two groups. Using the criterion of the president's independence for their implementation, they are prerogatives and acts subject to countersignature.

The notion of cohabitation is derived from the French constitutional practice and means the situation where the president is a representative of the opposite political option to the current parliamentary majority. In such a situation, as the French experience has demonstrated, the role of the President of the Republic is limited, especially in the process of forming the Council of Ministers, where the parliamentary majority has a decisive say. Also the two segments of the executive power are separated. The importance of the Prime Minister grows, since he "manages policies of the nation" reducing the constitutional role of the president to guaranteeing the proper functioning of the public authorities (arbiter). On the other hand, if the president and the parliamentary majority are representatives of the same political colours, the status of the President justifies the name of the ruling model of the Fifth Republic, which is the 'semi–presidential system'. In such political reality the president had a decisive say in forming the cabinet. He could force the Prime Minister's resignation and, in practice, the implementation of the political responsibility of the government was transferred from the parliament to the president. Along with the prerogatives allowing for influence on the current actions of the government (e.g. summoning meetings and determining their agenda), this allows to state that the president becomes an actual boss of the whole executive.

The constitutional status of the **Government of the Fifth Republic** reflects some general assumptions of a parliamentary system, yet with some modifications connected with the constitutional role of the head of state as well as a current distribution of political powers (cohabitation). This is reflected in, for example, the way of forming the government, which consists of the Prime Minister and members of the

government, whose number is not rigidly determined and corresponds with the vision of the organs participating in the process of its forming. The Prime Minister is nominated by the president by a nomination degree, although, depending on the political situation , either he has a dominating status in this process, or, in the case of cohabitation, it is reduced to complicated negotiations with the parliamentary majority. The other members of the government are nominated on request of the Prime Minister himself, who in addition will gives his countersignature to appropriate acts of the president concerning this case, nominating and attributive decrees, by the same token determining the structure, the scope of competences of the particular members of the government. What is important, in the French constitutional system the government does not have to apply for the investiture to the parliament, though there are no obstacles for the government to do so in the form of presenting the National Assembly a motion of the vote of confidence in connection with the programme or a statement concerning the general policy of the government. The assembly may reject it by simple majority.

Currently (2011) the government consist of the Prime Minister and 39 members of the government, among whom there are three categories: ministers of state (now 2), deputy ministers (17) and secretaries of state (19). The division into these three categories has its historic background. Nomination of a minister of state is of honorary nature, whereas the function of deputy minister and secretary of state concern actually the same function of managing a particular section of the state administration or another task (in both situations these categories of persons may be authorised by the Prime Minister: deputy ministers by the Prime Minister or by another minister). Regardless of the decree establishing the scope of responsibilities or a current distribution of political forces, the traditional ministers appointed in every successive government were: ministers of finance, interior ministers, foreign ministers and ministers of defence.

There are generally two constitutional responsibilities of the government: determining and conducting policies of the nation and managing the administration and the armed forces. According to E. Gdulewicz, traditionally basic functions of the government are considered legislation, nominations of public offices and management

of the state administration. These tasks and functions are carried out through more precise competences of both the Prime Minister and the whole government and its particular members[26]. The term Council of Ministers is reserved for the government meeting led by the president, which means that the meetings of the Council of Ministers are held in the Élysée Palace once a week, and the president determines the date and the composition of the cabinet. A special right of the government concerning making law, included in article 38 of the constitution (also subject to the reform of 2008) is worth noting. In order to implement an established programme of the government, it may turn to the parliament for consent to issue ordinances in legislative matters in a particular time.

Further competences belong to the Prime Minister alone, these being the right to issue decrees, implementation of a government legislative initiative, application to the president for the implementation of an initiative of changing the Constitution, motion of confidence, motion for appointing a mixed committee (see: the subchapter on the parliament), countersignature of the president's acts, the right of application to the Constitutional Council for examination of constitutionality of laws and international agreements, the right to appoint persons for particular civil and military positions, application to the president for nominating and dismissing members of the government, as well as organisation and course of the government's work.

The role of members of the government is to manage the section of the administration, vested in them, responsible for building respective policies of the government, and then their implementation. Moreover, they countersign some acts of the president, along with the Prime Minister, and also the latter's acts. Certainly, their right but also responsibility is participation in works of the Council of Ministers as well as public speeches in the parliament.

It is also worth emphasising two elements which are essential in the government administration. First, the managing political role is played by cabinets which accompany the Prime Minister and the

26 E. Gdulewicz, System konstytucyjny Francji, Warszawa 2000, p. 57 and next.

members of the government. They are teams of approximately 50 people in the Prime Minister's cabinet and 6–9 people in the case of members of the government, whose task is to prepare and presentation to them various affairs within their property, often with proposals of solutions. Second, a serious role among the layer of professional administration, being somewhat below the above–mentioned political layer, is played by the Secretariat–General. It is an auxiliary organ of the government subordinate to the Prime Minister, attending him legally and administratively, e.g. coordinating the legislative activity of the government and its relations with the parliament, as well as preparing meetings of the Council of Ministers.

In accordance with the constitutional approach to the **judicial power**, only common courts are counted as such in France. The guarantor of their independence is the President of the Republic, who is supported in this matter by the Superior Council of Judiciary (le Conseil supérieur de la magistrature). Among the constitutional competences of this council is giving opinions on candidates for judges and public prosecutors, acting as a disciplinary court for judges, recommending disciplinary measures in the cases of public prosecutors, giving opinions on judges' deontology, as well as functioning of the judicial power presented by the Minister of Justice.

The system of common judiciary in France is relatively extended. What is characteristic is that there are several courts which consider a case as the first instance, depending on the worth and object of the conflict. They are divided into civil courts and special courts. Among the former are:

- first instance courts; they decide on disputes between private persons, where the worth of the object of the conflict does not exceed EUR 7,600,
- higher instance courts, they decide on disputes between private persons, where the worth of the object of the conflict exceeds EUR 7,600, as well as family affairs concerning citizenship, property seizures, patents, trademarks, dissolution of associations.

Special courts are:

- commercial courts; they decide on all types of economic and commercial disputes,
- labour courts; they adjudicate in cases between an employer and an employee,
- courts for social insurance; they decide on disputes between social insurance funds and their beneficiaries,
- arbitration courts for agricultural property lease; they decide on disputes connected with leasing agricultural property,
- courts adjudicating in disputes about inability to work, which deal with disputes connected with states or degrees of inability to work resulting from an illness or disability.

The higher instances, which will judge the case again on its merits, are appeal courts. The ultimate instance is the Court of Cassation (Cour de cassation), which considering cassation complaints, judicially supervises the accuracy of work of lower instance courts.

The Constitution of the Fifth Republic also provides for the existence of special institutions affecting the image of the judiciary in France, but not counted among it: the Council of State and the Constitutional Council.

The Council of State (Conseil d'Etat) is an organ for two functions: opinion–giving and control. As for the former function, it gives opinions on generally applicable government decrees which do not concern statutory matters (article 37 para 2), consults government ordinances (article 38 para 2) as well as gives opinions on governmental law proposals before their presentation for discussion in the Council of Ministers (article 39). In the scope of administration control, its property has been changing along with creating successive levels of administration courts. The Council of State gradually lost its competences and whereas before 1953 it had exclusive rights in this matter, now its role is reduced to an administrative court of cassation (exceptionally it works as the first or appeal instance). A characteristic quality of the French administrative judicial model is regarding the Council of State, administrative courts of appeal and courts of administration as part of

the executive power. Members of the Council of State are appointed by the Council of Ministers on application of the Minister of Justice, and its president is the Prime Minister.

France does not have a typical constitutional court. Its counterpart is the Constitutional Council (Le Conceil Constitutionnel), instituted by the Constitution of the Fifth Republic in 1958. As a result of the constitutional reform of 23 July 2008, a few quite important constitutional changes concerning the Constitutional Council were introduced. The modifications came into effect on 1 March 2010.

One of the particular qualities of this institution is the way of its appointment. It consists of 9 members (there are no special requirements from the candidates) appointed by the President of the Republic, the President of the National Assembly and the President of the Senate, three by each.

Among the responsibilities of the Constitutional Council are:

- control over the constitutionality of organic laws, ordinary laws, international agreements and regulations of the both chambers,
- so–called competency control: the Council stands on guard of the principle of the separation of powers, examining if the Parliament in its legislative work does not intrude the competences of the government,
- giving opinions on the President's competences to proclaim a state of emergency,
- guarding the correctness of parliamentary and presidential electoral procedure, as well as referendum; it announces its results and considers electoral protests.

Since the reform of 2008, two additional competences have been granted to the Constitutional Council. It may decide on constitutional complaints, and also answer the questions asked by common courts through the Council of State or the Court of Cassation.

