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Tolerate or repress anti-democratic parties? Factors shaping instruments of democratic defence

Abstract

There is no single correct answer as to how states should respond to actors who undermine democratic values. Research to date indicates that the approach to defending democracy in a given country is shaped by a combination of various systemic, political and cultural factors. However, it is still unclear which factors are the decisive variables shaping a tolerant or repressive approach to anti-democratic parties, and what are the reasons for changes in this approach in a specific historical, political and institutional context. The lack of clear answers calls for further research. This article analyses the process of shaping and changing legal regulations towards anti-democratic parties in Poland. The study focuses on three factors: historical experiences, the democratisation process and political motivations, the importance of which is widely discussed in the literature. The study proved that the challenges of democratisation and historical experiences have, to some extent, shaped both a tolerant and repressive approach to anti-democratic parties in Poland. However, it was political motivations, and in particular the pursuit of compromise, that were decisive in adopting a particular approach and changing it over the years. The study also indicated that individual factors are interrelated and mutually reinforcing. The article uses content analysis of parliamentary debate transcripts and legal acts, as well as analysis of published materials.

Keywords: anti-democratic parties, party bans, tolerant and militant concepts of democracy protection, political factors, historical experiences, democratisation.

Introduction

The existence of various anti-democratic challenges to the liberal democratic states is not a new phenomenon.¹ There is no single answer as to how states

¹ Here, the term ‘anti-democratic’ refers to political parties that undermine the norms, values and/or mechanisms of liberal democracy. This term covers a broad range of entities that oppose the

should deal with actors who undermine democratic values, principles, or institutions. The consensus is on the elimination of organisations that use violence as a method of political struggle. However, there is controversy as to whether democracies should tolerate or repress parties on the basis of their ideological and programmatic characteristics, for example neo-Nazi or communist groups, or those promoting racial or national hatred.

Research to date has indicated that a state approach to defending democracy may be shaped by different systemic, political, and cultural factors. Scholars admit that much depends on the legal and political culture, democratic identities, historical experiences, the institutional setting, but also on more dynamic conditions coming from the internal and external environments.² While we already know a great deal about why some democracies respond to the dilemma posed by anti-democratic parties by banning them, while others do not, there are still gaps in the existing literature. It is unclear which factors are the decisive variables shaping tolerant and/or militant instruments towards anti-democratic parties. What correlations exist between the factors? Do they go hand in hand or are they mutually exclusive in shaping instruments for the protection of democracy? We also know little about the reasons for the changing conceptions of democratic protection embedded in a particular historical, political, and institutional environment.

To address this shortcomings the paper analyses the legal regulations to anti-democratic parties in Poland. In this case, in the first decade after the regime change, there was a shift in attitude towards political parties. The tolerant instruments were replaced by instruments typical for a militant approach. Thus the study enables an in-depth examination of the specific causal mechanism of the passage of distinct provisions and detailed process tracing of country's policy change over the years. It also allows for analysis of the impact of three factors – historical experience, the democratisation process, and political motivations, the importance of which is widely debated in the literature. Yet, the study remains open to other potential determinants.

In order to demonstrate the importance of particular factors, a thematic content analysis of the discourse conducted by veto-players during parliamentary

liberal democratic political system as a whole or some of its key aspects. Depending on their specific characteristics, these organisations are defined as extremist, radical, populist, anti-system, anti-liberal, totalitarian, communist, racist, neo-Nazi, far-right, nationalist.

² W. M. Downs, *Political Extremism in Democracies: Combating Intolerance*, New York 2012; U. Backes, *Limits of Political Freedom in Democratic Constitutional States – A Comparative Study on Germany, France and the USA*, “Totalitarismus und Demokratie” 2006, no. 3, pp. 265–283; M. Klamt, *Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions*, [in:] *Explorations in Legal Cultures*, eds F. Bruinsma, D. Nelken, Gravenhage 2007, pp. 133–159; Bourne A. K., *Democratic dilemmas: why democracies ban political parties*, New York 2018; B. Laumond, *State Responses to the Radical Right in France and Germany: Public Actors, Policy Frames and Decision-Making*, London 2020.

debates in the Sejm and the Senate as well as in the Constitutional Committee of the National Assembly (CCNA) was applied. This made it possible to identify arguments and group them in terms of problem areas justifying the introduction of the solutions in question. The discourse analysis also made it possible to identify the interrelationship of the various determinants and to indicate in favour of which concept of democratic protection particular arguments were used. The analysis of the decision-making process was set in the broader context of the current political environment in Poland in order to verify if and how the micro-political factors affected the process of shaping instruments for the protection of democracy. The study is based on primary sources, particularly- transcripts of the Sejm, Senate and CCNA debates as well as constitutional regulations and laws on political parties. The secondary sources became the basis for the analysis of the political environment and systemic conditions.³

Militant and tolerant approaches to enemies of democracy. Democratic dilemmas

Liberal democracies have different ways of reacting to anti-democratic parties. Reactions range from highly repressive, such as association and party bans, or criminalization of offensive speech acts; through exclusion of extremists from government; to more liberal, accommodative and persuasive strategies.⁴ To illustrate the philosophy behind the different reactions, political scientists refer to two ideal types of democracy protection – militant (repressive) and liberal-procedural (tolerant)—lying at opposite poles.⁵ Although the boundaries between the two are blurred, the ideal types illustrate the different normative bases of the instruments applied. They thus indicate the specific ‘mentality’ of the political system.⁶

The concept of militant democracy is based on the principle according to which *democracies can legally restrict the rights and freedoms of those who seek to overthrow democracy by peaceful means.*⁷ As Jan-Werner Müller points out

³ This work was supported by research grant number UMO-2014/15/D/HS5/03272 funded by the National Science Centre, Poland.

⁴ G. Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe*, Baltimore 2005; W. M. Downs, *Political Extremism in Democracies: Combating Intolerance*, New York 2012.

⁵ A. Malkopoulou, L. Norman, *Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives*, *Political Studies*, 2018, vol. 66, no. 2, pp. 442–458.

⁶ A. Malkopoulou, *Greece: A Procedural Defence of Democracy against the Golden Dawn*, “European Constitutional Law Review”, 2021, vol. 17, no. 2, p. 179.

⁷ K. Löwenstein, *Militant Democracy and Fundamental Rights I*, “The American Political Science Review”, 1937, vol. 31, no. 3, p. 423.

