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How the means of electing the President of Poland acts to distort roles within the country's political system

STUDIA I ANALIZY

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Abstract: *This article is concerned with the relationship between more than 30 years of universal direct election to the post of President of the Republic of Poland and the essence of the roles associated with that position. The hypothesis put forward for testing has been that elections of the above kind give rise to distortions in the systemic model associated with the Polish Presidency. The legitimisation of the President at the ballot box reinforces the efforts of many holders of the office to introduce ruling-related elements of the Presidency in practice, in the context of the political system. Elections also strengthen relations between the President and his political camp, in this way undermining the presidential arbitration function. In essence, an election campaign is subject to mechanisms of “Prime Minister-isation”, whereby a candidate for President usually presents (feels obliged to present) a programme appropriate for an organ truly engaged in the pursuit of state policy.*

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Initial remarks

There are several reasons at least why the institution of President of Poland would seem of crucial importance within the country's political system. These may be divided into two groups, of which the first concerns the set of needs linked to post-holding by the supreme organ of the state, in whom are imbued entitlements serving arbitration, the harmonisation of political relationships in the state, and the representation of that state in both internal and external relations. The second group is in turn linked with society's need to have in place a leader and "father figure". The majesty and the solemnity or dignity of the state are as made manifest in the person of the President.

Under the 1997 Constitution of the Republic of Poland, the President thereof is located within a model of parliamentary and cabinet governments¹, albeit without any possibility of "the ship of state" actually being run from that post. For Poland's Basic Law states authoritatively in Art. 146, para. 1 that "The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland", while the functions and competences vested in the President are such as to confer upon the holder the status of guardian and guarantor of the state's fundamental principles and values.

The above gives rise to a first research question as to whether the model of universal direct election to the presidency kept in place for more than three decades now actually corresponds with the roles apparently assigned to the President under Poland's political system. For the subject literature does feature a standpoint of the following kind (albeit as translated into English): "adoption of the rule that the President shall be chosen by way of universal elections has first and foremost reflected society's acceptance of this means of election, even as this fails to coincide cohesively with the overall shape of solutions arrived at within the political system"².

¹ However, there is no shortage of views that it is possible to find elements of different government systems within the Polish Constitution. *Powoduje to, że poglądy zmierzające do zaklasyfikowania, wynikającego z Konstytucji, systemu rządów do którejś ze znanych form ustrojowych, są zróżnicowane, a nawet dość rozbieżne* ("This ensures that reviews seeking to achieve an assignment of systems of government arising out of the Polish Constitution to different known forms of political system are diverse and even quite disparate"). A. Jamróz, *Status konstytucyjny Prezydenta RP w świetle funkcji określonych w art. 126 Konstytucji (propozycje wykładni)*, [in:] S. Bożyk (ed.), *Aktualne problemy reform konstytucyjnych*, Białystok 2013, p. 77.

² B. Dziemidok-Olszewska, M. Kowalska, K. Leszczyńska, M. Michalczyk-Wlizio, *Ustrój polityczny Rzeczypospolitej Polskiej w Konstytucji 1997 roku*, Lublin 2018, p. 117.

Also making their appearance are somewhat controversial approaches that require the posing of a further research question – as to the level of authority achieved by the President as a reflection of the model adopted for elections to the post in question. Thus Paweł Sarnecki for example writes (in Polish) to the effect that: “There can after all be no doubt that such a system by which the Head of State might be designated [*involving a selection being made by Parliament – T.S.*] assures the holder of office of far more limited authority, while only generating a far more limited weight of the political office than do universal and direct elections”³. Equally, practice noted for the German or Israeli presidencies requires that we take a careful look at how the approach in question is justified.

The constitutional model relating to the office of President of Poland may be put together with the practice when it comes to the exercise of the power of that office (including the elements associated with elections) to warrant a research hypothesis that universal elections actually give rise to a distortion of the systemic model in place in Poland for its presidency. On the one hand, any election campaign – and especially the kind we actually encounter – cannot help but persuade voters that they are dealing with a key decision-making entity within the governance system (or even within the political system more broadly). Indeed, the practice is that the campaign is run in a “Prime Ministerial” sort of spirit – a truth I will seek to illustrate by reference to the 2020 Presidential Election. But then there is of course the other side of the coin – whereby the actual holders of the highest office in the land tend to feel that universal elections have conferred upon them some high(er) level of legitimacy going beyond the basic normative level. And this strong mandate is perceived by incumbents as a kind of right to claim a role in the joint pursuit of state policy.

As the subject matter in question is taken up and pursued, it would seem inevitable that a neo-institutional method be followed as the basic means of doing research. This allows, not only for appropriate consideration to be given to the normative/institutional factor, but also for it to be appreciated in the political context, as well as in relation to the personalities and competences of holders of the office of Head of State.

³ P. Sarnecki, *Konstytucyjna pozycja prezydenta wybranego przez parlament w państwach Europy Środkowo-Wschodniej*, [in:] S. Bożyk (ed.), *Prawo, parlament i egzekutywa we współczesnych systemach rządów*, Białystok 2009, pp. 331–332.

The restoration of the office of President and first elections thereto

The reinstatement of the office of President was an outcome of the so-called “Round Table” (*Okrągły Stół*) talks held between February and April 1989. More than once there was an impasse in those negotiations regarding the wisdom of bringing back a single-person Head of State. However, the side representing the governing coalition saw the office of President as safeguarding gentle, evolutionary political and systemic change, and indeed as in some way standing guard over the position and role in the state of the (Polish United Workers’) Party (*Polska Zjednoczona Partia Robotnicza, PZPR*) as well as its various allies. For its part, the Solidarity/Opposition party to the talks saw any excessively strong systemic “tethering” of a Head of State as unacceptable. From the opposition standpoint, an optimal solution would have been to continue with the kind of collegiate Presidency that the Council of State (*Rada Państwa*) was deemed to represent. The then stance of the Solidarity/Opposition side would thus appear to have applied a logic maintaining that the most important change was that of the “philosophy” of the political system, which would allow for a step-by-step extending of civil rights and freedoms, including in particular as regards political pluralism, freedom of speech, the re-legalisation of NSZZ “*Solidarność*” as such, the redevelopment of local and or regional government, and so on. Only further down the line would they envisage more-profound systemic change involving the supreme organs of state.