4. The administrative division of the state and local government

The administrative division of France, formed in its outline as early as during the French Revolution, is relatively complicated. It is a multi–tier system[27]. In addition, in the units of administrative division of some tiers there are parallel organs of the government administration and organs of local government. Moreover, the territory of France is divided into metropolitan France and overseas territories, which refers to the imperial power of France. Another quality characterising the territorial organisation of this state is an evolutional process of transformation from a centralised unitary state to a decentralised unitary state[28]. This process was initiated only in the Fifth Republic and is still on–going.

The process of decentralisation is reflected on the constitutional level. Article 72 para 3 of the Constitution of the Fifth French Republic of 4 October 1958, granted the territorial communities (i.e. communes, departments, regions, special–status areas and the overseas territorial communities) and their authorities some extent of independence, stating that: "these units are self–governing through elected councils and have power to make regulations". The territorial communities enumerated in Article 72 enjoy, by the same token, the constitutional protection. Any attempt at removal of a particular category is possible only through changes on the constitutional level. Limits to the process of decentralisation are set in Article 1 of the Constitution, which says that France is an indivisible Republic and in Article 3 with the principle of the sovereignty of the people.

The reform of the administration took place relatively recently[29]. The changes were introduced by a method of "small steps" through a series of laws in the years 1982–1988[30]. By the statute of 2 March

27 C. Crespy, J.A. Heraud, B. Perry, Multi–level Governance, Regions and Science in France: Between Competition and Equality, Regional Studies 2007, vol. 41.8, p. 1069–1084.

28 M. Keating, Decentralization in Mtiterrand's France, Public Administration 1983, vol. 61, p. 237–251.

29 H. Wollmann, Local Government Reforms in Great Britain, Sweden, Germany and France: Between Multi–Function and Single–Purpose Organisations, Local Government Studies 2004, vol. 30, no. 4, p. 655.

30 See: M. Keating, Decentralization in Mitterrand's France, Public Administration 1983, vol. 61, p. 237–251, P. Booth, Planning and the Culture of Governance: Local Institutions and Reform

1982 on the rights and freedoms of the communes, the departments and the regions, it was announced that "the communes, the departments and the regions are governed independently through elected councils". Among the major premises of the reform were:

1. Constitutional–structural changes, or transforming the regions into entities of local government, due to which regional councils were established, elected in direct and general elections, entitled to carry out their own administrative operations and issuing local legal acts. It was as early as 1972 that the regions were granted the status of entities of public law or territorial public corporation. The constitutional–structural changes in the region mean that the executive authority in these units is exercised by elected presidents and not government prefects.
2. Competence changes: a significantly extended scope of local competences was distributed on new principles among the communes, the departments and the state. The competences were granted in the co–called blocks, which means that they make possible the regulation of all cases connected with a particular domain and provide the means indispensable for these regulations. The systems of competences, in accordance with the main idea of the legislators, are expected to increase the position of local organs and to be distributed in such a way so as to provide the communes, the departments and the regions with opportunities of broad cooperation in order to implement them.
3. Changes in the way of financing: instead of special subsidies from the state budget hedged about with many clauses, local centres of authority receive global subsidies: for current operations, for investments and the decentralisation subsidy, which provides them with far higher independence in making decisions concerning handling the financial resources.
4. Changes in the administrative, financial and technical supervision: the central supervision was replaced with the judicial control of courts of administration. In finance the supervising organs are

in France, European Planning Studies 2009, vol. 17, no. 5, p. 680 and next.

regional audit chambers, which have priority in adjudicating all the questions connected therewith.

Successive laws, on the other hand, assigned numerous responsibilities, so far attributed to the state, to departments in social issues, higher, vocational and secondary education, transport and communication, as well as in construction, spatial planning and housing.[31]

The territorial division of metropolitan France is based on five categories of units. France is divided into 26 regions, from which 22 are in metropolitan France (21 are on the continental part of metropolitan France; one is the territorial collectivity of Corsica), and four are overseas regions. Then the regions are subdivided into 100 departments. The 100 departments are subdivided into 341 arrondissements which are, in turn, subdivided into 4,032 cantons. These cantons are then divided into 36,680 communes, which are the lowest tier of administrative division of France. The regions, departments and communes are all known as "territorial collectivities", meaning they possess local assemblies as well as an executive. Arrondissements and cantons are merely administrative divisions[32].

The term "region" was officially created by the Law of Decentralization (2 March 1982). This law has also set their legal status. Currently the **regions** are of dual nature: they are both units of state administration and units of local government. The organ of state administration is the prefect of the department where the capital of the region is situated. Traditionally, since the Napoleonic era, the prefect has been appointed by the head of state; currently by the President on the Prime Minister and the Minister of Interior's application. The process of decentralisation resulted in transferring part of the competences of the prefect to the local government organs of the region. However, the prefect is still remains the most important centre of authority in the

31 A. Jackiewicz, A. Olechno, K. Prokop, Samorząd terytorialny, Siedlce 2010, p. 159–160, see also J.C. Thoenig, Territorial Administration and Political Control: Decentralization in France, Public Administration 2005, vol. 83, no. 3, p. 685–708.

32 Historically, the arrondissements and the cantons were also territorial collectivities with their elected assemblies.

region. He/she is a representative of the members of the Government, each of the ministers, as well as a supervisor of various organs of territorial administration in the region. Besides, he/she is to secure cooperation with the regional local government, which works through the right to speak on behalf of the state before the regional council as well as several competences of controlling nature, such as the right to demand information about the situation in the region from the president of the regional council.

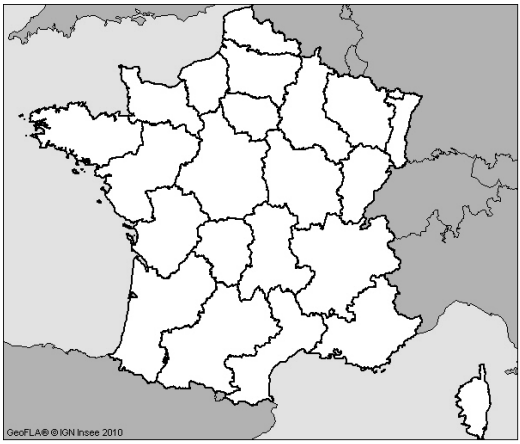
The organs of local government are regional councils (conseil régional). Originally (1972–1982) they were simply consultative bodies consisting of the region's parliamentary representatives plus an equal number of members nominated by the departments and municipalities. The Law of Decentralization (1982) introduced direct elections to regional councils and strengthened their powers. The first direct elections for regional representatives took place on 16 March 1986. Since 2004 three quarters of the seats continue to be elected by proportional representation with each list having an equal number of male and female candidates. The other quarter are given to the list that received the most votes. In order to gain these top up seats, a list must have gained an absolute majority of the votes in the first round. If this has not been achieved a second round is held with each party that gained at least ten percent of the votes competing. The party that wins a plurality in this round gains the bonus seats. It is common in this round for lower ranking parties to withdraw in favour of parties they have entered into an alliance with. Regional councils are elected for 6-year term[33]. The regional councils elect their own Presidents who preside over the meetings. They also function as a head of the Regional Executive.

Regions have considerable discretionary power over infrastructure, public transit, education, tourism, universities and research, economic development and assistance to business owners.

As the process of decentralisation has not been completed yet, there appear further proposals of reforms of territorial administration.

33 See: P. Delwit, The March 2004 Regional Elections in France: Terms for a Transfer of Power, Regional and Federal Studies 2004, vol. 14, no. 4, p. 580–590.

Proposals to give regions limited legislative autonomy have met with considerable resistance; others propose transferring certain powers from the departments to their respective regions, leaving the former with limited authority. Besides proposals to change the regions' competences, the regional structure of France is going to change as a result of an impending major overhaul of local government. The new structure, which should be in place by 2014, will probably see the number of regions reduced, with the amalgamation of contiguous small regions (probably the two Normandy regions, Auvergne and Limousin, Franche Comté and Burgundy), and the disappearance of either Pays de la Loire and/or Picardy as regional entities.



Map: L'Institut national de la statistique et des études économiques (Insee), www.insee.fr

All regions are further subdivided into **departments**, ranging in number from 2 to 8 per region for the metropolitan ones whereas the overseas regions are technically composed by only one departement. In this moment (2011), there are 101 departments in total, counting the four overseas departments–French Guiana, Guadeloupe, Martinique, Réunion and Mayotte.

The legislative body of the department is the general council (conseil général). It consists of 20–45 councillors elected for 6 years

in general elections, when in each election 50% of the composition of the council is renewed. Since 1982, the president of the council has acted as the executive of the department. Before 1982, the executive of a department was the prefect (préfet) who represents the Government of France in each department and is appointed the President of France. The prefect is assisted by one or more sub–prefects (sous–préfet) based in the subprefectures of the department. The prefect is still entitled to monitor legality of local government organs' operations. The capital of the department seat is called the prefecture (préfecture) or chef–lieu de department.