[...] *it is the idea of a democratic system that is willing to adopt pre-emptive, illiberal measures against those whose aim is to overthrow democracy (or decisively weaken it) by democratic (non-violent) means*⁸. Militant democracies define criteria that are substantive (based on political content) indicating what values are not acceptable.⁹ Invernizzi and Zuckerman explain that the concept of militant democracy differs from the general provisions of constitutional and criminal law (which are typical of all democracies) *in that it involves the prosecution of specific actors because of their goals or ideologies*.¹⁰ Restricting the freedom of political parties (banning or refusing to register)¹¹, is the most orthodox instrument of militant democracy, as it excludes a certain social group on the basis of their beliefs from participating in the political process. However the line between repression in defence of democracy and authoritarian tendencies is thin thus the ‘substantive’ banning of political parties raises risks for democracy. Antoszewski points out that a common strategy in communist states was to ban parties that were labelled ‘anti-democratic’ or ‘counter-revolutionary’ in the name of defending USSR-controlled democracy.¹² This so called democratic paradox is one of the fundamental weaknesses of militant democracy.¹³

By contrast, the tolerant (liberal-procedural) concept of protecting democracy against its enemies is based on the belief that the democratic system should not dictate what constitutes an acceptable view, but rather serve to regulate dissenting interests through democratic procedures. As Robert Dhal points out [...] *citizens are encouraged to express their individual preferences, each with the same moral value and the same right to express themselves*.¹⁴ It is linked to the liberal economic doctrine of the *free market of ideas* metaphorically applied to the American free speech debate. Free and fair elections, separation of powers, freedom of the press, of speech, of assembly, form the framework that allows citizens to participate in the political process and confront their views and interests. Thus the most important means of countering anti-democratic parties is argumentation and persuasion.¹⁵ Therefore procedural democracy does not

⁸ J-W. Müller, *Militant Democracy*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds M. Rosenfeld, A. Sajó, Oxford 2012, p. 1253.

⁹ M. Thiel, *Comparative Aspects*, [in:] *The ‘Militant Democracy’ Principle in Modern Democracies*, ed. M. Thiel, Farnham 2009, pp. 386–387.

¹⁰ C. Invernizzi-Accetti, I. Zuckerman, *What’s Wrong with Militant Democracy?*, “Political Studies” 2017, vol. 65, no. 1S, p. 195.

¹¹ A. Sajó, *Militant Democracy and Transition towards Democracy*, [in:] *Militant Democracy*, ed. A. Sajó, Utrecht 2004, pp. 209–230; B. Rijpkema, *Militant Democracy. The Limits of Democratic Tolerance*, London and New York 2018.

¹² A. Antoszewski, *Contemporary theories of democracy*, Warsaw 2016, p. 34.

¹³ K. Popper, *The open society and its enemies*, Princeton 1966.

¹⁴ G. H. Fox, G. Nolte, *Intolerant Democracies*, “Harvard International Law Journal” 1995, vol. 36, no. 1, p. 15.

¹⁵ B. Rijpkema, *op. cit.*, p. 104.

expect protection from state structures. However, the democratic political process is also open to anti-democratic parties and thus does not guarantee that the proponents of democracy will always win.¹⁶ As with repressive instruments, unlimited tolerance also poses the risk of destroying democracy. Antoszewski points out that [...] *the freedom to proclaim diverse (and theoretically any) political views, the possibility to organise into parties advocating any ideology [...], may lead to a situation in which power – in the majesty of democracy itself – is taken over by its ruthless enemies.*¹⁷ Similar scenarios for the destruction of democracy were considered in interwar Germany by proponents of procedural democracy, such as Hans Kelsen and Richard Thoma.

Changing attitudes towards political parties in Polish law. From tolerance to militancy

Key to the regulation of the status of political parties during the period of systemic transformation was the amendment of the 1952 Constitution of the People's Republic of Poland, enacted on 29 December 1989. The then Article 3 of the Constitution, referring to communist Polish United Workers' Party (PZPR) as the leading political force of society in the construction of socialism, was replaced by Article 4 stipulating: *(1) Political parties bring together on a voluntary and equal basis citizens of the Republic of Poland in order to influence the shaping of state policy by democratic means. (2) The Constitutional Tribunal shall rule on whether the aims or activities of a political party are contrary to the Constitution.* This provision conditioned the development of political pluralism in Poland; at the same time, in terms of restricting the freedom of political parties, it was laconic and unclear. On the one hand, it subjected the conformity of the aims and activities of parties to the constitution. On the other, it did not define the substantive criteria for this assessment and the repressive sanction, typical for militant democracy, if such a contradiction was found.

The position of the legislators is clarified by Article 5 of the Act on political parties, adopted on 28 July 1990. It indicates that the Constitutional Tribunal (on the motion of the Provincial Court in Warsaw or the Minister of Justice) renders a ruling on the inconsistency of the aims or activities of a political party with the Constitution. However, the ruling does not result in the banning of the party or any other 'softer' sanctions that would exclude the party from the political process. Instead, it only results in a possible order to introduce applicable changes

¹⁶ M. Thiel, *Comparative Aspects*, [in:] *The 'Militant Democracy' Principle in Modern Democracies*, ed. M. Thiel, Farnham 2009, p. 386.

¹⁷ A. Antoszewski, *op. cit.*, p. 34.

to the party's statute or programme within a certain period of time.¹⁸ The second point defines the conditions for the prohibition of a political party in Poland – *if the activity of a political party aims to change the constitutional system of the Republic of Poland by violence, or is expressed in the organisation of the use of violence in public life by party authorities*. The Minister of Justice then applies to the Constitutional Tribunal for the prohibition of party activity.¹⁹ A legally valid ruling of the Tribunal banning the activity of a political party results in its deletion from the register, and the party is then subject to liquidation.²⁰ This means that the most repressive instrument of militant democracy, the party ban, has been linked to the violent activities of the party and not to its programme, ideas, or demands of its members. The contradiction of the party's objectives with the Constitution was not clearly defined but nevertheless it did not result in the exclusion of the party from public life. This provision was the result of a compromise between supporters of a liberal approach to political parties in Poland and those with a more repressive outlook.

The Constitution of the Republic of Poland, established on 2 April 1997, completed the long process of creating a new fundamental law in democratic Poland. Regulations on the freedom of political parties and their limitations were contained in Articles 11 and 13 of the Constitution. Article 11 ensured the freedom of establishment and operation of political parties and stated that the purpose of parties was to influence the shaping of state policy by democratic means. Article 13, on the other hand, formulated, for the first time, clear limits on the freedom of action of political parties based on substantive criteria – *the existence of political parties and other organisations referring in their programmes to the totalitarian methods and practices of Nazism, fascism, and communism, as well as those whose programme or activities presuppose or permit racial and national hatred, the use of violence to gain power or influence state policy, or provide for the secrecy of structures or membership, are prohibited*.²¹ Ruling on the constitutionality of the parties' objectives and activities was within the competence of the Constitutional Court.²² Thus, in contrast to earlier regulations, the restriction

¹⁸ Art. 5. ust 1, Ustawa z dnia 28 lipca 1990 r. o partiach politycznych (Dz.U. 1990 nr 54, poz. 312), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19900540312>.

