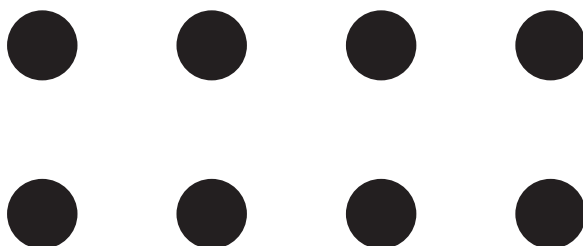




FACULTY OF LAW  
AND ADMINISTRATION

Edited by

W. Dajczak / T. Nieborak / P. Wiliński



# Foundations of Law

The Polish  
Perspective

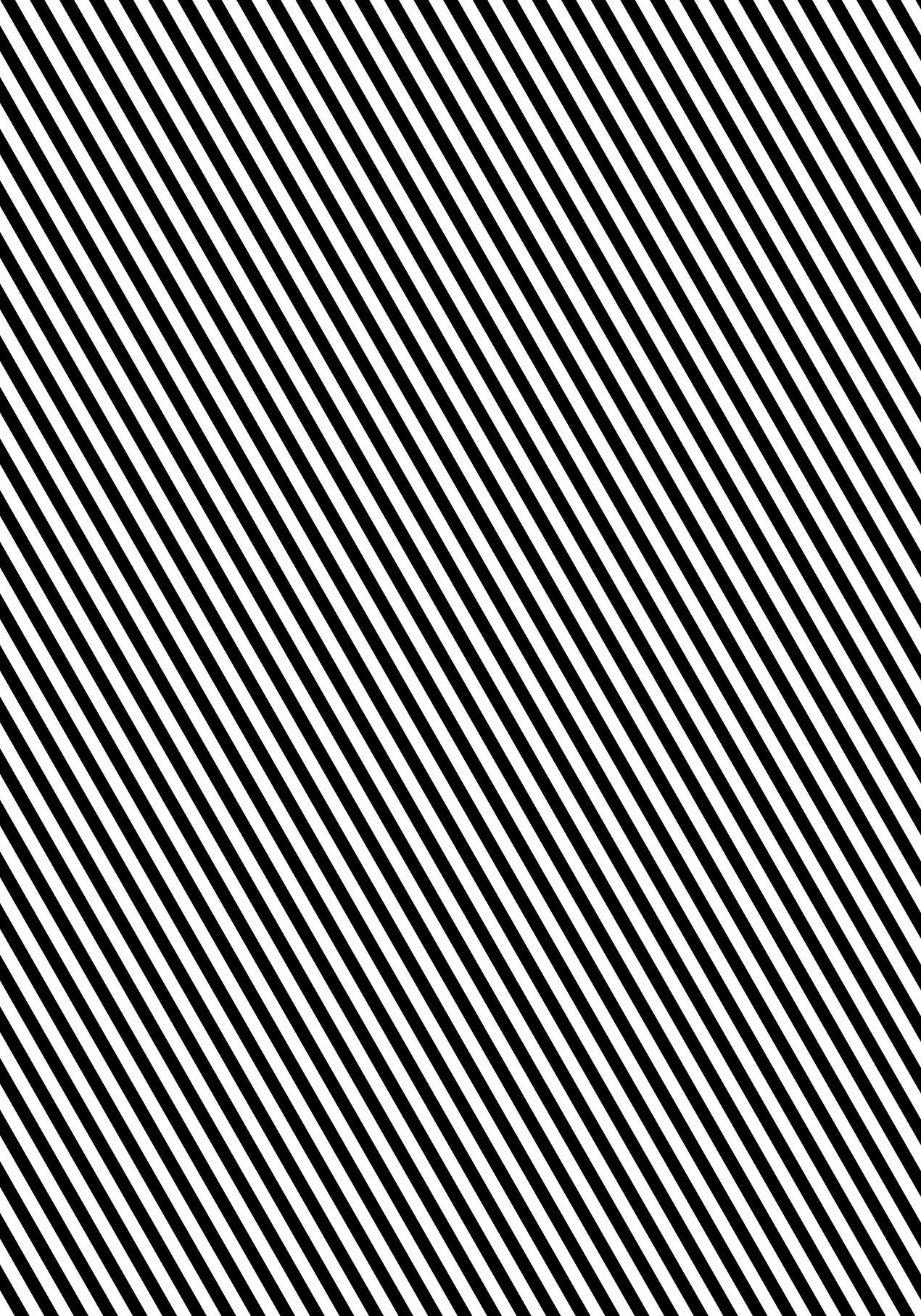
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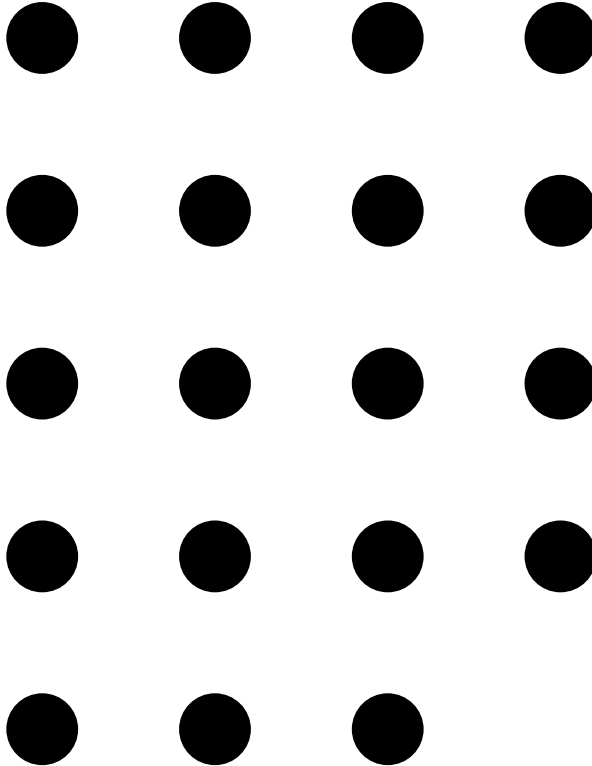