Clearly, the governing-coalition side had the intention of drawing – possibly dragging – “Solidarity” into a cooperative, joint-responsibility venture that would not at the same time deprive the authorities in charge up to that point of the control they exerted overall, over the “ship of state”. In contrast, the Solidarity/Opposition side was seeking to acquire the possibility of exerting control and exercising scrutiny over those in power as broadly as possible, without actually taking on that power formally. This would certainly have provided for *Solidarność* and other associations and organisations to be legalised⁴.

However, this kind of approach left it looking more appropriate or wise for representatives of the Opposition to take assigned places within the Council of State, in this way coming to influence the activities of this collegiate Head of State (while not at the same time becoming account-

⁴ J. A. Majcherek, *Pierwsza dekada III Rzeczypospolitej 1989–1999*, Warsaw 1999, p. 24.

able for the actual process of governance). As one view (here translated into English) had it: “In rejecting [...] the proposal that a post of President of Poland be established, the opposition reasoned that that might be acceptable where the President was elected directly by universal suffrage. Another solution would have been agreement to competitive elections for the lower House of Parliament (the Sejm), denoting therefore free elections with no pre-agreed deal regarding the divide-up of seats”⁵.

The opposition were thus setting out clearly enough their price for the reinstatement of the office of President, even as they (seemingly) lacked conviction as to the possibility of such a scenario actually coming to pass. The opposition stance can therefore be regarded as a bargaining position, and a point of entry into further negotiations. In essence therefore, at the beginning of March 1989, a compromise regarding the reappearance of the institution of President of Poland had been sketched out. According to R. Mojak, the deal in question was based on three key premises⁶:

1. In exchange for an office of President supplied with a considerable range of competences, the authorities were to accept a departure from *PZPR* managing role within the state.
2. The position of the President within the system was to be compensated for by the restoration of a freely-elected Senate chamber. The President would then have been elected by the two House of Parliament – *Sejm* and *Senat* – acting as combined together in Poland’s National Assembly (*Zgromadzenie Narodowe*). Representatives of the Opposition sitting in the Senate would at the same time, and in this way, have offered a legitimising seal of approval to the office of President.
3. It was in the very nature of the political philosophy espoused and embodied by the Round Table Talks to see it as desirable for the opposition to become coupled with Poland’s political system, with accountability for the state shared in this way.

April 5th 1989 then brought signature of a crowning document for the Round Table work on state reform, entitled *Stanowisko w sprawie reform politycznych* (the Standpoint in the matter of Political Reforms). The accord between the two parties that this in essence represented met the key demands and requirements of the *Solidarity* side, given that the document had provisions on the introduction of political pluralism,

⁵ R. Mojak, *Instytucja Prezydenta RP w okresie przekształceń ustrojowych*, Lublin 1995, p. 70.

⁶ *Ibidem*, pp. 71–72.

freedom of speech, democratic elections and local/regional governance. Equally, systemic change was to occur via evolutionary change, hence the *Standpoint* was grounded firmly in the process of transformation, thereby at the same time putting paid to any ideas for abrupt or revolutionary change. The last sequence in the outlined evolution of the political system was to be parliamentary democracy.

The accord foresaw the holding of elections to the *Sejm* albeit limited contractually⁷, as well as fully free elections to the *Senat*. It was therefore in line with what was established at the Round Table that a mechanism of moderate governance was ushered in, with no question that the government and opposition camps had to work together. There was then a specific kind of coupling of the two camps, with *PZPR* hanging on to actual power, while not being able to take decisions unless the consent of *Solidarity* was forthcoming – and with the latter in turn drawing its key institutional support from the *Senat* or Upper House.

In line with the *Standpoint*, reform of state institutions was to encompass both *Sejm* and *Senat*, as well as the office of President and the courts. The principle of the uniformity of state power was upheld, with the *Sejm* to remain the supreme organ of state authority. Furthermore, combined together as the National Assembly, the *Sejm* and *Senat* were to elect the President of the People's Republic of Poland for a 6-year term. A candidate for this office of Head of State could be put forward by one-quarter of all the Deputies and Senators.

In this context, the establishment of the office of President was justified by the need to maintain the stability of the state and allow for decision-making where work in the *Sejm* and *Senat* was blocked, or where some extended crisis of government had taken hold⁸. The Agreement simultaneously foresaw the office of President as the highest in the land (and hence supreme representative of Poland and Head of State) and also as a segment of the executive alongside the Council of Ministers (*Rada Ministrów*). This denoted its being supplied with broad possibilities to exert an influence on other organs of the state. There was thus here a manifestation of a concept verbalised by the coalition-government

⁷ In line with this agreement, 65% of seats in Parliament were assigned to the (Polish United Workers' Party and its political allies, while the free-election part (involving "non-party candidates") had 35% of the seats assigned to it. When the election results came to be announced, it was found that the entire 35% pool (equal to 161 seats) has been won by *Solidarność* candidates.

⁸ T. Moidawa, *Konstytucje polskie 1918–1998*, Warsaw 1999, p. 290.

party, which demanded that the President be turned into a guardian of a modernised socialist political system.

In practice, the way in (General) Wojciech Jaruzelski actually discharged his official duties while in office only served to accelerate the transformation process – not least a final and decisive departure from communism otherwise portrayed as “Real Socialism”⁹.

The presidential election in the circumstances of the Polish People’s Republic took place on July 19th 1989, by reference to just one announced candidature – that of the aforesaid General Jaruzelski, who had through to that time chaired the Council of State. Following long procedural discussions, it had been established that the President would be elected via an open voting process involving ballot papers. Voting was participated in by 544 Members of the National Assembly (though the total number was 560). 537 of the votes cast were valid, though election of the President required just 269 of these. Nevertheless, the candidate was actually voted for by just 270 of the Members of the National Assembly, with 233 votes against and 34 abstentions. It can be argued that this absolutely minimalist expression of support for the First Secretary of the Party was one of the influences (though certainly not the sole influence) shaping what came to be regarded as Jaruzelski’s passive presidential style¹⁰.