Departments are divided into one or more **arrondissements** (districts). Most departments have only three or four arrondissements. There are 342 arrondissements in total. The capital of an arrondissement is called a subprefecture (sous–préfecture) or chef–lieu d'arrondissement[34]. The administration of an arrondissement is assigned to a subprefect (sous–préfet) who assists the departmental prefect (préfet). Arrondissements do not have the status of local government, they are not run by elected officials, but by political appointees, officials appointed by the French president.

Districts are divided into **cantons** (canton). There are currently 4,036 cantons in France. Most of them group together a number of communes, although larger communes may comprise a number of cantons, since the cantons are intended to be roughly equal in size of population. This is because the main purpose of the cantons today is to serve as constituencies for the election of the members of the representative assembly (general council) in each department. Each canton elects a person to represent it at the general council (conseil général). For this reason, such elections are known in France as cantonal elections (élections cantonales). Moreover, they are organizational units in certain aspects of the administration of public services and justice. The canton is not a unit of local government.

The lowest tier of the territorial local government are **communes**, which are, simultaneously, the smallest unit of the territorial

34 The municipal arrondissements of Paris, Lyon and Marseille are divisions of the city (or commune) rather than the prefecture, and so are not arrondissements in the same sense.

administrative division of France. There are 36682 communes in total (2011)[35]. The number is relatively high, because French communes still largely reflect the division of France into villages or parishes at the time of the French Revolution. The rights and obligations of communes are governed by the Code général des collectivités territoriales.[36]

The legislative organ of the commune is the municipal council (conseil municipal), elected for a 6-year term in general elections, which consists of the number of councillors proportional to the number of its residents (e.g. 9 councillors in the communes below 100 residents, 69 councillors in the communes over 300 thousand residents).[37] The basic competences of the council may be divided into decisive and consultative ones. Decision making is determined in the municipal code, which states that the municipal council decides on the affairs of the commune by its resolutions. Limits of the council's competences are determined on the principle of territoriality and the principle of acting in the interest of the commune. Among the decisive competences are, for example, enacting the budget, enacting local principles of landscape management, opening primary schools, designing representatives to extra–commune institutions, etc. The consultative competences involve formulating proposals and expressing opinions. The council is obliged to express its opinion if it provided for by law or on the prefect's request. This occurs in such cases as, for example, a project of exploitation of national and department roads, a plan of land management, organising welfare, budgets of charity institutions. The council is also responsible for instituting and organising public services for whose functioning the mayor is responsible.[38] What is essential for the process of decentralisation is that every resolution of the municipal council requires the prefect's approval.

35 Data based on: L'Institut national de la statistique et des études économiques (Insee), www.insee.fr

36 Loi n°96–142 du 21 février 1996 relative à la partie Législative du code général des collectivités territoriales. Access: Legifrance: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070633

37 An exception to the rule is three cities, Paris: 163 councillors, Marseilles: 101 councillors and Lyon: 73 councillors.

38 A. Jackiewicz, A. Olechno, K. Prokop, Samorząd terytorialny, Siedlce 2010, p. 164.

The executive organ is the mayor (maire), who summons and presides the sessions of the council. He/she is appointed by the council from among its members by qualified majority in the first and, if necessary, the second round. If this brings no result, in the third round the election is concluded by simple majority. His/her basic task is to implement the resolutions of the council as well as performing the tasks vested in him/her in the scope of local government administration and also tasks delegated by the state administration. Like the council, the mayor is subject to supervision from the prefect for legality. In the event of "a grave error in performing his/her tasks" the minister of interior may dismiss or suspend the mayor from office.

Taking into consideration quite a high fragmentation on the lowest tier of local government, over last decades there have appeared intercommunal consortia which aim at joint implementation of public tasks, such as public transport and water supply. In 1986 a statute was passed, known as "The Chevènement Law", which, through subsidies from the government, encourages to create such structures. There are two models of these structures: without fiscal power, the loosest form of intercommunality and structures with fiscal power: the Community of Communes (communauté de communes), the Community of Agglomeration (communauté d'agglomération), and the Urban Community (communauté urbaine).

Part 8

THE REPUBLIC OF POLAND AS A UNITARY STATE

1. The origins of the modern territorial structure of the Republic of Poland: historical aspects

The tribes, belonging to the Slavonic ethnic group, with whose history the origins of the Polish state are connected, arrived in the territories of present day Poland around 6th century, making a few dozen tribal bodies. Among them of the most importance were two tribes: the Vistulans, whose small state developed in the south and the Polans, spreading their territories in the north. The beginning of the Polish statehood results directly from events which took place in the 9th century. From that time on we can talk about largely documented history of Poland. The first Duke of the Polans, indisputably present in historical sources, was Mieszko I, who assumed the rule in c. 960. The territorial expansion as well as subduing other tribes soon led to first political contacts with the Germans and the Bohemians (Czechs), whose countries had already been established states in the circle of the Christian culture. In 965 Mieszko married the Bohemian Princess Dobrava, and a year later, through the Bohemians, he was baptised and began the process of Christianisation of his state, gaining an ally, averting a threat of forced Christianisation from German dukes, as well as introducing his country into the progressive cultural circle of the Western civilisation. The territory of Mieszko's state is known thanks to a document that placed Poland under the protection of the Holy See (the so–called Dagome Iudex). Poland of that time included Great Poland, Mazovia, Silesia and Cracow Land (Little Poland).

Until 1138 Poland was formed as a centralised state ruled by the Piast dynasty which fought the Germans, the Bohemians and the

Kiev Rus. An important factor in creating the outline of statehood was the origin of the first Polish archbishopric, consolidating the state organisation, still weak at that time, which was of special significance during political crises and actual collapse of secular institutions. Patrimonial divisions of state, so characteristic of the era of medieval monarchies, occurred also in Poland. They took place almost every time the ruler died and whose descendants tried to subordinate their rivals (often their own brothers). The gravest division of the state was performed by virtue of the succession statute (1138) issued by Boleslaw III the Wrymouth, who divided the state among his sons. Intending to prevent wars of succession, he introduced the senioral principle, in accordance with which the power was to be assumed by successively the oldest representatives of the dynasty. The succession statute did not meet the expectations. Poland soon plunged into internal wars, and that period is known as the feudal division. It was characteristic thereof that the territory of the country was gradually divided into smaller and smaller bodies – *quasi* states. The senioral hegemony was by and large illusive. Simultaneously, the importance of the mighty increased. Poland lost part of its territories in favour of Brandenburg, the Teutonic Knights and Bohemia.

The unification of the state and the end of the feudal division is traditionally dated to 1320, when Wladyslaw the Short was crowned in Cracow. The rule of this king as well as his successor Kazimir the Great, is connected with attempts at regaining the lost lands and numerous armed and diplomatic conflicts with the Teutonic Kights, Bohemia, Lithuania, Rus and Tartars. Poland restored its international position and extended its territory through annexation of Ruthenian lands and regaining Mazovia. According to H. Samsonowicz, among the enlightened people the good of the country had become a notion superior to the king's interests.[1] This was confirmed during the rule of his successor; in accordance with dynastic deals, after Kazimir the Great's death, King Louis of Hungary became king of Poland. The patrimonial monarchy was replaced by the idea of the Crown of the Kingdom of Poland (Latin: Corona Regni Poloniae) understood in

1 H. Samsonowicz et al., Historia Polski, Warszawa 2007, p. 127.

the aspect of separation of the institution of state and the person of the monarch. In this ruler's policy Poland was of lesser importance. He tried to secure the interest of the dynasty through privileges for noblemen, which gave rise to the period of noblemen's domination in political life.

Another stage of the Polish statehood began with the so–called Krewo Act of Union, in accordance with which Jadwiga, Louis of Hungary's daughter, having been crown king (sic!) of Poland, married Grand Duke Jogaila of Lithuania and the both states were bound with the Union that survived centuries and whose effects are present even today. Originally the history of the Polish–Lithuanian Union was connected with the conflict with the Teutonic Knights. In 1410 one of the major battles of Middle Ages took place. It was the Battle of Grunwald, in which the Polish–Lithuanian troops defeated the Teutonic Knights' army.[2] The Jagiellonian Dynasty reigned in Poland till 1572 and it was the time when the Polish–Lithuanian state attained the status of power in central Europe. This period, however, like the whole history of Poland, is full of various armed conflicts and frequent changes of borders. The Polish–Lithuanian state waged wars, with changeable success, for example against Turkey (the Ottoman Empire), the Duchy of Moscow or the Teutonic Knights. It is worth noting that in 1493 the first bicameral parliament appears as the Sejm in Piotrków, which was a further step of the development of noblemen's democracy. In 1569, as a result of the Union of Lublin, the relations with Lithuania were tightened, and a joint parliament was summoned as well as introducing common currency. Remarkable differences were preserved, for example in the army, offices and official languages.