¹⁹ *Ibidem*.

²⁰ Liquidation proceedings are subject to the provisions set out in articles 36–39, Ustawa z dnia 7 kwietnia 1989 r. Prawo o stowarzyszeniach (Dz.U. 1989 nr 20, poz. 104), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19890200104>, and article 4 ust. 3–4, Ustawa z dnia 28 lipca 1990 r. o partiach politycznych, *op. cit.*

²¹ Art. 13, Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. 1997 nr 78, poz. 483), <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970780483/U/D19970483Lj.pdf>.

²² Art. 188, ust. 4, *ibidem*. A motion to ban a party may be submitted by: President of the Republic, Speaker of the Sejm, Speaker of the Senate, President of the Council of Ministers, 50 deputies, 30 senators, First President of the Supreme Court, President of the Supreme Administrative Court, Prosecutor General, President of the Supreme Chamber of Control, Ombudsman for Civil

of party freedom was linked both to the content of the programmes – which is specific to the repressive conception of the protection of democracy – and to the way the parties functioned and the methods of achieving their goals.²³ The premises mentioned in the article indicate the threats against which democracy wants to defend itself, even though the protection of the democratic system was not formulated explicitly.

Although the provision arouses numerous interpretative controversies, it undoubtedly clarified the substantive criteria for restricting the freedom of action of political parties absent in Article 4 of the amended 1952 Constitution. Compared to the Political Parties Act of 1990, the new 1997 regulation expanded party control through both substantive and formal requirements. The law clarified the mechanism of party control by indicating a preventive mode – an examination of the compliance of the party's objectives and principles of action provided for in the statute at the time of party registration – and a follow-up mode concerning the compliance of its objectives and actions with the constitution. It also defined the criteria for assessing when a party's activities comply with democratic principles, when it ensures the openness of party structures, appoints party bodies through elections, and adopts resolutions by a majority vote.²⁴ This regulation was criticised as interfering too far with party freedom. However, the legislator considered that *this rule would serve to introduce good models for the functioning of political parties in a democratic state*.²⁵

Determinants of attitudes towards enemies of democracy

One of the most important determinants of the concept of the defence of democracy is considered to be the historical context, in particular the experience with authoritarianism. According to Downs, historical experiences define and

Rights, National Council of the Judiciary (if the party's goals harm the independence of the courts and the independence of judges), Art. 191 ust. 1 pkt 2 in conjunction with Article 186 ust. 2 of the Constitution of the Republic of Poland, *ibidem*.

²³ Although, as Sułkowski points out, the purposes and activities of parties prohibited by Article 13 intersect, J. Sułkowski, *Art. 13*, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1–86*, red. M. Safjan, L. Bosek, Warszawa 2016, p. 385–386. podobnie Tuleja – art. 13 Konstytucji *nie rozgranicza wyraźnie płaszczyzny programowej i płaszczyzny działania partii politycznej*, są one przemieszane, P. Tuleja, *Podstawy prawne delegalizacji partii politycznych*, [in:] *Państwo prawa i prawo karne*, red. P. Kardas, T. Sroka, W. Wróbel, Warszawa 2012, vol I, p. 608.

²⁴ Art. 8, Ustawa z dnia 27 czerwca 1997 r. o partiach politycznych, *op. cit.* As pointed out by Piotr Tuleja, judge of the Constitutional Tribunal, the principles of action as a premise for adjudicating on the constitutionality of parties are not present in the constitutional provisions, which causes doubts as to the scope of the Tribunal's adjudication P. Tuleja, *op. cit.*, p. 609.

²⁵ M. Bartoszewicz, *Nadzór nad partiami politycznymi w polskim porządku konstytucyjnym*, Warszawa 2006, p. 130.

constrain strategic choices.²⁶ Even if events are in the distant past and ‘seem forgotten’, they leave traces that can significantly influence democratic responses against their enemies.²⁷ At the same time, the research indicates that experiences with authoritarianism can influence the model of democratic defence in two ways, *i.e.*, justifying more repressive, or more tolerant instruments for responding to anti-democratic parties. Bleich and Lambert showed that the experience of a non-democratic regime is the most important factor predisposing a country to an increased level of repression against racist organisations, but nevertheless when a state decides to introduce these mechanisms depends on situational factors.²⁸ By contrast, Hartmann and Kemmerzell explain the lack of provisions on the prohibition of political parties in the South African constitution by, among other things, the particular historical experience of restrictions on freedom of association during apartheid. The bans are thus seen as an ‘unwelcome legacy of an old, unjust regime’.²⁹ Similar arguments have been made in post-Francoist Spain.³⁰ In the context of the case under review, the question arises as to whether historical experience can explain different approaches to instruments for the protection of democracy in one country? It seems that in such a case other factors determining the specificity of democracy protection will also be relevant. As Downs points out, the wide variation in approaches to extremist parties within countries, forces one to take into account the indirect influence of factors at both the systemic and micro-political levels.³¹

Research indicates that in the case of post-authoritarian states, the changing level of democratisation may play an important explanatory role. Angela Bourne points out that so-called incomplete democracies in transition, characterised by the absence of an effective system of executive control, limited political participation and undeveloped liberal constitutionalism are more likely to ban political parties than consolidated democracies.³² At the same time, the author points out that some countries like Poland or Spain have introduced the legal possibility of banning parties during or after the consolidation of the democratic system.³³ Democratisation could therefore potentially explain the change in attitude towards

²⁶ W. M. Downs, *op. cit.*, p. 54.

²⁷ *Ibidem*, p. 55.

²⁸ E. Bleich, F. Lambert, *Why Are Racist Associations Free in Some States and Banned in Others? Evidence from 10 Liberal Democracies*, “West European Politics” 2013, vol. 36, no. 1, p. 123.

²⁹ C. Hartmann and J. Kemmerzell, *Understanding Variation in Party Bans in Africa*, “Democratization” 2010, vol. 17, no. 4, p. 701.

³⁰ V. Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, [in:] *Militant Democracy*, ed. A. Sajó, Utrecht 2004, p. 141.

³¹ W. M. Downs, *op. cit.*, pp. 54–55.