The introduction of universal presidential elections in 1990

A matter of key significance to the subject matter here was of course the amendment of the Constitution as enacted on September 27th 1990. It was the means of electing the President that represented the foremost of these September modifications, with the idea of election by the National Assembly now abandoned, and its place taken by an adopted model of universal and direct elections. By ensuring legitimacy derived from the people as sovereign, such elections were to ensure a constitutional strengthening of the post of Head of State, including above all an “arbiter” function within the political system. In practice, this became a key argument in disputes – first and foremost between President and Parliament – given that both *Sejm* and *Senat* on the one hand

⁹ To read more widely about the agreement regarding the political system concluded at the Round Table, see T. Słomka, *Socjalistyczna demokracja parlamentarna: granice porozumienia ustrojowego w 1989 r.*, «Studia Politologiczne» 2009, vol. 15.

¹⁰ T. Słomka, *Prezydent Rzeczypospolitej po 1989 roku. Ujęcie porównawcze*, Warsaw 2005, p. 101.

and President on the other enjoyed direct mandates from the citizen¹¹. The President thus ceased to be a specific kind of “hostage” to political groupings, while the presidency of Lech Wałęsa (with him being the figure in the country and world that he actually was) came to symbolise a particular kind of emancipation of the Head of State, and beyond that a kind of attempt to turn this person and post (and indeed a wider presidential administration) into a key element by which state policy was to be shaped, above all when it came to matters of international relations and security.

Amendments to the Constitution changed the presidential term in office from 6 to 5 years (with a single possibility for re-election). Furthermore, a candidate for the office of President now had to have Polish citizenship, had to enjoy full rights where the election of Deputies to the *Sejm* was concerned, and had to be 35 or more years old (at the latest on election day)¹². Indeed, following the 1990 presidential elections a further requirement came into play – that a candidate needed to be permanently resident on the territory of the Republic of Poland; and in fact to have been so for 5 years prior to the time of the election. A candidate for the presidency might be put forward by voters directly, or by social or political organisations, though either way the signatures of 100,000 or more voters for the candidacy was required.

However, the change in the means by which the President of the Republic of Poland is elected was no systemically-grounded concept arising out of an analysis of the Constitutional system and its shortfalls. Instead, it needs to be seen as a manifestation of a kind of political compromise entered into within the *Solidarity* camp – between supporters of Lech Wałęsa and Tadeusz Mazowiecki; who had in fact split from one another and were in a state of constant dispute. There was thus no attendant reflection on “what should become of the Presidency and where should it be located?” post-1990¹³, given that the institution was anyway seen as little more than a provisional Constitutional measure.

¹¹ D. Górecki, *Ewolucja przepisów dotyczących trybu wyboru prezydenta w polskim prawie konstytucyjnym*, «Przegląd Sejmowy» 1996, no. 2, p. 9.

¹² Under Constitutional provisions from the years 1989–1990, a candidate for the Presidency of Poland had to be 21 or more years old (thereby meeting conditions (also in regard to age) that are set for those seeking to be Parliamentary Deputies).

¹³ For a broad view of this topic, see S. Gebethner, *Geneza i tło polityczno-ustrojowe wyborów prezydenckich 1990 r.*, [in:] S. Gebethner, K. Jasiewicz (eds.), *Dlaczego tak głosowano. Wybory prezydenckie '90*, Warsaw 1993.

The President's role in the system in the light of the 1997 Constitution of the Republic of Poland

It is here necessary to invoke one of the adopted assumptions here, in line with which the experiences with a hybrid-model presidency from the time of amendment of the 1952 Constitution as well as the Constitutional Act of October 17th 1992 (the so-called *Mala Konstytucja* or “Small Constitution”) were followed by a more consistent “parliamentarisation” of the system of governance, while the presidency – still finding itself located within the active model – found itself steadily stripped of entitlements of any more far-reaching governing significance (*vide* the exercise of “overall leadership” over international and security policy). And of no minor significance here was the practice gained in relation to Presidents’ (notably Lech Wałęsa’s) actual exercising of their powers in office¹⁴.

The core notion of the role of the President of Poland under the Constitution is as set out in Art. 126, para. 1 thereof. It needs to be emphasised quite clearly that, the basic law has the President as the supreme representative of the state, rather than the nation or people. The latter role (as invoked in Art. 104) is rather one ascribed solely to Deputies in the *Sejm* and Senators in the *Senat*.

However, there is no way to entirely eliminate a specific relationship pertaining between the Head of State and citizens, especially given the accentuation of the idea that the Polish state is the common good of all of the country’s citizens. There is thus no way of fully representing the state organisation, and discharging the functions associated with that, unless some account is taken of the factor that is bearer of supreme authority. A new solution present in the 1997 Constitution is conferment upon the President of a role in securing the continuity of state authority.

Now this may be looked at from two different perspectives. On the one hand, there is an organisational side that “entails appropriate shaping of the terms in office of different state organs (with that of the President being longer than that of Parliament) in line with a privileged stability of the office of President and the safeguarding of continuity of

¹⁴ Z. Witkowski emphasises that “[...] Wałęsa niejednokrotnie doprowadzał do takiego rozregulowania mechanizmów konstytucyjnych, że wcale nierzadko praktyka instytucjonalna zbliżała jego rządy do reguł systemu prezydencko-parlamentarnego, co zresztą było w konsekwencji istotnym powodem [...] dążeń w ZN do ograniczania konstytucyjnej pozycji prezydenta w pracach nad nową konstytucją”. Z. Witkowski, *Model prezydentury polskiej w Konstytucji z 1997 r. w porównaniu z rozwiązaniami Francji, Niemiec i Włoch*, [in:] E. Gdulewicz, H. Zięba-Zaluśka (eds.), *Dziesięć lat Konstytucji Rzeczypospolitej Polskiej*, Rzeszów 2007, p. 326.

its operations. This means that there is no gap between terms in office, as well as a concept that obligations may if necessary be discharged by the Speakers (Marshals) of the *Sejm* or *Senat*). Ultimately, this approach also finds its confirmation in the remit supplied to the President when it comes to the creative and organisational sides, *vis-à-vis* all other authorities in the state; as well as [...] a political-arbiter role”¹⁵. Also necessarily ascribed to the role is something in the nature of a guarantor function, first and foremost as regards the ongoing functioning of the state and its institution, as well as the generation of essential set standards where a state of exceptional threat comes into play. Examples of entitlements falling upon the Head of State related to the declaration and introduction of Martial Law and/or a State of Emergency, the issuing of Regulations by virtue of Acts under Martial Law and the appointing of a Supreme Commander of the Armed Forces in time of war.