The Polish–Lithuanian Commonwealth, also known as the Republic of Both Nations, including the Crown of the Polish Kingdom and the Grand Duchy of Lithuania, was one of the powers and largest European states reaching the largest in history surface area of nearly one million square kilometres. However, subsequent numerous armed conflicts with Sweden, Russia and the Ottoman Empire, as well as rebellions of the Cossacks, impoverished the state and led to the loss

2 N. Davies, Boże igrzysko. Historia Polski, Kraków 2009, p. 131–132.

of enormous territories in the east. The anachronistic constitutional system where the weak king's authority was practically dependent on the nobles, seriously affected the crisis: magnates enjoyed practically independence in their own estates. The only yet temporary success of that period was Wladyslaw IV's capture of Moscow (1610). Attempts at reforms proposed by John III Sobieski were torpedoed by magnates. By the same token the military success achieved in the wars against the Ottoman Empire (Vienna 1683) failed to be used in internal policies.

In the 18th century, the weakening Polish–Lithuanian Commonwealth became a political playground for stronger neighbours. Attempts at constitutional reforms – enacting one of the first modern Constitutions of the world (the so–called Constitution of 3rd May) came too late. This led to the so–called partitions (1773, 1793 and 1795); the territory of the Polish–Lithuanian Commonwealth was partitioned among Russia, Austria and Prussia. The Polish state disappeared from the map of Europe for the following 123 years. On the partitioned territories, the conquerors introduced different legal orders, frequently carrying out aggressive policies of assimilation. As a result, on regaining independence after World War I, the territory of the Second Republic consisted of parts with different constitutional, social and economic models[3]. It is worth noting, however, that the Poles never reconciled themselves with the loss of independence, the evidence of which were successive uprisings against the occupants: the November Uprising (1830), the Cracow (Kraków) Uprising (1846), the Greater Poland Uprising and part in the European Revolutions of 1848, the January Uprising (1863). Throughout the whole period of the partitions, independence movement were active both in Poland and among the Polish emigrants abroad.

Poland as an independent state appeared on the map of Europe after World War I, which resulted from the favourable geopolitical situation connected with military defeats of all the three partitioning powers as well as with Communist revolutions in Russia and Germany. A special

3 See: T. Zarycki, History and regional development. A controversy over the 'right' interpretation of the role of history in the development of the Polish regions, Geoforum 2007, no. 38, p. 485–493.

role in the Polish independence impulse was played by Józef Piłsudski, who became Chief of State in 1918. However, along with the end of the war the process of uniting the lands to make up the territory of the Second Republic had only began. Poland was a ruined and plundered country and beside the aforementioned divisions resulting from the partitions there were noticeable ethnic divisions.

The Treaty of Versailles established the western borderline of Poland only and these decisions were slightly modified as the final establishment of borders took place after a series of conflicts, for example in East Galicia, Greater Poland, Cieszyn Silesia, Upper Silesia and Vilnius Region. The gravest conflict, which was a threat to the reviving Polish state, was the war between the Republic of Poland and Soviet Russia. The victorious war not only saved the independence but also stopped the march of the Red Army to Western Europe. The victory in the battle of Warsaw was called "Miracle at the Vistula". The shape of the eastern border was determined in the treaty of Riga in 1921. The Polish–Soviet borderline run henceforth basically along the line of the second partition of 1793 (with some modifications in favour of Poland).

Further territorial changes occurred after World War II. They resulted from the decisions of the conferences in Tehran, Yalta and Potsdam. They shaped the present day borderlines of Poland, transferring the areas east of the River Lusatian Neisse, the River Oder and the Free City of Danzig (including East Prussia, West Pomerania and Silesia) to Poland. However, in the east Poland lost the so–called Kresy (East Borderlands) (e.g. the Vilnius region, Lvov) to the Soviet Union. Nevertheless, what is very important, the effect of the decisions of these conferences (especially that in Yalta) was actual giving Poland away under the Soviet hegemony[4]. Until 1989 Poland called the Polish People's Republic was in fact a vassal of its eastern neighbour, although formally it was an independent and sovereign state.

4 See: T. Zarycki, History and regional development. A controversy over the 'right' interpretation of the role of history in the development of the Polish regions, Geoforum 2007, no. 38, p. 485–493.

The present surface area of Poland is 322,595 square kilometres, embracing territories between the Baltic Sea in the north and the Carpathians and the Sudetes in the south. It is the ninth largest surface area in Europe and the sixty–eighth in the world. Poland is inhabited by over 38 million people, which is the sixth position in Europe and the thirty–fourth in the world. The major cities of Poland are: the capital Warsaw 1.7 million residents, Kraków 755 thousand, Łódź 747 thousand, Wrocław 632 thousand, Poznań 557 thousand and Gdańsk 456 thousand.[5]

Poland is a state ethnically relatively homogeneous: 96% of its inhabitants declare the Polish ethnicity. The most numerous ethnic minorities are Silesians (173.2 thousand, although formally they are not recognised as a minority), Germans (152.9), Belorussians (48.7 thousand), Ukrainians (31.0 thousand), Romani people (12.9 thousand), Russians (6.1 thousand), Lemkos (5.9 thousand) and Lithuanians (5.8 thousand). This also determines the language map: the Polish language is dominating but in 21 communes there are also auxiliary official languages: German, Kashubian, Lithuanian and Belorussian (the so–called bilingual communes). Poland is also relatively religiously homogenous: 89% of its inhabitants declare their affiliation with the Roman Catholic Church. Further major religious congregations are the Polish Autocephalous Orthodox Church (506,8 thousand) and Protestants (150 thousand, various congregations) as well as the Union of Jehovah's Witnesses (127 thousand).

Poland belongs to many international organisations, for example the European Union, NATO, UN, the Council of Europe and the World Trade Organisation. It is a party of the Schengen Agreement and has taken steps towards the accession to the euro zone. Poland is counted among developing countries; its GDP is USD 430 billion, which gives it the 21st position in the world.[6] Between the regions of Poland there are serious differences in economic development: the Mazowieckie

5 Data quoted in this subchapter come from the Concise Statistical Yearbook of Poland, Warszawa 2010, available at: www.stat.gov.pl

6 Data from the World Bank for 2009: available at: data.worldbank.org

Province is the richest while the poorest are the Podkarpackie Province and Lublin Province.

The constitutional basis is the Constitution of the Republic of Poland enacted on 2 April 1997 by the National Assembly and approved of by the national referendum on 25 May 1997. It came into force on 17 October 1997.

2. The principles of the political system of the state

The catalogue of constitutional principles is in Chapter I of the Constitution of the Republic of Poland, though some of them are also based on the Preamble and the rules in the other chapters. Among the most important constitutional principles are those of: democratic state of law, sovereignty of the people, separation and balance of powers, political pluralism, as well as, the most important from the point of view of this textbook, the principle of unitarity, subsidiarity and decentralisation.

The **principle of democratic state of law** expressed in article 2 means that the organs of public authorities in the state (e.g. local government organs) may take their actions only on the basis of and within the framework of the binding law (which is repeated in article 7 of the Constitution, the so–called principle of legalism). This also means that law has to be made democratically and so applied. This is determined by the acceptance of the system of separation of powers, judicial independence and protection of legally acquired rights, as well as the prohibition of surprising the citizens with sudden changes concerning their legal regulations, whose aim is to shape the citizens' trust in the state and the law made by the state.

The **principle of sovereignty of the People** (article 4) is understood as binding all organs of the public power functioning on the territory of the Republic of Poland with the will of the citizens at large. The power and its particular manifestations should be exercised on behalf, by authorisation of and in accordance with the interest of the People.

In view of article 10 para 1 of the Constitution of the Republic of Poland the system of the Republic of Poland is based on the separation and balance of the legislative power, the executive power and the judicial power. The aforementioned regulation emphasises not only the principle of separation of powers but also basing their mutual relations on the principle of balance. By virtue of article 10 para 2 the legislative power is exercised by the Sejm and the Senat, the executive power by the President of the Republic of Poland and the Council of Ministers, and the judicial power by courts of law.

The essence of the **principle of political pluralism** in the freedom of building and operating of political parties (article 11 of the Constitution). It provides for the existence of a multiparty system and prohibits any single–party system. Every political party may associate, on the principles of voluntariness and equality, exclusively Polish citizens. The Constitution simultaneously includes provisions limiting the operations of the political parties, which are connected with the prohibition of their propagating certain issues and methods of acting.[7]

The **principle of unitary state**, included in article 3 of the Constitution, rules that none of the units of territorial division has a state independence and is not sovereign.[8] This also means that the existence of all organs of public authorities (and even all public authorities) is based on the provisions established by the legislator, which are central state organs, and in the process of which the sovereign, the People, can directly participate.

What is characteristic of the unitary state is the lack of a vertical division of the legislative power among particular units of the territorial division of the state. This results from the definition of the bearer of sovereign power in the state, which is the whole society, in the case of the Republic of Poland in article 4 of the Constitution which

7 Article 13 of the Constitution of the Republic of Poland: Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be prohibited.