³² A. K. Bourne, *Democratization and the illegalization of political parties in Europe*, “Democratization” 2012, December, vol. 19, no. 6, pp. 1065–1085.

³³ *Ibidem*.

repressive or permissive instruments for the protection of democracy. The fact that some states banned parties during the consolidation period may also mean that factors other than democratisation were also momentous. Hence, pointing out the importance and interconnectedness of the different determinants is important.

Research shows that reactions to political extremism are also the result of rivalry and compromises between decision – making actors. Hence, explaining attitudes towards anti-democratic parties requires attention to factors at the micro-political level.³⁴ Politicians' approaches to anti-democratic parties may be motivated by a desire for office maximisation, ideology advocacy or constituency representation. As Bourne explains [...] *It may be that a party is only banned when its competitors expect the ban to win them more votes or seats or when it helps them reach or maintain their position in executive office.*³⁵ On the other hand the implementation of a ban on political parties requires the agreement of all veto-players – actors whose agreement is required for a change in the status quo.³⁶ The researcher points out *veto-players with agenda setting prerogatives have significant control over which of the range of possible policies may replace the status quo, providing agreement with other veto players is possible.*³⁷ However, politicians pursue their goals within the specific socio-political, historical context in which they operate, which may support or constrain their strategic choices.³⁸

The democratisation process and historical experience as determinants of tolerant and militant approaches to anti-democratic parties

Democratisation is a 'complex historical process with analytically distinct, if empirically overlapping, stages of transition'.³⁹ Theorists agree on at least two

³⁴ C. Mudde, *Conclusion: Defending Democracy and the Extreme Right*, [in:] *Western Democracies and the New Extreme Right Challenge*, eds R. Eatwell, C. Mudde, London and New York 2004; U. Backes, *Streitbare Demokratie: 1949 – 1989/90 – 2009*, [in:] *Das vereinte Deutschland*, ed. E. Jesse, Köln 2012; W. M. Downs, *op. cit.*, New York 2012.

³⁵ A. K. Bourne, *Democratization and the illegalization of political parties in Europe*, *op. cit.*, p. 1080.

³⁶ G. Tsebelis, *Veto players*, Princeton 2002, p. 17.

³⁷ A. K. Bourne, *Democratic dilemmas...*, *op. cit.*, p. 25.

³⁸ W. M. Downs, *op. cit.*, pp. 74–78; A. Moroska-Bonkiewicz, *Political responses to the extreme right in Poland. Motivations and constraints for collaboration in the executive arena*, "Studia Polityczne" 2019, vol. 47, no 4.

³⁹ T. Karl and P. Schmitter, *Modes of transition in Latin America, Southern and Eastern Europe*, *International Social Science Journal*, 128, p. 271.

of its stages: transition, and consolidation of democracy.⁴⁰ On the basis of the experience of post-communist Europe, Antoszewski assumed that transition is a time when dual power of political elites, representing the old regime and the anti-regime opposition, is maintained and authoritarian institutions and procedures are dismantled.⁴¹ Competitive elections and the coming to power of the opposition are universal criteria for the end of the transition.⁴² Consolidation of democracy is identified primarily with stability, understood as permanence, continuity and the absence of real threats to political competition, executive accountability, protection of citizens' rights.⁴³ It is characterised, among other things, by the legitimisation and internalisation of new institutions.⁴⁴ Researchers consider the end of consolidation to be the test of multiple alternations of power, the enactment of the rule of law, consensus around the constitution, or the formation of civil society.⁴⁵

Transition to democracy

A tolerant approach to political parties was formed during the systemic transition period. Amendments to the People's Republic of Poland's Constitution of December 1989 and the Law on Political Parties of July 1990 were debated by the 'Contract Sejm', formed by 65% representatives of the communist regime and 35% representatives of the opposition, by the Senate, dominated by 99% of the opposition, and by a coalition government composed of representatives of 'Solidarity' movement organisations with the regime party.⁴⁶ The new authorities

⁴⁰ Clearly distinguishing them, however, poses both empirical and theoretical difficulties. Nevertheless, researchers also point to their intermediate phases: institutionalization or installation (between transition and consolidation stages) and following consolidation the process of persistence or habituation and possibly also deconsolidation; A. K. Bourne, *Democratization...*, *op. cit.*, pp. 163–203.

⁴¹ A. Antoszewski, *op. cit.*, p. 170.

⁴² D. Beetham, *Conditions for Democratic Consolidation*, "Review of African Political Economy" 1994, vol. 60, p. 159; G. Munck, C. Skalnik Leff, *Modes of Transition and Consolidation. South America and Eastern Europe in Comparative Perspective*, "Comparative Politics" 1997, vol. 29, no. 3, p. 350; D. Share, *Transitions to Democracy and Transitions through Transaction*, "Comparative Political Studies" 1987, vol. 19, no. 4, p. 528; J. Linz, *Transition to democracy*, "Washington Quarterly" 1990, vol. 13, no. 3, p. 148, 157.

⁴³ L. Diamond, F. Fukuyama, D. Horowitz, M. Plattner, *Reconsidering the 'Transition Paradigm'*, "Journal of Democracy" 2014, vol. 25, no. 1.

⁴⁴ A. Antoszewski, *op. cit.*, p. 181; L. Diamond, *Consolidating Democracies*, [in:] *Comparing Democracies 2. New Challenges in the Study of Elections and Voting*, eds L. LeDuc, R. Niemi, P. Norris, London 2002, pp. 213–214.

⁴⁵ J. Linz, A. Stepan, *Toward Consolidated Democracies*, [in:] *Consolidating the Third Wave. Themes and Perspectives*, eds L. Diamond, M. Plattner, Y. Chu, H. Tien, Baltimore 1997, p. 17; S. Huntington, *The third wave of democratisation*, transl. A. Dziurdzik, Warsaw 1995, p. 169.

⁴⁶ As a result of the Round Table Agreement and the June elections, 65% of the seats in the Sejm were filled by the pro-government party (the communist PZPR with its satellites ZSL, SD and concessionary Christian parties). The remaining 35%, in free elections, went to the opposition Civic

continued the systemic changes initiated by the Round Table, dismantling the political and economic communist regime. One of the challenges was the pluralisation of political life, including the consolidation of the status of political parties.