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Reviewers

Arkadiusz Wudarski, PhD, Professor of the University of Zielona Góra (Poland)  
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Proof-reader

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Design of the cover, title pages and interleaves

Agata Kulczyk, PhD, Magdalena Abakanowicz University of the Arts Poznan

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Collegium Iuridicum Novum, Faculty of Law and Administration,  
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## PREFACE

Poland is a country in the heart of Europe. The geometric centre of the continent lies within the country. However, the history of the past 250 years and the difficult parochial language excluded Polish law from the mainstream of comparative legal analyses. Polish lawyers have contributed and continue to contribute to the development of the global legal heritage. Poland adopted the first written, democratically drafted constitution in Europe in May 1791. The Polish Code of Obligations of 1933 was a success in the unification of private law. This regulation replaced the French, Austrian, German and Russian codifications on Polish territories. The concept of genocide was introduced into the legal debate by Raphael Lemkin, a lawyer who started his legal carrier in Poland. Poland has been a Member State of the European Union since 2004. Public support for European integration is in Poland among the highest in Europe.

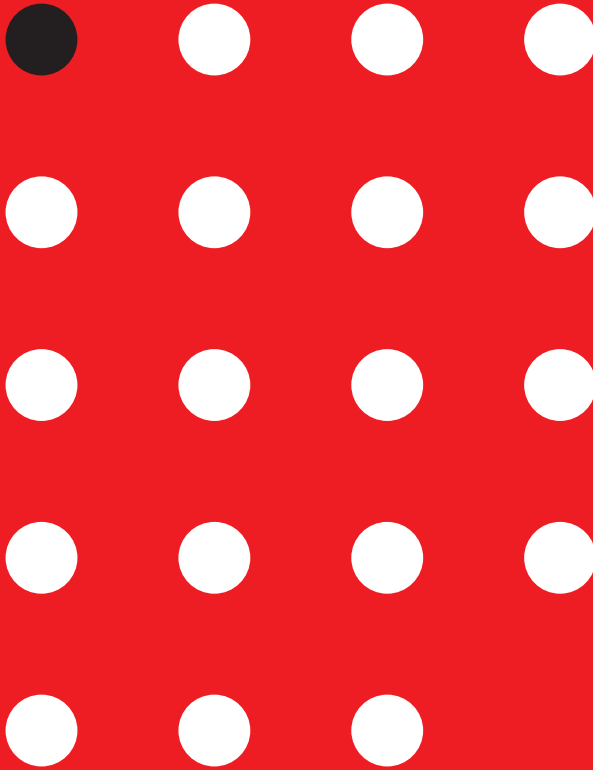
There are good reasons for choosing Poland as a place to start studying the European approach to the idea of law, legal reasoning, recent challenges and problems of legal developments. This book can be useful as a first step in this. The work was compiled by scholars of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań. The structure of the book reflects the main elements of the curricula of law schools in Poland. The chapters dedicated to the Polish legal tradition and legal methods are followed by seventeen contributions focusing on specific areas of law. The link between all the chapters is Polish law viewed in the European context. This book may be approached with various objectives and can be read in a number of ways. We hope that the demonstration of how local identity, fundamental values and the EU legal framework affect the Polish discussion of law can be informative for foreign students and revealing for foreign lawyers. The fact that the book is rather short should help look at Polish law this way. You will find references to recommended multilingual publications at the end of each chapter that can cast further light on Polish law and the Polish legal culture.