8 P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z 1997 r., Warszawa 2008, p. 22.

reads: "Supreme power in the Republic of Poland shall be vested in the Nation". It is acceptable, though not necessary at all, to divide vertically the executive power, which is a starting point for institutions of territorial local government. If this division of the executive power occurs and meets certain assumptions (which will be discussed later), we can talk about decentralisation in the interpretation of article 15 of the Constitution.[9]

The **principle of decentralisation of public authorities** is understood as transferring part of essential tasks and competences of the state government to units of lower tier (foremost local governments), securing them independence in carrying out their tasks. This should be followed by transferring appropriate means to perform the tasks and competences. Intervention of the organs of government administration in operations of the units of local government takes place exclusively within the limits determined by law. There is no hierarchic subordination of local government bodies to the organs of higher tier.[10]

The constitutional provisions on the principle of decentralisation of the public authorities and local government make a manifestation of the principle of subsidiarity, established in the doctrine and legislation of democratic states. The Constitution of the Republic of Poland declares the principle of subsidiarity in the Preample: "We, the Polish Nation – all citizens of the Republic, […] 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 powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities." So expressed the principle of subsidiarity determines directions of legislation as well as directions of law application. The essence of the principle of subsidiarity is pointing at the secondary and auxiliary role of the state. Its intervention in particular citizens' or local communities' affairs is acceptable only when there occur difficulties in the performance of their tasks. According to M. Granat, the principle of subsidiarity means

9 Article 15 para 1 of the Constitution of the Republic of Poland: The territorial system of the Republic of Poland shall ensure the decentralization of public power.

10 A. Jackiewicz, A. Olechno, K. Prokop, Samorząd terytorialny, Siedlce 2010, p. 10.

an obligation of "such forming legal relations between the state and the entities coming from the sphere of civil society, so as to secure the citizens and their communities their rights yet before the entitlements of the authorities."[11]

In the situation where there is a multi–tier structure of local government and the entities of lower tier cannot perform their tasks, the competence of their execution is taken over by entities of higher tier (poviat – district, province). Only when the implementation of a particular task exceeds the capacities of local or regional government units can the organs of state government administration intervene. Probably the most important proposal resulting from the principle of subsidiarity is taking decisions as close to the citizen as possible. Public authorities are to stimulate, maintain and, if necessary, complement the unit's initiative if it cannot manage to execute certain tasks (positive aspect). They cannot, on the other hand, impede these initiatives (negative aspect).[12]

3. The structure of the central authorities

According to article 10, the system of government of the Republic of Poland is based on the separation of and balance between the legislative, executive and judicial powers. Legislative power is vested in the Sejm and the Senate, executive power is vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power is vested in courts and tribunals.

The Parliament of the Republic of Poland is bicameral but the status of the chambers is not equal. The comparison of the range of competences of the both chambers definitely indicates the Sejm as the stronger chamber. The both chambers make the representation of the People. Now the Senate is not an organ of territorial representation,

11 M. Granat, Konstytucja RP na tle rozwoju i osiągnięć konstytucjonalizmu polskiego, Przegląd Sejmowy 2007 no. 4, p. 22.

12 A. Jackiewicz, A. Olechno, K. Prokop, *op. cit.*, p. 13.

as it is common in second chambers of compound states, which was before the reform of state administration of 1998 (1989–1998).[13]

The **Sejm** is composed of 460 Deputies. Elections to the Sejm are universal, equal, direct and proportional and conducted by secret ballot. Elections are based on multi–seat constituencies. The **Senate** is composed of 100 senators. Elections to the Senate are universal, direct and conducted by secret ballot. The Senate elections in 2011 will be carried out in single–seat constituencies. So far elections were carried out in multi–seat districts. The Sejm and the Senate are chosen each for a 4-year term of office. Deputies and Senators are representatives of the Nation. They are not bound by any instructions of the electorate. The President of the Republic may, in those instances specified in the Constitution, order shortening of the Sejm's term of office. The Sejm may shorten its term of office by a resolution passed by a majority of at least two–thirds of the votes of the statutory number of deputies. Whenever the term of office of the Sejm has been so shortened, then the term of office of the Senate shall also be shortened.

The both chambers, which debate permanently, work in open sessions summoned by the Marshal of the Sejm or, respectively, of the Senate, on dates established by the chamber itself or the proper Convention of Seniors. The Sejm and the Senate establish their internal structures and procedures autonomously. As a rule the both chambers take decisions by simple majority of votes at the presence of half the number of the members of the given chamber. In certain cases the provisions also require absolute majority, statutory majority or qualified majority (e.g. 2/3, 3/5).

The structure of the both chambers is similar and a few differences principally result from the number of deputies and senators. In the both chambers the managing organs are, respectively, the Marshal of the Sejm and the Marshal of the Senate, vice–marshals and, respectively, the Presiding Board of the Sejm and the Presiding Board of the Senate (Marshals and vice–marshals). The opinion–giving organ which supports the managing organs is the Convention of Seniors, which

13 G. Kryszeń, Prawo wyborcze do parlamentu. Status prawny posłów i senatorów. [in:] M. Grzybowski, Prawo konstytucyjne, Białystok 2008, p. 173.

includes, beside the members of the Presiding Board of the chamber, the chairpersons of parliamentary clubs. Committees (permanent and extraordinary), where most of substantial works are carried out, and whose responsibility is to prepare decisions of the given chamber.

Traditionally, among the most important functions of the Sejm legislation, controlling and creation are counted.

The Sejm plays a key role in the process of making laws in Poland (articles 118–122). The right to introduce legislation belongs to deputies, to the Senate, to the President of the Republic, to the Council of Ministers and to a group of at least 100,000 citizens. The Sejm considers bills in the course of three readings and passes bills by a simple majority vote, in the presence of at least half of the statutory number of deputies, unless the Constitution provides for another majority. A bill passed by the Sejm is submitted to the Senate, which within 30 days, may adopt it without amendment, adopt amendments or resolve upon its complete rejection. If, within 30 days following the submission of the bill, the Senate fails to adopt an appropriate resolution, the bill is considered adopted according to the wording submitted by the Sejm. A resolution of the Senate rejecting a bill, or an amendment proposed in the Senate's resolution, is considered accepted unless the Sejm rejects it by an absolute majority vote in the presence of at least half of the statutory number of deputies. After the completion of this procedure, the Marshal of the Sejm submits an adopted bill to the President of the Republic for signature. The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution or refer the bill, with reasons given, to the Sejm for its reconsideration. If the said bill is repassed by the Sejm by a three–fifths majority vote in the presence of at least half of the statutory number of deputies, then, the President of the Republic shall sign it within 7 days and shall order its promulgation in the Journal of Laws of the Republic of Poland (Dziennik Ustaw).

The controlling function of the Sejm concerns foremost the work of the government administration. The Sejm as a chamber, committees and individual deputies use controlling instruments provided for by the Constitution and statutes in order to acquire information on the

work of the government as well as to exact political accountability in accordance with the rules characteristic of the parliamentary–cabinet system. Basic mechanisms in this scope are the vote of no confidence (article 158), investigative committees (article 111), interpellations and Deputies' questions (article 115) and granting approval of the financial accounts submitted by the Council of Ministers (article 226). The Sejm often uses the assistance of the Supreme Chamber of Control in the controlling process, deputing particular inspections.

The creational function involves creating legal bases for the operations of the organs of public authorities or/and appointing staff for so created offices. For instance, the Sejm takes part in the process of appointing the government, appoints the National Council of Judiciary, 15 judges of the Constitutional Tribunal. In the procedure of appointing some organs the decision of the Sejm requires the Senate's consent, for example in the case of the Commissioner for Citizens' Rights and the President of the Supreme Chamber of Control.

The functions of the Senate involve foremost the already mentioned part in the legislative process and appointing staff for the offices defined in the Constitution and statues, which the Senate performs independently or with the participation of the Sejm.

In instances specified in the Constitution, the Sejm and the Senate sitting in joint session, act as the National Assembly, with the Marshal of the Sejm presiding or, in his absence, the Marshal of the Senate. All the cases envisaged by the Constitution concern the president, his oath (article 130), hearing its message (address) (article 140), holding him accountable before the State Tribunal (article 145) or stating his incapacity to exercise his duties due to the state of his health (article 131).

In the Republic of Poland there occurs dualism of the executive, which is so characteristic of the parliamentary–cabinet system. As already mentioned, the organs of the executive power are the President of the Republic of Poland and the Council of Ministers.

The **President of the Republic of Poland** is the supreme representative of the Republic of Poland and the guarantor of the

continuity of State authority. Other responsibilities vested in him by the Constitution are ensuring observance of the Constitution, safeguarding the sovereignty and security of the state as well as the inviolability and integrity of its territory.