In essence, the Polish model for the presidency does have assigned to it an arbiter function not gaining verbalisation in the Constitution (unlike, say, in France’s Fifth Republic or in Romania). The President plays a key role in the system of governance (and indeed the political system) as this kind of arbiter (or indeed moderator) – supplied with a strong set of instruments by which to exert an impact on organs of state authority and other entities within the political system.

In other words, a task falling upon the President is to harmonise the operations of state institutions, and to “cool down” inflamed situations or those of clear crisis.

I here propose to draw a distinction between two types of presidential arbitration, i.e. that placed under the framework of the country’s political system on the one hand, and – on the other – that of a more politico-social nature¹⁶.

Arbitration of the first kind is pursued on several levels: shaping conditions for the functioning of (and for cooperation between) state authorities, inspiring the activity of other authorities and balance between powers and otherwise serving in the role of a “barrage” or “dam” or “tollgate” where the activity of other authorities is concerned. The scope of this arbitration is thus very broad and allows for involvement (or interference) in the activity of both legislative and executive organs (the Prime Minister in the role of Chair of the Council of Ministers, as well as Ministers and the Council of Ministers itself).

¹⁵ D. Dudek, *Autorytet Prezydenta a Konstytucja Rzeczypospolitej Polskiej*, Lublin 2013, p. 28.

¹⁶ See T. Słomka, *Prezydent Rzeczypospolitej...*, pp. 144–151.

However, the President's remit in regard to the discharge of arbitration functions does not turn him into an organ of authority (or ruler), or a leader, or even a co-shaper of state policy. But equally there is no way the post can be demoted to that of "notary" with the government system. For the President is that system's keystone, burdened with a duty to safeguard its proper functioning. The sphere involving systemic arbitration is mainly delimited by entitlements specific to the President (and thus freed of any need for the government to "counter-sign").

Now, it would be risks to advance and pursue a hypothesis that a President deprived of the chance to be chosen in universal direct elections would in any way find him/herself deprived of the chance to pursue and proceed with the arbiter-type entitlements referred to above. Speaking against that idea would be the entire output of the Italian Presidency, correctly described and summed up by Marek Bankowicz in the words *prezydent często pozostaje jedynym stabilnym elementem systemu władzy, gwarantem ustrojowego equilibrium oraz pewnym punktem oparcia, cieszącym się sporym autorytetem w społeczeństwie* ("The President is regularly the sole stable element in the system of power, a guarantor of systemic equilibrium and a certain kind of support-point who enjoys considerable authority in society")¹⁷.

Equally, universal elections are not in fact a means by which a President/Presidency can be imbued with authority (in this "public respect" sense of the term), nor a way of ensuring that the post-holder is supplied with appropriate political competences and experience. Indeed, the reality might be quite the opposite, as such elections may operate to dignify a Head of State with some kind of efficient demagoguery, or else to fashion from him or her some kind of unique "product of political marketing".

In turn, the Presidential arbitration of a political and social nature is basically pursued with no resort to instruments provided for under the Constitution. To put it broadly, what is involved here is Head-of-State mediation – as taken up in matters proving controversial and/or divisive within society. Ensured in this way is a suitable level and plane on which political and public interests are balanced, and efforts can be made to achieve one goal or another, as articulated by a variety of different groups.

However, the element central to this kind of process is again whatever authority the post-holder has been able to muster with the public and

¹⁷ M. Bankowicz, *System polityczny Republiki Włoskiej*, [in:] M. Bankowicz, B. Kosowska-Gąstoł (eds), *Systemy polityczne 2: Ustroje państw współczesnych*, Kraków 2020, p. 202.

others, as well as convictions regarding that person's capacity to rise above political division and bring mediation skills to bear. Hypothetically, there is indeed a certain sphere in which this kind of role might be favoured by universal elections and a mandate from the masses. On the other hand, an election campaign and the political dispute or even rancour that surrounds it may weaken or undermine the presidential capacity to later engage in political and social arbitration. Indeed, there may be many voters for whom the President is and will remain nothing more or less than a political opponent¹⁸.

The tasks of the President in the context of the country's political system (as referred to in Art. 126, para. 2 of the Constitution) include the safeguarding of that basic law, as well as the defence and security of the state. A major role is also assigned above all to defending the constitutional order present in the country. *Prezydent – strażnik ustawy zasadniczej – powinien być naturalnym wzorem przestrzegania jej przepisów dla innych organów władzy państwowej oraz obywateli, a co się z tym wiąże – stanowić autorytet w sferze ochrony ładu konstytucyjnego* ("the President – as guardian of the Constitution – should be a natural model for other organs of state authority – and for citizens – when it comes to the heeding of its provisions. And going together with that is the authority offered where the defence of the constitutional order is concerned"¹⁹).

The relevant authority residing in the Head of State should be fostered and reinforced by some kind of outstanding legal knowledge (even as it remains obvious that the President need not be a lawyer); and indeed by a wealth of experience when it comes to the law being applied. However, it is by no means obvious or automatic that this factor will be well enough on display in the course of an election campaign. Furthermore, these are not in fact matters of any particular interest to voters, who are rather anticipating a prescription for a higher quality of daily life.

The role of the President within Poland's political system (and perhaps in particular the part of that the role relating to arbitration) is also to be interpreted through the prism of the Head of State being located within a specifically-defined model for the division of power. Post-1992,

¹⁸ For example, in opinion polling carried out in July 2020, having been commissioned by the *DoRzeczy*, as many as 48% of those voting for Rafał Trzaskowski claimed they had mainly supported the *PO* candidate so that Andrzej Duda would not win. See: <https://dorzeczy.pl/kraj/148386/co-rozni-wyborcow-dudy-i-trzaskowskiego-znamienny-sondaz.html> (28.01.2021).