We would like to thank all the authors for their contributions provided during the difficult time of major institutional changes in higher education in Poland. Special thanks go to the former Dean of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań, Professor Roman Budzinowski, among others, for his kind support of this project and for providing the funding for this initiative. Last but not least, we are greatly indebted to the editorial staff of Wolters Kluwer Polska for their patience and professionalism.

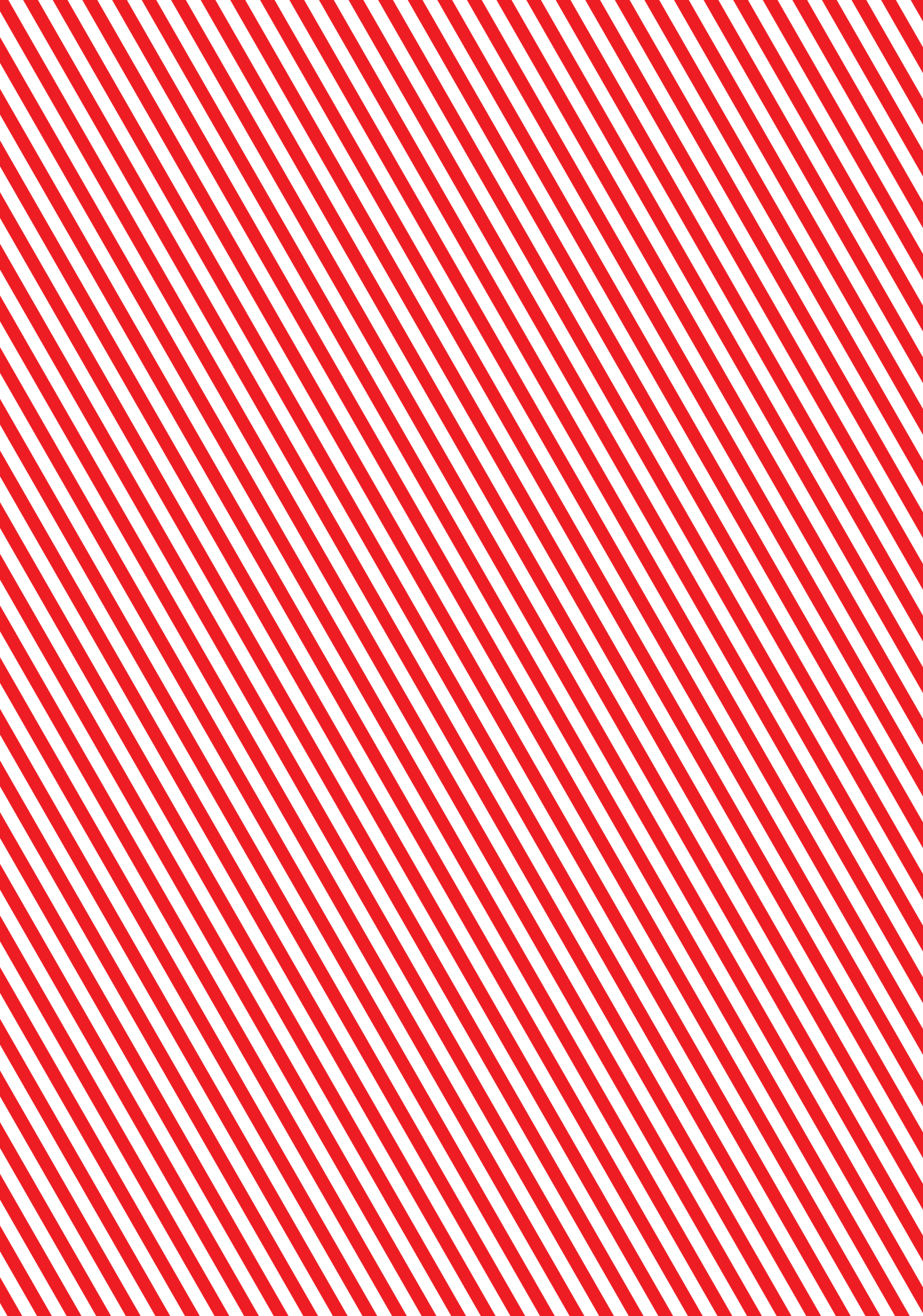
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W. Dajczak / P. Pilarczyk