The President is elected by the Nation (People), in universal, equal and direct elections, conducted by secret ballot for a 5–year term of office and may be re–elected only for one more term. The President is elected by absolute majority (article 127). Among the most important competences of the President are:

- ratifying and renouncing international agreements (art. 133),
- appointing and recalling the plenipotentiary representatives of the Republic of Poland to other states and to international organizations (art. 133),
- exercising command over the Armed Forces through the Minister of National Defence, in times of peace. For a period of war, he appoints the Commander–in–Chief of the Armed Forces on request of the Prime Minister (art. 134),
- ordering a general or partial mobilization and deployment of the Armed Forces in defence of the Republic of Poland, on request of the Prime Minister (art. 136),
- granting Polish citizenship (art. 137),
- exercising the power of pardon (art. 139),
- issuing regulations and executive orders (art. 142), shortening of the term of office of the Sejm in the instances specified in the Constitution (article 144, which enumerates all the President's prerogatives, among which are the following competences),
- proclaiming the holding of a nationwide referendum,
- making a referral to the Constitutional Tribunal,
- requesting the Supreme Chamber of Control to carry out an audit,
- nominating and appointing the Prime Minister.

Among the competences of the president the constitution also counts appointing staff for many important offices in the state. The president

appoints judges, presidents of supreme courts and Constitutional Tribunal and also the members of the Council for Monetary Policy (3) and the members of the National Council of Radio Broadcasting and Television (2). The president also request the Sejm to appoint the President of the National Bank of Poland.

Official acts of the president require, for their validity, a countersignature of the Prime Minister who, by such a signature, accepts accountability therefore to the Sejm. Some of these acts called prerogatives do not require a countersignature. They are enumerated in article 144. The president does not bear political responsibility, but he may be held accountable before the Tribunal of State for an infringement of the Constitution or statute, or for commission of an offence.

The **Council of Ministers** conducts the internal affairs and foreign policy of the Republic of Poland. What supports its position is the implication of competence included in article 146, according to which, the Council of Ministers conducts the affairs of state not reserved to other state organs or local government. Such understanding of the constitutional status of the Council of Ministers, corresponding with the competences included in the Constitution and statutes, makes the Council of Ministers a center of real executive power in the state, which limits the influence of the Head of State – the President – on the process of taking crucial executive decisions. The most important tasks set for the Council of Ministers by the Constitution are included in article 146 para 4. According to this provision, the Council of Ministers, in particular:

- ensures the implementation of statutes,
- issues regulations,
- coordinates and supervise the work of organs of state administration,
- protects the interests of the State Treasury,
- adopts a draft State Budget and supervises the implementation of the State Budget,
- ensures the internal and external security of the State and public order,

– concludes international agreements requiring ratification as well as accept and renounce other international agreements.

The Council of Ministers is composed of the president of the Council of Ministers (Prime Minister) and ministers. Vice–presidents of the Council of Ministers (Deputy Prime Ministers) and the presidents of committees specified in statutes may also be appointed within the Council of Ministers. The Prime Minister represents the Council of Ministers and manages the work of the Council of Ministers. He also exercises, within the limits and by the means specified in the Constitution and statute, supervision of local government (article 148). Ministers directs a particular branch of government administration or perform tasks allocated to them by the Prime Minister (article 149).

The process of appointing the Council of Ministers is quite complex. The Constitution provides for a basic mode and two reserve modes, which are applicable in the event of failure in creating the government (articles 154–155). In each of these modes, it is the president who appoints and gives the oath of office to the members of the Council of Ministers, whereas the Sejm gives the Council of Ministers the vote of confidence.

In accordance to the rules of the parliamentary–cabinet system, the members of the Council of Ministers are collectively responsible to the Sejm for the activities of the Council of Ministers. Also, the members of the Council of Ministers are individually responsible to the Sejm for those matters falling within their competence or assigned to them by the Prime Minister (article 157). The members of the Council of Ministers shall be accountable to the Tribunal of State for an infringement of the Constitution or statutes, as well as for the commission of an offence connected with the duties of his office.

As the title of Chapter VIII of the Constitution of the Republic of Poland of 2 April 1997 indicates, the **judicial branch** in Poland is organized in accordance with the principle of dualism, as it consists of courts and tribunals. The principal difference between them is that only courts administer justice, which is referred to as the principle of monopoly of courts in the administration of justice. Administration of

justice is defined as resolution of conflicts regarding rights where one of the parties is a private law entity. On the other hand, both Poland's tribunals, namely the Constitutional Tribunal and the Tribunal of State, have a specific characteristic, related to public law, which allows for distinguishing them from courts and for treating them differently. The most important principles which govern the functioning of the first part of the judicial branch – the courts – are:

- autonomy of courts, which means that no state body can change their decisions,
- independence of judges,
- the right to a fair trial and the right to counsel,
- the principle of a two–instance (two stages) system, which means that it must be possible to refer each case which has been considered by a first–instance court for consideration by a higher–instance court,
- the principle of uniformity, which means that the whole state has a uniform structure of courts which act based on the same legal grounds,
- the principle of openness of the trial,
- the principle of participation of citizens in administration of justice, according to which representatives of the citizenry participate in consideration of disputes. Their participation is limited to some legally defined proceedings in first–instance courts.

The court structure in Poland is defined in the Constitution only generally as one including the Supreme Court, common courts of law, administrative courts, and military courts (article 175). The detailed organization of the courts is defined in relevant statutes.

Common courts of law are courts of general property, i.e. ones which consider cases that relevant statutes do not ascribe to other courts. Currently, there are three levels (instances) of common courts of law in Poland: district courts, regional courts, and appellate courts. Courts are established and disbanded by the Minister of Justice, subject to opinion by the National Council of the Judiciary.

District courts are the basic entities formed for communes or their parts. Their structure may consist of separate departments: criminal, civil, labor, family, or economic. In principle, district courts are proper to consider cases in the first instance. The next level is regional courts which are proper to consider appeals against the decisions of district courts and to consider, as the first–instance courts, complex or more serious cases identified in relevant statutes. Regional courts cover several districts (areas of district courts). Appellate courts consider appeals against decisions of district courts, acting as the first–instance courts, and consider requests for reversals of court decisions (cessation). Appellate courts are formed for several court regions. Just like district courts, regional courts and appellate courts can be divided into various departments.

Administrative courts and military courts are described as special courts. They are proper to consider specific categories of cases defined in relevant statutes.

The role of administrative courts is to provide judicial control of public administration. Since 2004, administrative courts form a two–instance system: in addition to the Supreme Administrative Court which, in principle, is an appellate court, cases are considered by provincial administrative courts which are first–instance courts.

What makes military courts special is the fact that they consider criminal cases involving crimes committed by soldiers on active duty, as well as some crimes committed by civilian employees of the Polish Armed Forces and soldiers of other countries' armed forces. The structure of military courts includes garrison courts, which are first–instance courts, and regional courts, which are the appellate courts and, in exceptional cases, first–instance courts. In the later situations, the second–instance court is the Military Chamber of the Supreme Court, which also has the function of a third–instance court and considers requests for reversal of court decisions.

The role of the Supreme Court, as defined in the Constitution, is to supervise the decisions of common courts of law and military courts, as well as to consider other cases identified in relevant statutes, to assure correct and uniform construction of law, and to evaluate draft statutes.

The Supreme Court performs its role by considering appeals against court decisions, issuing resolutions aimed at clarifying legal provisions which raise practical doubts or whose application has lead to different court decisions. An example of other matters considered by the Supreme Court is deciding on the validity of elections and referendums. The Supreme Court has four chambers: the Labor Law, Social Security and Public Affairs Chamber, the Civil Chamber, the Criminal Chamber, and the Military Chamber. Each chamber is headed by a President who is also appointed by the President of Poland.

A special body which is closely connected with the judicial branch is the National Council of the Judiciary. It is considered to be a part of the structure of the central bodies of the administration of justice system with some powers which are characteristic of professional self–governing organizations. Its constitutional role is to protect the independence of judges and the autonomy of courts. Examples of the tasks of the Council are evaluation of candidates for the position of a judge and presenting the opinions concerning such candidates to the President of Poland, issuing statements regarding the principles of professional ethics of judges, and expressing opinions on matters pertaining to judges and courts.

The second part of the judicial branch is tribunals: the Constitutional Tribunal and the Tribunal of State. The members of the Constitutional Tribunal are 15 judges who are appointed by the Sejm for a nine–year term from among persons with exemplary knowledge of the law. The most important task of the Constitutional Tribunal is to defend the Constitution, which consists most of all in exercising a hierarchic control of the legal system and in issuing decisions regarding the compliance of lower–order laws with higher–order laws. Moreover, the Tribunal issues decisions regarding grounds for constitutional complaints, resolves disputes regarding competences, issues decisions regarding compliance of goals or activities of political parties with the Constitution, determines the occurrence of a temporary impediment to the exercise of the office of the President of Poland, and entrusts the temporary exercise of the duties of the President of Poland to the Marshall of the Sejm.