¹⁹ A. Suska, *Prezydent Rzeczypospolitej Polskiej jako organ czuwający nad przestrzeganiem porządku konstytucyjnego*, Toruń 2019, p. 72.

the President gained formal inclusion within Poland's executive²⁰. The model adopted foresaw the separation of powers *à la Montesquieu*, albeit with certain modifications taken into account. Poland's Constitution bases the system relating to the supreme organs of the state on mechanisms entailing separation and balance, but also joint action – as the Preamble make very clear. This is a model for moderate governance, with a clear counterbalance offered to any model based around confrontation, or else any dominance of given centres of authority.

The above reference to a duty on the part of the authorities to work together corresponds closely with the model that sees the President as an arbiter, even as the fact of the post falling within the framework of the Executive fails to favour that. A more effective systemic solution would seem to involve the Head of State being separated out as a kind of “fourth estate” – with the causes of arbitration and neutrality served, in just the kind of way as is envisaged by the 1947 Constitution for the Italian Republic²¹. This is a politically-neutral (though naturally not an apolitical) Presidency founded upon the concept of monarchy as enshrined in the model for the separation of powers owing to Benjamin Constant. That outstanding French theorist of the state system regarded Montesquieu's tripartite division as inadequate and incomplete, given that its set of instruments of the state was in need of an independent and neutral arbiter whose task was to ensure cooperation between organs, preventing the dominance of any one centre of power within the political system. The neutral Head of State is moved aside from any active state governance as *le pouvoir neutre et intermédiaire* should take care of interests different from those applying to the governing on the one hand and the governed on the other. The highest authority is also to be enjoyed – similar to that of a judge among parties to a case²².

It is obviously hard to anticipate that a constitutional democracy of republic form will provide for any meeting of Constant's condition that the office of Head of State might be hereditary. Equally, it would be hard to claim unambiguously that universal elections are favourable to the singling-out of the kind of holder of the office who might at the same time match the model in question. On the contrary, with the conditioning present in post-1990 Poland, and other than in the specific case of Lech Wałęsa (who represented a major – though not 100% –

²⁰ Still formally binding in the 1989–1992 period was the principle of unified state authority as inherited from the original wording of the Constitution in the Polish People's Republic.

²¹ Cf. F. del Giudice (ed.), *Costituzione esplicita spiegata articolo per articolo*, Napoli 2017, p. 199.

²² R. M. Małajny, *Trzy teorie podzielonej władzy*, Warsaw 2001, p. 372.

chunk of the Solidarity Movement as supported by *Solidarność* the trade union), the Polish Presidency always went to a candidate representative of a clearly-defined political option, and more often than not a particular political party²³. The universal election process thus failed to deliver into office persons who “should personify interests different from those of either the governing or the governed”. Ultimately, this is not about the fact that candidates representing authority figures in society as a whole were lacking²⁴, but rather about specific features of the campaign requiring large financial outlays and inputs of organisational effort. It is these that the political parties that really count are able to ensure first and foremost.

Beyond that, Rafał Glajcar rightly drew attention to the way in which universal elections usher in a defined kind of political mechanism, as: “the ties linking the victor in given Presidential Elections with the party from which that person derives, do not find themselves severed at the moment the new office is taken up, irrespective of the relevant standpoint presented officially. The systemic mechanism of the Presidential election favour maintenance of proper relationship between the two entities. By supporting his grouping, the President ensures (himself) the chance to stand in the next election, while the party in which that person originates uses the intermediary role to ensure control of a key fragment of state policy, being thus in a better position to take action in pursuit of its political programme” (*relacje łączące zwycięzcę wyborów prezydenckich z partią, z której się wywodzi, nie zostają zerwane w momencie objęcia przez niego urzędu, bez względu na oficjalnie prezentowane w tym względzie stanowiska. Systemowy mechanizm wyboru prezydenta sprzyja utrzymywaniu poprawnych stosunków pomiędzy obydwoma podmiotami. Prezydent wspierając swoje ugrupowanie zapewnia sobie możliwość startu w kolejnej elekcji, zaś partia, z której się wywodzi, za jego pośrednictwem kontroluje istotny fragment polityki państwowej i ma możliwość podejmowania działań zmierzających do realizacji swojego programu politycznego*)²⁵. This particular kind of symbiosis between

²³ Aleksander Kwaśniewski had been the leader of *Sojusz Lewicy Demokratycznej/SLD* (the Democratic Left Alliance) and Lech Kaczyński of *Prawa i Sprawiedliwości/PiS* (“Law and Justice”). For their part, Bronisław Komorowski was a major political figure of *Platforma Obywatelska/PO* (the Civic Platform), while Andrzej Duda was a committed *Law and Justice* activist.

²⁴ It is here worth recalling candidates including the first President of the Supreme Court, the Commissioner of Human Rights/Ombudsman and an outstanding cardiologist and heart surgeon.

²⁵ R. Glajcar, *Podzielona egzekutywa – relacje między Prezydentem RP a Radą Ministrów w latach 2007–2013*, [in:] D. Plecka (ed.), *Demokracja w Polsce po 2007 roku*, Katowice 2014, p. 52.

the Head of State and the given political camp, as nicely shaped by the model in place for the election of Presidents, ensures an in-practice distancing of the presidency from the relevant constitutional axiology.

The tendency for elements of a presidency with authority to be ushered in

Over the last 30 years the holders of the office of Polish Head of State have shaped Presidencies of differing styles, both more active and more passive²⁶. On the one hand, it is possible to identify a tendency towards the neutral and symbolic holding of the office (as by Wojciech Jaruzelski or Bronisław Komorowski), in line with an assumption that the pursuit of state policy is a matter for the government. On the other hand – there have been several other holders of the office (I would say Lech Wałęsa, Aleksander Kwaśniewski and Lech Kaczyński) who attempted active participation in the exercise of power within the state, or even – to put it another way – to harness elements of a presidency with real power and put them into effect within the system. There were many reasons for this, with account needing to be taken of the personality factor, the political context, and provisions of the Constitution.