An analysis of the discourse in the Contract Sejm and the Senate shows that both parties had in common the conviction that political parties were in an embryonic state and should therefore be provided with the most favourable conditions for their development. However, there was a different perception of how to achieve this goal. The opposition to the communist regime stood on liberal positions in favour of a minimum of legal regulation.⁴⁷ They saw regulation of political parties as a threat to freedom of association, an obstacle to the free formation of parties, a pluralist party system and democracy.⁴⁸ After years of restrictions on political freedoms, they sought to leave space for the spontaneous development of organisations.⁴⁹

The MPs of the communist PZPR and its satellite Democratic Party stood on legalistic positions. In a situation of uncertainty in the political system, *which was in a phase of re-evaluation, the direction of which was not fully defined*, they saw the law as a guarantee of the proper development of the party system, of political pluralism.⁵⁰ Parties, as an indispensable element of the state and the exercise of power, should be subject to the law and not stand above it, which, they stressed, had been the case in the past. They therefore sought to comprehensively normalise the operation of political parties – their formation, registration, funding, and banning.⁵¹ The communist opposition considered this solutions a relic of Marxist thinking, state doctrine and totalitarian legislation.⁵²

Committee ‘Solidarity’ (KO’S’). In the free elections to the Senate, 99% of the seats were given to representatives of Civic Committee ‘Solidarity’ and 1 seat to an independent MP. KO’S’ leader Tadeusz Mazowiecki became Prime Minister.

⁴⁷ Rząd T. Mazowieckiego, *Projekt ustawy o partiach politycznych*, druk nr. 183, Warszawa 1990.01.16, materials from the Sejm of the Republic of Poland archives; Posłowie OKP, KPUD, KPPSL i PKChL Sejmu X kadencji, *Projekt ustawy i stronnictwach politycznych*, druk nr. 165, Warszawa 1989.12.29, materials from the Sejm of the Republic of Poland archives.

⁴⁸ Z. Kedzia, *Das Parteienrecht in Polen*, [in:] *Parteienrecht in mittel- und osteuropäischen Staaten*, eds D. Tsatsos, Z. Kedzia, Nomos 1994, p. 138; W. Sokolewicz, *Partie polityczne w polskim prawie konstytucyjnym: wczoraj, dziś, jutro*, “Studia Prawnicze” 1991, vol. 4, p. 3.

⁴⁹ Sprawozdanie Stenograficzne z 26 posiedzenia Senatu Rzeczypospolitej Polskiej w dniach 21 i 22 czerwca 1990 r., Warszawa 1990, materials from the Senate of the Republic of Poland archives, p. 18, 35; Z. Kedzia, *Das Parteienrecht in Polen*, [in:] *Parteienrecht in mittel- und osteuropäischen Staaten*, eds D. Tsatsos, Z. Kedzia, Nomos 1994, p. 127–129.

⁵⁰ Posłowie PZPR Sejmu X kadencji, *Projekt ustawy o partiach politycznych i warunkach ich finansowania*, druk nr. 60, Warszawa 1989.10.26, materials from the Sejm of the Republic of Poland archives.

⁵¹ *Ibidem*; Posłowie Stronnictwa Demokratycznego Sejmu X kadencji, *Ustawa o partiach politycznych*, druki nr. 34 i 35, Warszawa 1989.09.13; Sprawozdanie Stenograficzne z 31 posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 24 maja 1990 r., Warszawa 1990, [https://orka2.sejm.gov.pl/StenogramyX.nsf/0/BF06B24F83C109B3C1257D20002CC716/\\$file/031_000007501.pdf](https://orka2.sejm.gov.pl/StenogramyX.nsf/0/BF06B24F83C109B3C1257D20002CC716/$file/031_000007501.pdf).

⁵² Sprawozdanie Stenograficzne z 26 posiedzenia Senatu Rzeczypospolitej Polskiej, *op. cit.*, p. 18, 35.

The divisions between liberalism and legalism became also apparent in the discussion concerning the banning of political parties. The crucial element distinguishing the position of the Sejm from the communist regime opposition, including the Senate, and the government was the question of whether the criterion constituting the basis leading to the banning of a party should be the (unconstitutional) objectives of the party contained in its programme and statutes, or only its illegal and/or violent activities. The liberal position was taken by the government, which advocated a precise definition of the situations in which a ban is possible in order to limit arbitrariness of decisions and possible abuse of restrictions on freedom of association. It advocated a ban only if the party's actions aim to change the state system by violence.⁵³ A similar position was presented by the draft law on political parties of politicians mostly originating from Solidarity – the Civic Committee 'Solidarność' (OKP) and the Parliamentary Club of the Democratic Union (KPUD).⁵⁴ They advocated a strictly defined exceptional situations in which a party ban was possible related to the party's activities and not its programme. Otherwise, MPs saw the risk of restricting activities under the cover of the law. A similar position, albeit often based on different grounds, was expressed by the Senate majority. An example is the opinion of Senator Andrzejewski [...] *No sanction can result from the fact that the party's aim is to overthrow by legal means the political system, the Constitution or to change it. By doing so, we do what the communists did all the time – we petrify the existing state as an inviolable state. [...] Hence, even if these goals are contrary to the Constitution, what we are interested in is the way the party works and how these goals are implemented.*⁵⁵

A different approach was taken by PZPR MPs. In order to protect democracy, they proposed a broader and substantive formulation of the conditions for banning a party, namely, when the goals and statutory assumptions of the party being formed are contrary to the Constitution, when they pose a threat to the democratic system of the Republic of Poland, or when they threaten the territorial integrity and independence of the state. The party's methods of operation and internal organisation must also be based on democratic principles.⁵⁶

The discussion in the Sejm indicates that the communist opposition stood on strongly liberal positions. In the name of freedom, it allowed for the possibility of overthrowing or changing the system by legal means. This stance grew out of opposition to the rules of the authoritarian system, and aspirations for the development of political pluralism as a condition for the development of democracy. From this base grew an aversion to a regulation of the formation and activists of

⁵³ Sprawozdanie stenograficzne z 31 posiedzenia Sejmu Rzeczypospolitej Polskiej, *op. cit.*, p. 43.

⁵⁴ Posłowie OKP, KPUD, KPPSL i PKChL Sejmu X kadencji, *op. cit.*

⁵⁵ Sprawozdanie Stenograficzne z 26 posiedzenia Senatu Rzeczypospolitej Polskiej, *op. cit.*, p. 19.

⁵⁶ Posłowie PZPR Sejmu X kadencji, *op. cit.*

political parties and to militant approach to anti-democratic parties.⁵⁷ Interestingly, similar arguments related to the transition process – the need to ensure the proper development of the party system in a situation of instability and to protect democracy from anti-system threats – were used by proponents of the repressive approach.