Proceedings before the Constitutional Tribunal are one–instance proceedings and the Tribunal's decisions are universally binding and final.

The role of the Tribunal of State is to enforce constitutional responsibility, which is defined as responsibility for specific breaches of law enforced upon the parliament's initiative by a body of the judicial branch against persons holding high offices for illicit acts committed deliberately in relation to their office, which are referred to as constitutional delicts. The origin of this institution is the English mechanism referred to as impeachment.

The members of the Tribunal of State are the President, who is the First President of the Supreme Court, two deputy presidents, and 16 members selected by the Sejm from among members of both chambers of the Parliament. Their term is equal to the term of the Sejm.

4. Province as a administrative division of the state and a unit of regional self – government

The Constitution of the Republic of Poland treats quite broadly the problems of the territorial structure of the state, foremost defining it as a unitary state decentralized through institutions of territorial local government. The region, through making the term regional self – government constitutional, became an extremely important element of this construction. In spite of this, however, the Constitution does not settle exhaustively the territorial structure of the Republic of Poland, leaving it to the regular legislator's decision. This legislator decides then on the territorial shape of the regions as well as on the degree of their independence. These decisions, however, are not completely discretionary, as the Constitution and also acts of international law, e.g. the European Charter of Local Self–Government and the European Charter of Regional Self–Government,[14] contain several regulations

14 Article 3 para 1 of the ECRSG indicates that the scope of the regional self–government' operations should be determined by internal legislation of each state in accordance with the provisions established in Article 2 para 2, i.e. only by the Constitution, statutes of the regions and internal or international provisions of law.

determining the limits to this discretion, such as the aforementioned principles of unitary state, decentralization of the public authorities, independence of local and regional government units and their legal protection.

As a consequence of the fact that the Republic of Poland is a unitary state, an outline of the legal status of the region is to certain degree determined, which means that there is limited possibility to grant the Polish regions autonomous status with granting the regions attributes of sovereignty.

The notion region was used in article 164 para 2 of the Constitution, which states that a statute is to determine other units of regional self–government or regional and local self–government. The term regional self–government in the Polish legal order appears for the first time. The constitution–maker decided then on a multi–tier model of local government,[15] whose final form was to be determined by a separate law. Nevertheless, whatever model were accepted, in all cases the existence of regional self–government is obligatory.[16]

This constitutional recommendation was implemented in 1998 by several laws reforming the territorial structure of the state, among which the statutes especially worth noting for the subject of this book are: the Act of 5 June 1998 on Province (województwo) Self–Government, [17] the Act of 5 June 1998 on District (powiat) Self–Government[18] and the Act of 24 July 1998 on Three–Tier Territorial Division of the State.[19] Through these laws, not without controversies, the legislator decided to create, beside the commune self–government which had existed

15 Article 164 of the Constitution is so commented by, for example, P. Sarnecki, Uwagi do art. 164 Konstytucji RP, [in:] L. Garlicki (ed.), Komentarz do Konstytucji Rzeczypospolitej Polskiej, t. IV, Wydawnictwo Sejmowe, Warszawa 2007, P. Winczorek, Komentarz do Konstytucji Rzeczypospolitej Polskiej z 1997 r., Warszawa 2000, p. 216.

16 A completely different potential problem which may occur every time with constitutional provisions imposing regulating certain set of issues upon the ordinary legislator, like in this case, is the question of potential responsibility in the event of failure in implementing the so imposed duty. In the Polish legal order there are no regulations which in such a case would sanction the inaction of the legislative bodies in the form of, for example, shortening the Parliament's term. It i also impossible on the plane of responsibility of the members of these bodies.

17 Dziennik Ustaw of 2001, no 142, position 1590 with further changes.

18 Dziennik Ustaw of 2001, no 142, position 1592 with further changes.

19 Dziennik Ustaw of 1998, no 96, position 603 with further changes.

since 1990,[20] two further tiers of territorial self–government: the district (powiat) of local nature, and the province (województwo – voivodship) of regional nature. It is worth bearing in mind, however, that on the grounds of the constitutional regulation, formally an option with more than one tier of regional self–government is also possible. It would be possible then to "add" another tier of regional self–government (as well as local).[21]

It is worth emphasising here that between particular units of self – government there is no hierachical dependence. Each unit has tasks to perform which are determined by law, in which a unit of higher tier has no right to intervene. Organs of province (województwo) self–government are not organs of supervision or control over the organs of the district (powiat) or the commune (gmina). They are not superior organs in administrative procedure either. This organ is the self–government appeal college.

Another important aspect of the current constitutional regulation is the premise of not determining the identity of self–government units of regional tier with the units of administrative divisions carried out for the needs of government administration, either terminologically or territorially. It is of particular importance in the context of article 152 para 1,[22] which defined the province as an area of operating of the voivod, who is an organ of the government administration. Two issuess have to be taken into consideration. On the one hand, the administrative division is expected to consider the needs of territorial self–government, which is stated in articles 15 and 16 of the Constitution of the Republic of Poland, which establish legally the principle of decentralisation and local government. On the other hand, this issue is influenced by the way of forming supervision over the territorial self–government established in article 171 of the Constitution.[23]

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20 Which was restored by the Act of 8 March 1990 on Territorial Self–Government (Dziennik Ustaw of 1990, no 16, position 95). This law, after introducing higher tiers of territorial self–government is called the Act on Commune Self–Government.

21 H. Izdebski, Samorząd terytorialny. Podstawy ustroju i działalności, Warszawa 2006, p. 68.

22 Article 152 para 1 of the Constitution of the Republic of Poland: The voivod shall be the representative of the Council of Ministers in a voivodship [province].

23 B. Banaszak, Prawo konstytucyjne, Warszawa 2007, p. 729.

Article 15 of the Constitution of the Republic of Poland, beside expressing in paragraph 1[24] a general principle of decentralisation of public power, in the very same provision includes a crucial directive making the legislator, defining the territorial system of the Republic of Poland, treat the constitutional decentralisation, whose bearer is the territorial self–government, as a priority. It is of particular importance for the status of the region in the aspect of its relation with the "governmental" province (voivodship).

Article 15 para 2 of the Constitution of the Republic of Poland[25] also results in two essential directives for the legislator determining the status of the region. First, the constitution–maker decided that from that time on the basic territorial division of the State will be an instrument ensuring the territorial units the capacity of performing public tasks. Hence it should be established in the way considering foremost the needs of territorial self–government and thus also the region, and only after that the needs of the government administration.

Secondly, this provision establishes the factors which determine the distinction of the region (as well as the remaining units of territorial self–government), as a separate territorial unit. In accordance with this provision it is determined by natural ties existing on a given territory such as:

- social (e.g. a region of certain structure of employment, ethnic),
- economic (e.g. a mining region or an agricultural region with dominating large area crops),
- cultural (e.g. a region where a characteristic dialect or customs developed).

The form of this provision where is a particle "or" expressing an alternative, means that the ties of this type do not necessarily have to occur jointly. It is enough if we deal with only one type of them to meet the requirement of article 15 of the Constitution. Certainly, it is

24 Article 15 para 1 of the Constitution of the Republic of Poland: The territorial system of the Republic of Poland shall ensure the decentralization of public power.

25 Article 15 para 2 of the Constitution of the Republic of Poland: The basic territorial division of the State shall be determined by statute, allowing for the social, economic and cultural ties which ensure to the territorial units the capacity to perform their public duties.

not a sufficient condition to create a region but only condition sine qua non. In addition to it, we may point at such factors as, for example, national interest, economic reasons or historical traditions.

As already mentioned, through the administrative reform of 1998, the legislator decided on the territorial identity of the region – territorial self–government units as well as provinces – a territory of the voivod's operations. Thus, currently there is a region of double nature: self–government and government.

A legislative body of the self–government of the province is the Provincial Sejmik, and its executive is the governing board with the Marshal of the Province. The members of the Sejmik are elected in general and proportional elections, whereas the executive body is elected by the Provincial Sejmik and is accountable thereto. The term of the organs of self–government units of all tiers is 4 years.

The Province as a unit of territorial self–government performs tasks of provincial nature which are not reserved by law to the organs of government administration. The responsibilities of the province result from its nature as a unit of regional self–government. The provincial self–government carries out the policy of development of the province, which comprises creating conditions for economic development, including creating labour market, maintenance and extension of social and technological infrastructure of provincial importance, acquisition and combination of financial resources (public and private) in order to fulfil public tasks, supporting and taking actions in favour of raising the level of education, rational using natural resources and shaping natural environment in accordance with the principle of sustainable development, supporting development of science and cooperation between science and economy, supporting technological progress and innovation, supporting development of culture, care for cultural heritage and its rational use, promoting values and development potential of the Province as well as supporting and taking action in favour of social integration and against social exclusion.