The factor of personality made itself felt in particular during the presidency of Lech Wałęsa. From 1990 onwards, the charismatic leader of a great social movement who had spent the whole of the 1980s as a politician working to bring a defined system of authority now found himself confined – and needing to operate – within the limits set for that particular organ of authority under the Polish Constitution.

Indeed, Wałęsa saw the model that has the President serving as an arbiter as “too tight a suit” for him, given that it prevented the Head of State from exerting a direct influence on that state’s governance. The public debate taking place at that time worked on a specific defining of Wałęsa’s personality, with features identified including unpredictability of action, a lack of responsibility (or accountability), an “unreformable” nature (in the sense that there was seen to be little or no capacity to learn from mistakes made), and a lack of competence – probably in both senses of the word – when it came to many spheres in which the state operated²⁷.

²⁶ More broadly, see: T. Słomka, *Style prezydentury. Analiza porównawcza*, «Przegląd Sejmowy» 2005, no. 6.

²⁷ Cf. A. Michnik, *Dlaczego nie oddam głosu na Lecha Wałęsę*, «Gazeta Wyborcza», 27–28 October 1990.

In turn, I feel that post-2007, a key aspect of the activity engaged in by President Lech Kaczyński revolved around raw emotion following the failure at the general election ballot box of *Prawo i Sprawiedliwość* – the *Law and Justice* political camp headed (at that time even as actual Prime Minister) by the President’s identical-twin brother Jarosław Kaczyński.

Obviously a key political factor influencing activity on the part of the Head of State (of course not only in Poland) is the so-called “co-habitation” that is very often needed – i.e. some kind of functioning between two segments of the executive in which circumstances have conspired to ensure origins in two opposing political camps. In the Polish case, the only Presidents not required to act as they at the same time “co-habited” have been Bronisław Komorowski and Andrzej Duda. That statement suffices to make it clear that Poland already has quite broad experience of the frequent difficulties arising when cooperation between President and Government is essential.

A key such example must of course be the relationship already alluded to – between Lech Kaczyński as President and the coalition government under Donald Tusk, which was formed between *Platforma Obywatelska* (*Civic Platform*) and *Polskie Stronnictwo Ludowe* (the Polish People’s Party or Peasants’ Party). The years in question of 2007–2010 witnessed a marked increase in the incidence of Acts receiving the Presidential veto, even as Kaczyński also sought to have an active influence on the makeup of the Cabinet, and was very willing to make use of his entitlement to convene the so-called Cabinet Council (*Rada Gabinetowa*) provided for under the Constitution. This notwithstanding the way in which “a characteristic feature of these sittings first and foremost entailed their bringing to the attention of the outside world the major differences pertaining between government and Head of State”²⁸.

Of course, relations between the organs of the executive manifested in periods and conditions of “co-habitation” are much influenced by the actual moment at which the public supplies the relevant mandate and legitimacy to govern. For the centre of power originating in the more-recent elections (whichever it is) is very frequently inclined to invoke that (somehow-greater) legitimacy conferred by the people as sovereign. In this way, universal elections of the Head of State are in a position to sharpen up conflict with the government (and a broader parliamentary majority), where a President can claim a fresh mandate, be that newly-renewed or just obtained in general.

²⁸ R. Głajcar, *Podzielona egzekutywa...*, pp. 56–57.

Finally, there is a clear need to draw attention to decisions and provisions in and around the Constitution of Poland that favour the appearance of aspects of a presidency wielding actual power or authority.

I have already referred to the dilemmas linking the upholding of the 1997 Constitution and the tripartite separation of powers. Provisions of Article 10 of that Constitution may incline the President to a kind of interpretation whereby – since that office does officially constitute a segment of the executive – there is actually no representative (or even arbitration-related) role being ascribed to it, but rather a ruling or governing role that makes possible active co-participation in the development and pursuit of state policy. This seems to be how Lech Kaczyński came to look at this role (and indeed give expression to it in public pronouncements), not least as he invoked a capacity to exert influence in both foreign and security policy. The President stated that provisions of the Constitution *czynią obszar polityki zagranicznej, a jeszcze bardziej obronnej, sferą kondominialną, w której istotny udział zachowuje prezydent, co oznacza, że jest to sfera koniecznych uzgodnień między prezydentem i rządem* (as translated into English: “make the area of foreign policy, and even more so defence, a condominium sphere, in which significant participation is reserved for the President. That means this is a sphere of necessary accommodations between President and Government”)²⁹. The particular kind of “clinch” pertaining between the centres of the Executive had to wait until May 20th 2009 to receive some resolution at the hands of the Constitutional Tribunal of the Republic of Poland.

There is no way of seeing the sphere of constitutional dilemmas favouring the political aspirations of Presidents in isolation from the model whereby the Head of State is elected directly and by universal suffrage³⁰. In the relevant subject literature the focus is not merely on the way in which universal presidential elections (as an institution copied from circumstances of presidentialism and semi-presidentialism) meet the assumptions of a parliamentary system. It is also worth giving credence to the standpoint of those sceptics who “also warned against the possibility of such elections being treated as springboards by which a President might bolster his/her position and authority – in contraven-

²⁹ Cited after: L. Mażewski, *Prezydent RP w projekcie konstytucji Prawa i Sprawiedliwości oraz według prezydenta Lecha Kaczyńskiego*, «Kwartalnik Prawa Publicznego» 2010, no. 3, p. 194. Cf. also M. Dobrowolski, *Przywódtwo polityczne Prezesa Rady Ministrów w Rzeczypospolitej Polskiej w latach 1989–2015*, Warsaw 2020, p. 311.

³⁰ See R. Glajcar, *Dwadzieścia pięć lat powszechnych wyborów prezydenckich w Polsce. Potrzeba rewizji?*, «Studia Politologiczne» 2016, vol. 42.

tion of the spirit of the 1997 Constitution” (*przestrzegali również przed możliwością traktowania takich wyborów jako swoistej trampoliny dla sukcesywnego powiększania rzeczywistej pozycji i władzy prezydenta, co przecież kłóciło się z »duchem« konstytucji z 1997 roku*)³¹.