Consolidation of Democracy

The process of forming the democratic authorities of the 3rd Republic ended with free presidential elections in 1990 and parliamentary elections in 1991. An important stage in the process of consolidating Polish democracy was the so-called ‘small constitution’ of 17 October 1992.⁵⁸ The following years brought a peaceful alternation of power between opposition and post-communist groupings, consolidating the so-called regime division of the political scene. Nevertheless, individual governments maintained policies leading to the consolidation of the political system. The militant approach towards political parties was thus established under conditions of stabilisation of the political system, general acceptance of democracy as a political regime, and relative internalisation of democratic structures, norms, and relations.

An analysis of the discourse around the Political Parties Act of July 1997 indicates that, unlike in the early 1990s, the challenges stemming from the democratisation process were important factor for comprehensive regulation of political parties.⁵⁹ The law raised especially from the need to counteract the fragmentation of the party system and pathologies in the operation of political parties. For MP Krzysztof Król, of the Confederation of Independent Poland, the new regulations were a testimony to the changes that had taken place since the 1990 Act on Parties came into force, *back then, it was a piece of legislation created under completely different conditions; it was intended to stimulate citizens to form political parties. This is what has happened. It therefore seemed*

⁵⁷ The Political Parties Act of 1990, as the result of a compromise between liberals and legalists, covered in a very general and concise manner some basic issues related to the functioning of political parties – their definition, rules of formation, activities and their limitations (including the prohibition of parties) as well as funding and access to public media, Ustawa z dnia 28 lipca 1990 r. o partiach politycznych (Dz.U. 1990 nr 54 poz. 312).

⁵⁸ Ustawa konstytucyjna z dnia 17 października 1992 r. o wzajemnych stosunkach między władzą ustawodawczą i wykonawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym (Dz.U. 1992 nr 84 poz. 426), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19920840426>.

⁵⁹ Sprawozdanie Stenograficzne z 74 posiedzenia Sejmu Rzeczypospolitej Polskiej w dniach 28, 29 lutego i 1 marca 1996 r., p. 171–186, [https://orka2.sejm.gov.pl/Stenogramy2.nsf/0/150B130DA2A63B8AC1258959004A27F3/\\$file/074.pdf](https://orka2.sejm.gov.pl/Stenogramy2.nsf/0/150B130DA2A63B8AC1258959004A27F3/$file/074.pdf); Sprawozdanie Stenograficzne ze 104 posiedzenia Sejmu Rzeczypospolitej Polskiej w dniach 8, 9, 10 i 11 kwietnia 1997 r., [https://orka2.sejm.gov.pl/Stenogramy2.nsf/0/0A3428305C0AE0F9C1258959004A2815/\\$file/104.pdf](https://orka2.sejm.gov.pl/Stenogramy2.nsf/0/0A3428305C0AE0F9C1258959004A2815/$file/104.pdf).

*high time that this law on political parties should be amended.*⁶⁰ The aim was to put in order the legislation on institutions guaranteeing democratic order in Poland, to create a stable party system, a democratic, parliamentary political culture.⁶¹ However, there were also a few critical voices from the anti-communist opposition MPs, who regarded the regulation as too far-reaching an interference in the freedom of action of political parties.⁶²

The general consensus on the comprehensive regulation of the operation of political parties went hand in hand with the legitimacy for restrictions on political parties, *inter alia*, defining procedures for proceedings to declare the objectives or activities of political parties contrary to the constitution, which has so far been a gap in Polish law.⁶³ However the primary aim of the legislator was to correlate the Act on parties with Article 13 of the Constitution. The statutory regulations went even further by requiring that party structures be shaped in accordance with democratic principles, including by ensuring their openness, the appointment of bodies through elections, or the adoption of resolutions by a majority vote. As pointed out by the rapporteur for the Committee on Human Rights and the Legislative Affairs, MP Stanisław Rogowski, despite the voices indicating that these regulations to a certain extent limit the formation of parties, the *position prevailed [...] that [...] one should not, as it were, programme the functioning of entities that operate undemocratically, because in a state governed by the rule of law, especially one that is at the beginning of the road to creating a democratic system, the functioning of undemocratic parties [...] can significantly influence the emergence of negative phenomena in political life. We do not yet have such a luxurious situation – I mean a certain political culture – that we can completely liberally indulge in this. Besides, the Constitution [...] has clearly set a certain direction and a certain goal here.*⁶⁴

The discourse around Article 13 of the Constitution defining the substantive criteria for the outlawing of political organisations, on the other hand, indicates that it was historical experience, that provided substantial justification for the introduction of a repressive instrument for the protection of democracy. MPs were in agreement that Poland's historical past demonstrated the necessity of a safety valve within the framework of freedom of association. By pointing to the traumatic totalitarian experiences of Poland and Europe as a whole, the MPs sought to morally stigmatise Nazism, Fascism, and Communism as a warning

⁶⁰ Sprawozdanie Stenograficzne z 74 posiedzenia Sejmu Rzeczypospolitej Polskiej, *op.cit.*, p. 173.

⁶¹ *Ibidem*, p. 171–186.

⁶² Sprawozdanie Stenograficzne ze 104 posiedzenia Sejmu Rzeczypospolitej Polskiej, *op. cit.*, p. 33–58.

⁶³ Sprawozdanie Stenograficzne z 74 posiedzenia Sejmu Rzeczypospolitej Polskiej, *op. cit.*, p. 172, 178, 180.

⁶⁴ Sprawozdanie Stenograficzne ze 104 posiedzenia Sejmu Rzeczypospolitej Polskiej, *op. cit.*, p. 57.

for the future.⁶⁵ Senator Andrzejewski, representing the party ban proposal, pointed out that the provision was both a reference to bad experiences of the past and *a safeguard for the future against pathology, especially when we are talking today about the savagery of political customs or the occurrence of certain formations that oscillate in a dangerous direction [...]*.⁶⁶ Thus, the argumentation also included references to threats from contemporary parties and organisations. At the same time the analysis of the discourse shows that the direct factor for the introduction of an additional substantive premise for banning parties into the content of Article 13 of the Constitution – *when the party's programme or activities imply racial or national hatred* – was a pressure made by the youth organisations on members of the Constitutional Committee.⁶⁷ Tadeusz Mazowiecki, the Committee member, noticed that during a meeting with representatives of social organisations, *they asked for a formula to be included in the draft Constitution regarding the prohibition of racism and racial hatred*.⁶⁸ As a result MP's Henryk Kroll and Wojciech Borowik advocated adding a provision to Article 13 to ban parties whose programme or activities imply racial or national hatred. However they justified this on a different grounds, the need for an early response to organisations that call themselves patriotic but in fact express racial hatred.⁶⁹ Sporadic objections to Article 13 of the Constitution, coming from post-communist formations, stemmed, *inter alia*, from the fear that organisations referring to communism in their name would be stigmatised.⁷⁰ Ultimately, Article 13 of the Constitution received broad support of MPs from various political formations.