In each province, beside the organs of local government administration there operate also organs of state administration, which is divided into two parts: general administration and special

administration. The general (joint) administration is managed by the voivod being the representative of the Council of Ministers in the Province and appointed by the President of the Council of Ministers. The organs of special administration are subordinate to central organs; for example, tax offices and tax chambers are subordinate to the Minster of Finance. An important competence of the voivod is supervision over all self–government units on the territory of his Province.

5. Local government in the Republic of Poland: districts and communes

The basic unit of territorial self–government is the **commune** (article 164 para 1). The implication of competence (article 164 para 3) acts in its favour. The principle of subsidiarity results in important consequences for the legal structure of local government. The commune (gmina), as the basic unit of territorial self–government, being the closest to the citizen, should be endowed with the possibly broadest range of responsibilities, inasmuch as it is able to fulfil its tasks effectively. Only when the commune cannot cope with a particular task, it should be passed to successively higher tiers of self–government, and only as a last resort to the state administration.[26]

As mentioned in the previous subchapter, the Constitution of 1997 introduced premises for the division into particular units of territorial self–government. According to article 15 para 2, the basic territorial system of the state should take into consideration social, economic or cultural ties and secure the territorial units capacity to fulfil public tasks. This provision limits the discretion of the legislator (in the case of the division of the country into provinces) and the Council of Ministers in forming the number and borders of local government units. In spite of this, the demographic and financial potential of the Polish communes are very diverse.

In view of article 169 para 1 of the Constitution of the Republic of Poland, units of local government perform their duties through

26 A. Jackiewicz, A. Olechno, K. Prokop, *op. cit.*, p. 13.

constitutive and executive organs. The legislative organ of the commune is the Commune Council (if its seat is in a town, the Town Council). The Council passes acts of local law and fulfils controlling function over managing bodies. The executive organ of the commune is the Wójt. The executive organ in the commune whose seat is in a town situated on the territory of this commune is the Mayor (burmistrz). In cities over 100,000 residents the executive organ is the President of the City. The executive organ implements the resolutions of the Council and other duties determined by law. Both the legislative and the executive organs are elected in universal elections; councils in proportional elections or by simple majority (commune up to 20 thousand residents), and the Wójt, the Mayor or the President of the City by absolute majority. It is worth adding that the only possibility to dismiss an executive organ is a local referendum.

The commune may make auxiliary units: sołectwos, quarters, estates and others. An auxiliary unit may also be a town situated on the territory of the commune. The head of the sołectwo is the Sołtys as an executive organ, elected by the Village Meeting, which plays the role of a legislative organ. The Sołtys's operations are supported by the Council of Sołectwo. The legislative body of a quarter (estate) is the Council, and the executive body is the Managing Board with the Chairperson as its head. The statute of the estate may establish that in the estate the legislative organ is a General Assembly of the Residents.

Another kind of commune is the town with the statute of district (powiat). Such a status was granted to the towns/cities which on 31 December 1998 had more than 100,000 residents, on 31 December 1998 ceased to be seats of provinces (unless the town was not granted the rights of powiat on request of the proper city council), or obtained the status of town with the rights of powiat (district) in 1998, when the local government reform involving introducing two additional tiers of territorial self–government came into force. From the formal point of view, a town with the rights of powiat is a commune. However, beside the duties of the commune it also fulfils the tasks of the powiat. The legislative organ of the town with the rights of powiat is the City Council, and the legislative organ is the President of the City.

The capital city of Warsaw has a special system. It is determined by the provisions of the Act of 15 March 2002 on the Territorial System of the Capital City of Warsaw[27]. The status of the capital city is attributed to Warsaw by force of article 29 of the Constitution. In accordance with the provisions of this law, Warsaw is a commune with the status of town with the rights of powiat.

The legislative body is the Council of the Capital City of Warsaw (with 60 councillors), and the executive body is the President of the Capital City of Warsaw. It is obligatory to create quarters, which have guaranteed appropriate financial sources necessary to perform their tasks. The legislative and controlling organ is the Quarter Council. The quarter councillors are elected in universal, direct and proportional elections. The Council elects the Managing Board of the quarter, which is an executive body (article 10). The head of the Managing Board is the Mayor of the Quarter (burmistrz dzielnicy). The Board consists also of the Deputy Mayor (Deputy Mayors) and the other members of the Managing Board. The Board includes 3–5 people. The Mayor of the Quarter is elected by the Quarter Council by secret ballot and absolute majority. The other members of the Board are elected by the Council on the Mayor's request by simple majority and also secret ballot. In the event of not electing the Managing Board of the quarter within 30 days from the first sitting of the Council, the Managing Board (including the Mayor) is appointed by the President of the Capital City of Warsaw. Among the special duties of Warsaw is securing the functioning of the supreme and central organs of the State, diplomatic representations and consular offices, providing conditions enabling to receive delegations of foreign states, as well as securing the functioning of public infrastructure important for the capital functions of the city.

In Poland there are two types of **districts** (powiats): land district and urban districts. The seat of a land district is situated outside the borders of this district, namely in the town with the rights of district. It is otherwise in the case of the urban district, whose seat is situated in the town being part of this district. In the district the legislative body is the District Council, whereas the executive organ is the Managing

27 Dziennik Ustaw no 41, position 361 with further changes.

Board with the Starosta as its head. The District Council is elected in universal and proportional elections whereas the Managing Board of the District is elected by the District Council and accountable thereto.

The provisions of the Constitution are of the basic importance for the establishment of the duties of the territorial self–government. Article 163 establishes the implication of competences in the scope of public tasks in favour of territorial self–government. Among the competences of the units of territorial self–government are fulfilling public tasks which are not reserved by the Constitution of statutes for the organs of other public authorities. The specific distribution of duties between the state administration and local government was performed in the so–called "competence laws": the Act of 17 May 1990 on the Distribution of Responsibilities and Competences determined in specific laws between the State and Local Government (Dziennik Ustaw, no 34, position 198) and the Act of 24 July 1998 on changing some laws determining the competences of the organs of public administration in connection with the constitutional reform of the State[28].

Moreover, the Constitution establishes the presumption of the fulfilment of the tasks of territorial self–government in favour of the commune (article 164, para 3). This means that the tasks of the district self–government and the provincial self–government must by enumerated by the law. They complement the tasks implemented by the commune. The district performs tasks of over–communal nature, whereas the province tasks of provincial nature not reserved by law for the organs of state administration.

Article 166 of the Constitution implies that the units of local government perform their own duties and delegated tasks. The own tasks serve satisfying the needs of a given self–governing community and are performed by it in its own name and on its own responsibility. Especially the commune's own duties embrace the issues of spatial order, real estate economy, environment protection and nature as well as water management, communal roads, streets, bridges, squares as well as organisation of traffic, waterworks and water supplies, sewage

28 Dziennik Ustaw, no. 106, position 668 with further changes.

system, removal and purification of communal sewage, maintenance of cleanliness and tidiness as well as sanitary devices.

The own duties of the district include public tasks of over–communal nature. They concern such things as promotion and environment protection, social welfare, public transport and roads, culture and protection of monuments of history, physical culture and tourism, geodesy, preventing unemployment and activation of the local labour market, and protection of the consumer's rights.

The delegated tasks are passed to the units of local government of all tiers by law or agreements, if it results from the justified needs of the State. The example of a delegated task organising, preparing and holding elections and referenda. After the commissioning of the tasks there should go financial resources from the State budget appropriate for their implementation.

In the context of the implementation of the delegated tasks by communes and districts as well as provinces, it is worth mentioning the principle of independence of the units of local government determined in article 165 para 2 of the Constitution.[29] The independence of self–government is foremost defined as a principle of freedom of operation within the framework determined by law, which is particularly important in the aspect of performing public tasks. The Supreme Administrative Court defined the essence of independence as follows: "independence of the commune, means that within the limits resultant from law it is not subordinate to anyone's will and that within these limits it takes legal and actual actions, led exclusively by its own will expressed by its elected organs. Thus, this independence results from the limits determined by law, which precisely establish the objective scope within which this independence is valid."[30] Since these legally established limits determine the scope of the independence of the region (as well as other units of local government), the task of these laws is,

29 Article 165 para 2 od the Constitution of the Republic of Poland: The self–governing nature of units of local government shall be protected by the courts.

30 Decision of 4 February 1999, IISA/Wr 1302/97, Orzecznictwo w Sprawach Samorządowych 2000, no 3, position 97.

as the Constitutional Tribunal stated, "creating a legal framework, in which this independence in the unitary state would be implemented."[31]

Protection of the units of local government is based foremost on the control of administration in the judicial sphere, which is guaranteed by the Polish system of administrative judiciary, over the acts issued by the supervisory organs. The Constitution, guaranteeing the judicial protection of the independence of the territorial self–government enables the units of local government to protect their interests also from common courts as well as from the Constitutional Tribunal.

31 See the decision of the Constitutional Tribunal of 4 May 1998, K38/97, OTK ZU 1998, position 31.

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