Moreover: *mandat, który prezydent uzyskuje bezpośrednio od suwerena, może [...] wytwarzać w nim przekonanie o szczególnej więzi łączącej go z narodem* (“the mandate a President gains directly from the sovereign might generate within him a conviction as to particular ties connecting him with the nation”)³². Such a stance was to be met with many times during the time the office of President was held by Lech Wałęsa, who became convinced that the strength of the mandate he enjoyed as a one-person organ in the state was far greater than the diluted one enjoyed by a Parliament in which a great many different representatives of the nation took their seats.

A “Prime Minister-isation” of the presidential election campaigns (as exemplified by the 2020 election)

The conditioning underpinning universal presidential elections denotes at least a couple of key regularities. The first draws attention to the confrontational nature of the election caused first and foremost by the participation of political parties (or even broader blocs), with these playing the main role in identifying and singling out key candidates. During an election campaign, but also quite commonly during the subsequent office-holding, a President may become a kind of “hostage to a political party”.

In the second place, it is possible to invoke a personalisation of political rivalry that merely encourages voters in their conviction that what is really involved is rivalry between the political leaders we in fact look to for key state decisions. The President appears to be a main figure with state power at his/her disposal, and as somebody that other organs of the state are in some sense dependent on, and certainly accountable to.

Voters thus pose – internally to themselves – a reasonable question as to whether somebody who can be elected can really be of no rel-

³¹ B. Szmulik, J. Szymanek (Introduction), *Konstytucja Rzeczypospolitej Polskiej*, Warsaw 2017, pp. 56–57.

³² R. Głajcar, *Podzielona egzekutywa...*, p. 57.

evance to the political system. Most often, this is then followed home by a lack of reflection as to the real constitutional opportunities the functioning of the presidency has to offer. Indeed, candidates do not seem to make too much effort to redirect the imaginations of the voters back on their proper track. It is therefore by no means easy to agree with the view that, irrespective *od wpływu retoryki wyborczej na sposób formułowania oferty programowej przyszłej prezydentury większość kandydatów przygotowując założenia kampanii wyborczej musiała brać pod uwagę zakres owych uprawnień konstytucyjnych* (“of the influence of electoral rhetoric on the way in which campaign platforms for the presidency are worded, most candidates had to bear in mind the constitutional entitlements”)³³. This shoves presidential campaigns in the direction of a kind of “Prime Minister-isation”, by which would be meant candidates’ putting forward to the electorate something appropriate for a head of the executive³⁴, even as the programmes involved might only be put into effect where the parliamentary majority in place happens to favour the given President.

From many points of view, the 2020 election campaign departed from previous standards for elections and campaigns run in the circumstances of constitutional democracy. On the one hand this was conditioned by the then-prevailing COVID-19 pandemic. However, the conditions that denoted were taken advantage of by the camp of the parties ruling in Poland (*PiS* (“Law and Justice”) and *Zjednoczona Prawica* (“the United Right”)) to achieve further violation of principles holding sway in a state operating fully under the rule of law.

What became a major dilemma in this category was the work done on an Act of Parliament (ultimately passed in April 2020) concerning the detailed principles for the holding of universal elections to the presidency of the Republic of Poland as organised in 2020. Reservations were aroused by the total departure from the model of running elections in voting districts organised territorially, with simultaneous application of alternative institutions (such as election plenipotentiaries and postal votes). Indeed, voting was to take place solely by way of correspondence. The opposition’s accusations levelled against the parliamentary majority were thus of infringements in respect of fundamental principles of electoral law relating to universality, direct nature, equality and the secrecy

³³ D. Walczak-Duraj, *Główne uwarunkowania przebiegu kampanii prezydenckiej*, [in:] S. Dziecielska-Machnikowska (ed.), *Prezydenci 2000*, Łódź 2001, p. 60.

³⁴ In passing, it would be worth noting that universal, direct elections of the Prime Minister were in force in Israel in the years 1992–2001.

of the ballot box. Issues raised concerned the fact that election packages failed to reach all voters, at the correct address; with it looking possible that those in quarantine or in an infectious-diseases hospital would have no possibility of free participation in voting.

In turn (and very atypically for Poland, though perhaps less surprising-looking to others), Polish citizens living abroad lost any possibility of playing their part ... e.g. in respect of the delivery of the aforementioned voting packages. Furthermore, there was a possibility of a voter being identified in relation to his/her electoral preference; and in any case – and above all – citizens' lives and health seemed to be being put in danger (*inter alia* as postal workers came into contact with large numbers of people, as the virus was transferred on paper, and as people in quarantine might be encouraged into activity).

On the other hand, opposition groups pointed to the unconstitutional procedural side, e.g. as major changes in election law were being made less than half a year before an election was due to be held (*vide* the case law of the Constitutional Tribunal), with the electoral code being amended with no due adherence to defined and specific deadlines.

Ultimately, it emerged as impossible for the elections to be held at the time organised earlier – i.e. May 10th 2020, with the Act on election “by correspondence” being repealed as its place was taken by the Act of June 2nd 2020 on the detailed principles of organisation of universal elections to the post of President of the Republic of Poland organised in 2020, allowing for the possibility of postal voting.

Nevertheless, *Zaplanowane na 26 czerwca wybory prezydenckie nadal nie spełniały konstytucyjnych przesłanek równości i powszechności, m.in. ze względu na niemożność prowadzenia kampanii przez kandydatów (oprócz prezydenta Dudy), stroniczne przedstawianie kandydatów przez media publiczne, a także faktyczny brak możliwości wzięcia udziału w głosowaniu przez wiele osób uprawnionych do głosowania, mieszkających poza granicami Polski. 12 lipca w II turze wyborów prezydenckich wygrał Duda. Pandemia pokazała zatem skłonność państwa do ograniczania praw i wolności ponad konieczność, a jednocześnie do inercji i bagatelizowania zagrożenia dla zdrowia publicznego w imię interesów partyjnych*³⁵ (“The Presidential election planned for June 26th persisted in contravention of key premises relating to equality and universality, *inter alia* in relation to the practical impossibility of candidates other than President Duda being in a position to run their campaigns, with candidates also being presented in a biased way by

³⁵ W. Sadurski, *Polski kryzys konstytucyjny*, Łódź 2020, p. 248.

public media, and with it being a practical impossibility for many of those entitled to vote but living outside Poland to actually take part in voting. Duda won in the second round of the presidential election run on July 12th, and the pandemic had thus made clear the state's inclination to limit rights and freedoms beyond what was necessary, even as it simultaneously displayed inertia – and a tendency to play down the threat to health – where that suited partisan interests”).