Historical foundations of Polish law



Wojciech Dajczak, Piotr M. Pilarczyk

## HISTORICAL FOUNDATIONS OF POLISH LAW

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## 1. History of Polish public law

### 1.1. Creation of the state. The First Polish Republic

#### 1.1.1. Evolution of the system

In the sixth century, the lands of Central Europe were inhabited by Slavic tribes. Free farmers, who were their members, lived in settlements, several of which formed a territorial community called *opole*. Individual *opoles* were part of larger tribal organizations. A group of warriors emerged in one of the tribes with the surpluses obtained. This enabled expansion, subordination and occupation of the neighbouring tribes. It then became necessary to create a new, supra-tribal structure. The emerging state grew outside the borders of the then European civilization, so it assumed original, specific forms arising from the tribal past.

The adoption of Christianity in 966 is the first piece of historical evidence marking the existence of a state that around the year 1000 was named *Polska*. It was headed by a prince (some such princes received the royal crown) supported by a *drużyna* (fellowship), namely warriors deployed in various different parts of the country. Wars were waged with their help and they ensured the obedience of the people and the enforcement of their performances which constituted the basis for maintaining the team, the prince and his court in the form of various tributes and services. A *veche* (assembly) was convened on the most important matters. This was an institution known

from the tribal era. All free people initially took part in it, but together with the evolution of statehood and the emergence of social divisions, the circle of participants narrowed down to the upper strata. Important state affairs were decided upon and the judiciary took their place at the *veches*.

The state was treated as the common property of the prince's family, which created numerous problems. It was divided among the members of the dynasty in 1138, and the division turned out to be permanent and deepening. The central authority disappeared, but there were dozens of principalities that copied the previous political forms on a micro scale. These states divided, united and waged wars against each other. However, important social changes took place during this period, for instance, the estate system emerged. The maintenance of the members of the *drużyna* required giving them land, which gave rise to knighthood, i.e. the later nobility (*szlachta*). The previously free peasants became dependent on them, and *opoles* were transformed into territorial administration units. Self-governing towns and cities began to arise with the nascent burgher estate in the 13th century, in place of the defensive castles, trade settlements and new locations. Thus, separate legal systems emerged that governed individual estates.

Poland was united in the 14th century and only hints of the old divisions of the territorial structure and local hierarchies of the officials remained. Poland's alliance with Lithuania, which lasted over 400 years, was established in 1385. Jadwiga, who was the monarch at that time, married the Lithuanian Duke Władysław Jagiełło, the result of which was that Jagiełło's descendants had no right to inherit the throne. The non-formalized election system prompted the search for broad support to win the throne for the descendant. Kings gained it by granting further privileges to the nobles, thereby increasing their role in public life, while eroding the royal power.

This way, a system defined as a mixed monarchy was created, which, in contrast with an absolute monarchy, in the days before the concept of the separation of powers arose, referred to a political system where power was distributed among various entities. In Europe, only England and Venice developed a similar form. Poland began to be called *Rzeczpospolita* (the Commonwealth), which is a translation of the Latin *res publica*. The term did not refer to the form of the political system (republic versus monarchy), but – in line with Cicero – the state as such, the political community, the common good of all citizens. From 1569 onwards, it was the Polish-Lithuanian Commonwealth, as the existing relationship with Lithuania was transformed into a real union of both states. By combining huge areas into one country, the Commonwealth became a pan-European phenomenon. It was a multicultural country: multilingual, multinational, and multireligious. Religious freedoms were granted by the act of the Warsaw Confederation (1573) signed by representatives of the largest denominations. Jews and Muslims lived alongside the followers of various Christian religions.

In the Commonwealth, only the nobles enjoyed full civic rights. Compared to other countries, this was formally an egalitarian and very populous group (about 10% of the population). The Golden Liberty, as the Commonwealth's political system was also described, granted the nobility the exclusive right to sit in parliament and to elect the king.

The key role in the system was vested in a *Sejm* (parliament) as the representation of the nobility. Like in other countries, in Poland, the parliament was formed as a result of the king's need to obtain permission to impose taxes, but the legislation later covered all areas of the state's activity. The final, bicameral Sejm was formed in the second half of the 15th century. Members of the chamber of deputies were elected by a regional gathering of the nobility called *Sejmik*. The most important state officials and Catholic bishops entered the Senate, the upper house, *ex officio*. The king had a legislative initiative, but he did not stand above the Sejm but was its third element. New laws had to be approved by the chamber of deputies, the Senate and the king.