The analysis indicates that the challenges to the political and party system that emerged during the democratic consolidation phase influenced the formation of the legalistic approach to political parties in the 1997 law. This facilitated the adoption of a repressive tools towards anti-democratic parties in a form of preventive and consequential control. Nevertheless, the needs arising from the democratisation process were of secondary importance for the introduction of a substantive

⁶⁵ Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn XLIII* (obejmuje okres od 14 stycznia do 6 marca 1997 r.), Warszawa 1997, p. 81, 83, https://bs.sejm.gov.pl/exlibris/aleph/a24_1/apache_media/M4XXFKDG1NEU7BGMJ9KSKKE5AE5MP2.pdf.

⁶⁶ *Ibidem*, p. 53.

⁶⁷ In 1996, the Anti-Nazi Group (GAN) and the Never Again Association launched a campaign to introduce Article 26a into the draft constitution, stipulating that *incitement to discrimination, hostility or violence on the grounds of nationality or race is prohibited*. The campaign gained the support of other social organisations – the Polish Union of Jewish Students, the Federation of Young Labour Unions, the PPS Youth Organisation, as well as the Ukrainian and German minority communities, *Konstytucja Przeciw Faszyzmowi*, “Nigdy Więcej” 1997, nr 4, p. 2; *Apel o uwzględnienie w Konstytucji zakazu propagowania treści o charakterze nazistowskim i rasistowskim*, “Nigdy Więcej” 1993, nr. 3.

⁶⁸ Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn XLIII*, *op. cit.*, p. 77, 83.

⁶⁹ *Ibidem*, p. 80.

⁷⁰ *Ibidem*, p. 77, 82–83.

ban on political parties in the Constitution of 2 April 1997. Here, Poland's totalitarian historical experiences and civil society's efforts to combat racial and ethnic discrimination were of particular importance.

Changing conception of response to anti-democratic parties as a result of political competition and compromise

An analysis of the discussion on the restriction of the freedom of political parties in Poland at the turn of 1989 and 1990 showed that there was no consensus among the political elite on this issue. There was a clear difference between the liberal and tolerant stance of the anti-communist opposition politicians concentrated mainly in the Civic Parliamentary Club (OKP), and the Democratic Union Parliamentary Club (KPUD), co-forming the government, the Senate majority and the minority in the Sejm, and the legalistic and repressive approach of the MPs of the Parliamentary Club of the communist Polish United Workers' Party (PZPR) and the Democratic Party (SD)⁷¹ co-forming the majority in the Sejm.⁷² According to the regulations in force at the time, the rejection of Senate amendments to laws and the amendment of the Constitution by the Sejm required a two-thirds majority vote, with at least half of the statutory number of MPs present. Such a majority was not available to the Communist Party and its satellites. In the end, the decision to take a tolerant approach towards anti-democratic political parties was the result of a compromise between the two blocs.

Work on the drafting of a new constitution began at the end of 1989. The prolonged process of establishing a constitution was influenced, among other things, by the lack of the socio-political consensus necessary for the adoption of the highest legal act in the state. As Zaleśny points out, *modern constitutionalism treats the constitution as an expression of the tradition of the social contract, binding all participants in a given political community. For this to take place, the constitution is established by consensus, by a qualified majority vote of the constitution, and in modern times it is additionally subjected to the approval of the sovereign himself, who in the form of a referendum decides on its adoption and thus on its bindingness by a social contract. In this way, the constitution is an act not only of the constitution of the parliament, but also of the constitution of the people. [...] Ensuring the constitution's due legitimacy and the maximum degree of social acceptance is considered the 'standard of European constitutionalism'*.⁷³

⁷¹ The satellite party of the PZPR during the communist period.

⁷² Sprawozdanie stenograficzne z 31 posiedzenia Sejmu Rzeczypospolitej Polskiej, *op. cit.*; Sprawozdanie Stenograficzne z 26 posiedzenia Senatu Rzeczypospolitej Polskiej, *op. cit.*

⁷³ J. Zaleśny, *Tworzenie konstytucji z 1997 roku. Przejaw kooperacji czy rywalizacji elit politycznych?*, "Przegląd Sejmowy" 2017, vol. 143, no. 6, p. 179.

However, a constitution is not only a legal process, but also, and perhaps above all, a political process in which politicians (their interests) as well as social groups or organisations play an important role.⁷⁴ For this reason, it was particularly important to adapt the mode of preparation and enactment of the Constitution of the Republic to the existing socio-political situation. The parliament elected in 1993 decided that the Constitutional Committee of the National Assembly would take into account both the drafts submitted in the earlier term of the Sejm and Senate by political groupings that were not represented in the Sejm in the later term, as well as the drafts submitted in the new, second term of the Sejm. In addition, the right of legislative initiative on the draft of the new Constitution was granted to a group of at least 500,000 citizens with electoral rights.⁷⁵ These provisions made it possible to include extra-parliamentary circles in the work on the Constitution, some of whom denied the Sejm of the second term (1993–1997) the legitimacy to act as a constitutional authority. This was related to the fact that after the introduction of the 5% barrier clause in the 1993 Sejm elections, some right-wing political parties and organisations found themselves outside the parliament, with a total of 34.4% of voters voting for electoral committees that had no representation. Moreover, as a result of the elections, the post-communist parties SLD and PSL formed the parliamentary majority and the governing coalition.⁷⁶ In this situation, it would have been very difficult to gain the broad socio-political support necessary for the project to be endorsed by a two-third majority of the National Assembly and to obtain the support of citizens in a constitutional referendum. Thus the new regulations on the procedure for the preparation and enactment of the Constitution opened up this process to the outside world, allowing non-parliamentary groupings and social circles to influence the shape of the Constitution. As it later turned out, this had a direct bearing on the establishment in the Constitution of a militant instrument to respond to anti-democratic parties. This is because the proposal came from the non-parliamentary right-wing politicians of the Solidarity Trade Union (NSZZ ‘Solidarność’), who patroned the so-called civic project of the constitution, for which almost a million signatures were collected.

The prohibition of political parties and associations contained in the draft was based on substantive criteria, for it explicitly identified parties with a totalitarian programme, including Nazi and communist parties.⁷⁷ In this way, it

⁷⁴ J. Zaleśny points out that *legal argumentation serves as a screen for the realisation of one's own political interests, relating both to general issues, e.g. the vision of the state, and in detail – specific political circles and even individual party leaders, Ibidem*, p. 182.