However, one regularity to the election campaign remains, i.e. its “Prime Minister-isation”. Candidates build a whole complex of offers of a political, social and economic nature that they might potentially implement, were the Constitution to provide for the post of President some counterpart of Art. 146, para. 1 (whereby: “the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland”). Looking at the programmes of the two main candidates recently (Andrzej Duda and Rafał Trzaskowski)³⁶, it is possible to speak of specific projects that have the look of a Prime Minister's exposé about them. A whole block of hot topics in society made their appearance, such as constitutional strengthening of the role of marriage and the “traditional” family (Andrzej Duda), a ban on the adoption of children by single-sex couples (both candidates), a resumption of state funding of *in vitro* fertilisation and the introduction of partnership-type unions (Rafał Trzaskowski), and a lack of consent to euthanasia and the liberalisation of abortion laws (Andrzej Duda). Matters of the lifestyles of LGBT individuals proved to be a very important element of the campaign, with the sitting President running a campaign of a markedly homophobic nature, even as the *PO* candidate emphasised the need for consistency in the conferring of equal rights and entitlements.

The candidates also had a whole series of economic postulates to offer, relating to the pursuit of such strategic investments as the canal cutting through the Vistula Spit and the construction of Poland's Central Airport and communications hub, reinforced energy security and the building of new transport corridors in line with the *Via Carpatia* and *Via Baltica* concepts, support for local and regional authorities when it came to own contributions to new developments (i.e. the Local Developments Fund), and indeed backing for the National Programme for the impoundment of water (*Krajowy Program Retencji*), the Family Charter and the maintenance of the *Rodzina 500+* income-support payment to families, as well as many other initiatives in or involving society (Andrzej

³⁶ These programmes can be found at www.MamPrawoWiedziec.pl (1.02.2021).

Duda). For his part, the opposition candidate referred *inter alia* to support for local centres of development (“round-the-corner” investment), equal opportunities for men and women when it came to job opportunities, and grant support for families striving to achieve cleaner air.

Where the political system was concerned, the incumbent spoke up firmly for ongoing reform of the justice system, the strengthening of administration at provincial level, and the maintenance of religion teaching in schools. He defended actions relating to systemic change that had been introduced by the government camp from 2015 onwards. In turn, Rafał Trzaskowski made clear his position that the practice of violating the Constitution needed to cease, with a Commission to make good the harm done needing to be put in place to help “all those harmed by those in power at present”. The candidate also spoke for a clearer separation of (Catholic) Church and State.

This mere outline of what was a multifaceted campaign serves to illustrate the regularity I am seeking to present: that it is a property of the universal election and the election campaign, as well as the attendant need for concrete proposed solutions important to the daily lives of the individual and society to be presented, that distances candidates from any possible presentation of visions for the presidency linking up more closely with the functions actually assigned to it under Poland’s constitutional and political system.

Conclusions

Introduced over 30 years ago, the principle that elections of the President of Poland would be universal and direct proved an exceptionally durable systemic solution. This reflects many good political and social reasons, accentuating leadership within the state and the need for a concrete entity to have conferred responsibility for policy pursued, as well as making it easier for candidates and what they stand for to be identified. Indeed, a powerful factor making such universal elections look favourable is the rather high turnouts they attract. These are actually the highest achieved in any of the different kinds of elections and other polls run in Poland³⁷. To that extent – and somewhat paradoxically – Poland’s Presidential Elections are actually the ones to enjoy the fullest level of

³⁷ The second rounds of the 1995 and 2020 elections reported turnouts at record levels for the Third Republic of Poland, of 68% of those citizens enjoying the right to vote.

legitimacy. In that context, any departure from the universal-election model would tend to look the opposite of “instructional”, as the lesson being imparted would not seem to do much to shape anticipated attitudes among citizens. Equally, it is hard to disagree with a standpoint that looks into the very essence of the Polish presidential model, whereby: “[...] uwagi [...], które dotyczą zagwarantowania Prezydentowi rzeczywistych możliwości realizowania funkcji arbitra w systemie ustrojowym – uzasadniają rozważenie postulatu wyłączenia go ze struktur władzy wykonawczej i odejścia od powszechnej i bezpośredniej elekcji [...] Być może formuła ta pozwoli Prezydentowi uwolnić się od ciężącego na jego wizerunku partyjnego emplotu, co niewątpliwie wzmocniłoby wiarygodność i autorytet głowy państwa jako arbitra” (“...remarks ... as to the safeguarding of the President’s real chance to serve in the role of arbiter under the political and constitutional system – speak for consideration being given to a separating-out of the role from the structure relating to executive power, and hence the abandonment of the practice involving universal, direct elections ... Such a formula might allow the office of President to free itself from the image of party servant or even hostage, with that undoubtedly serving to raise the level of credibility and authority of the Head of State in the role of arbiter”)³⁸.

However, a simple return to the status quo from before 1990 – with the President being elected by the two chambers of Parliament brought together as the National Assembly – would not seem fit for purpose. Rather rapidly, such a solution might simply convert into a new form by which the President is again held hostage by a political party, this time as a faction in Parliament. Thus it may well be that a search for some alternative election model with partial voter participation might make more systemic, constitutional and political sense. Attention might therefore be paid to the method of the “enlarged/extended/broadened Parliament”, bearing some resemblance to solutions arrived at in Italy, where the set of Deputies and Senators involved in electing the leader is expanded to include electors chosen at regional level, while a candidate for President cannot even be put forward unless the motion from Assembly members is augmented by a defined number of signatures from within the wider electorate.

³⁸ S. Patyra, *Dualizm egzekutywy – konieczność czy anachronizm?*, [in:] D. Dudek (ed.), *Zmieniać Konstytucję Rzeczypospolitej, czy nie zmieniać?*, Lublin 2017, pp. 118–119.

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