After the death of the last monarch of the Jagiellonian dynasty (1572), the election of the king became a common political act in which every nobleman was entitled to participate. The elections themselves attracted numerous candidates, both among the representatives of European ruling families and Polish nobility. Elected for life, the monarch was the head of state, but his position was limited by noble privileges and the position of the Sejm. After the Supreme Court was established (1578), he was removed from the judiciary, even losing his power to pardon. The king appointed all officials but could not dismiss them. In addition, the state was decentralized and, apart from the group of the highest central dignitaries, it had virtually no functioning bodies.

The basic political principles were contained in the Henrician Articles, which were drawn up for the first elected king, Henry of Valois (1573). The act was an unchanging law and a newly elected king had to pledge to respect it. They described the powers of the king and the Sejm, and primarily confirmed free elections and the obligation to convene the Sejm every two years. The breach of this obligation by the monarch gave the right to refuse to be obedient to him.

*Pacta conventa*, a public law agreement with the voters, was also agreed with each king. The elected monarch undertook to perform specific actions for the state, e.g. build a navy, repair fortresses or found an academy. The nobility promised obedience in return.

Confederations were an extraordinary element of the system. If necessary, the nobility could form a union which temporarily suspended the operation of all other state bodies, creating their own authorities and judiciary. Free from unanimity, the con-

federations, with wider support, could make changes that could not be ordinarily effected.

Formally, the political system of the Commonwealth created in the 16th century changed little afterwards. In practice, however, it evolved towards anarchy as a result of social and economic transformations followed by the collapse of political culture. Fossilized forms were increasingly anachronistic, and changing practice led to the dissolution of the state. The Sejm ceased to operate because the Roman law principle of *quod omnes tangit ab omnibus tractari et approbari debet* was brought to the point of absurdity. It evolved into an increasingly strict rule of unanimous consent, leading to the sessions of the Sejm being broken by its deputies. The failure to pass taxes meant that the state had to reduce the army to a minimum and there was no state administration on the ground. Power was transferred to the *Sejmiks* as self-governing bodies, which took over the full authority: the Commonwealth became a federation of provinces. It became a union with Saxony (1697–1763) after two more Wettin rulers from the Wettin dynasty were elected as kings. This union turned out to be very unfortunate. The Saxon monarchs were unable to carry out reforms and eventually, in order to remain on the throne, reached out for Russia's help, making the Commonwealth dependent on it.

Changes only took place in the last years of the Commonwealth. Stanisław August Poniatowski, elected king in 1764, with Russian support, was able to push through political reforms. The Sejm's operations were restored under the confederation rules. Collective government administration bodies, namely army and treasury committees were created with modern features of the executive power: the Sejm elected the committee members who were responsible for their actions.

Fearful of losing its influence, Russia decided to stop the reforms and forced the Sejm to adopt cardinal laws (1768). This was a formal act containing important and fixed elements of the Commonwealth's political system: they guaranteed the estate system, the free election of the king and rules of the Sejm, in which most matters were to be decided upon unanimously. The cardinal laws were included in the Polish-Russian treaty, so Russia became a guarantor of the maintenance of the system.

Excessive Russian interference caused the outbreak of an uprising and the difficulties with its suppression prompted Russia to come to an agreement with Austria and Prussia, which partitioned part of Poland (1772). It was easier to control a smaller state and to ensure a more efficient system, the Permanent Council (*Rada Nieustająca*) was established under additional cardinal laws. It was the first collegiate government divided into five departments. It was headed by a king, while the Sejm elected other members who reported to it.

“Foundations of Law: The Polish Perspective” covers a range of issues which form the core of academic legal education in Poland. It provides basic knowledge about Polish law and Polish legal culture, and constitutes an innovative introduction to the European approach to the concept of law, legal reasoning, recent challenges and the problems of legal development. The book contains nineteen chapters, the aim of each being to provide an accessible presentation and discussion of a specific field of law. The early chapters present an overview of the historical foundations of Polish law and the Polish theory and philosophy of law. The subsequent chapters concern private, public, criminal and economic law as it applies in Poland. Further reading in other languages recommended by the authors of individual chapters will facilitate a more in-depth understanding of Polish law and Polish legal culture as a part of the tradition of civil law, which is currently also a reflection of the legislative activity of the European Union.



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INFOLINIA 801 04 45 45  
ZAMÓWIENIA@WOLTERSKLUWER.PL  
WWW.PROFINFO.PL