⁷⁵ R. Mojak, *Geneza, prawnoustrojowe zasady i prawne procedury tworzenia i uchwalenia Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.*, “Gdańskie Studia Prawnicze” 2018, vol. XL, p. 127–128.

⁷⁶ J. Zaleśny, *op. cit.*, p. 191.

⁷⁷ *Article 32 ust. 3 Political parties and associations with a totalitarian, including Nazi and communist, programme, as well as those whose programme or activities presuppose or permit the*

differed fundamentally from the proposals presented in other draft constitutions, which were even more liberal and limited than the formulations adopted in the amendment of 1952 Constitution of the Peoples Republic of Poland from 29 December 1989 and the Political Parties Act of 1990.⁷⁸ The proposal of NSZZ ‘Solidarność’ was presented as a minority motion at the first stage of the Commission’s work in February 1995, both with regard to the regulations concerning political parties (Article 11), and then in connection with Article 58 of the Constitution of the Republic of Poland relating to freedom of association. Nevertheless, at that time it did not enjoy the support of the members of the Constitutional Commission. The draft Constitution devised by the Constitutional Committee and adopted on 19 June 1996⁷⁹ contained a very concise provision in Article 5, which stated that [...] *1 The Republic of Poland guarantees the freedom to form and operate political parties. Political parties shall bring together on a voluntary and equal basis the citizens of the Republic of Poland in order to influence by democratic means the formation of state policy. 2 Funding of political parties shall be open.*⁸⁰ It was thus a confirmation of the inter-party consensus on the freedom of action of political parties adopted in the December Amendment in 1989.

use of violence in order to gain power or influence state policy, or provide for the secrecy of structures or membership, shall be prohibited. Ust. 4. The contradiction of the aims or activities of a political party with the Constitution shall be ruled on by the Supreme Court, Konstytucja Rzeczypospolitej Polskiej, Projekt Obywatelski NSZZ „Solidarność”, Warszawa–Gdańsk, czerwiec 1994 r., p. 10.

⁷⁸ For example a joint project by the Polish People’s Party and the Labour Union Parliamentary Circle stated that political parties bring together citizens of the Republic of Poland on a voluntary and equal basis in order to influence the shaping of state policy by democratic means. There was a similar provision in the Democratic Union’s draft, albeit complemented by a provision prohibiting the existence of political parties whose programme or activities allow the use of force to gain power or influence public authority. The Senate draft guaranteed the freedom of association of citizens, with the proviso that the purpose of the association of citizens in political parties was to influence state policy by democratic means. The draft of the Parliamentary Club of the Covenant of the Centre granted citizens the right to organise themselves into political parties, but referred to the law for the rules of the parties. The project of the Parliamentary Club of the Confederation of Independent Poland did not touch upon the issue of political parties at all, Komisja Konstytucyjna Zgromadzenia Narodowego, *Projekty Konstytucji Rzeczypospolitej Polskiej 1993*, Warszawa 1993; Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn XIII* (obejmuje okres od 7 do 20 lutego 1995 r.), Warszawa 1995, p. 43–45, 50, https://bs.sejm.gov.pl/exlibris/aleph/a24_1/apache_media/4LY27XBS45MND41SNBTU57E2ESSF3P.pdf.

⁷⁹ This draft completed the fundamental stage of work on the preparation of the new Constitution, which had lasted a year and a half, and was the result of the work of the entire Constitutional Committee, comprising representatives of the political forces represented in Parliament. Of the 56 members of the Commission, 20 were parliamentarians from the SLD, 16 from the PSL, 8 from the UD, 4 from the UP, two each from the BBWR, KPN and NSZZ ‘Solidarność’, 1 representative of the German minority and a Senator from the Club of Independent Senators, R. Mojak, *op. cit.*, p. 127.

⁸⁰ *Konstytucja Rzeczypospolitej Polskiej, Projekt Obywatelski NSZZ „Solidarność”, op. cit.*

However, the constitution needed not only an ‘internal’ compromise – of the parliamentary groupings of the time – but also an ‘external’ one consisting of the acceptance of the postulates of large social and political groups, including the Catholic Church and the extra-parliamentary forces. The intensification of the constitution-making process coincided with the strengthening of the extra-parliamentary coalition of right-wing parties – the Electoral Action ‘Solidarity’ (AWS) and the Movement for Poland’s Reconstruction (ROP) – which were seeking to seize power after the forthcoming elections in autumn 1997. The result was a hardening of the AWS position, a demand that the solutions proposed in the civic draft constitution be broadly taken into account, and a polarisation of the constitutional dispute. On the other hand, the vision of losing the elections created among the parliamentary groupings a determination to adopt the constitution in the Sejm of the second term.⁸¹

The inclusion in the draft Constitution of a ban on political parties in the wording corresponding to the proposal of the civic project, supplemented (on the issue of racial and national hatred) by the proposal of civil society organisations, came shortly before the final vote on the unified text of the Constitution. In mid-January 1997, a meeting took place between the four parliamentary parties represented on the Constitutional Committee (SLD, PSL, UW, and UP) and Senator Andrzejewski, who represented the position of the NSZZ “Solidarność” Senate Club pushing the civic project of the Constitution. It was agreed at that time that some of the amendments, including the proposed article on the prohibition of political parties, *could be included in the draft constitution in such a way as not to disrupt the basic structure and philosophy of the draft*.⁸² The proposal, as Article 12a, was adopted by a majority of 37 votes of the Constitutional Committee, with 3 against and 5 abstentions. As Prof. Winczorek (an expert of the Constitutional Committee of the National Assembly) points out, the final adoption of Article 13 of the Constitution and its merger with the existing solutions contained in the draft Constitution was determined by considerations of a political rather than legal nature. This was the result of seeking agreement with the extra-parliamentary opposition.⁸³

The radical change of stance against anti-democratic parties expressed in Article 13 of the Polish Constitution was undoubtedly the result of political bargaining. It resulted from the pursuit of a constitutional compromise conditioned by the mode of adoption of the Constitution, as well as political rivalries

⁸¹ A. Dudek, *Historia polityczna Polski, 1989–2005*, Kraków 2007, p. 360; J. Zalesny, *op. cit.*, p. 191–204; R. Mojak, *op. cit.*

⁸² Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn XLIII, op. cit.*, p. 76.

⁸³ P. Winczorek, *Rachunek osobisty*, “Rzeczpospolita” 1997, no. 1045. The Constitution received broad support in the National Assembly 461 parliamentarians voted in favour of the motion, 31 were against and five abstained, and a sufficient majority (52.69%) in the constitutional referendum.

that became an element of pressure on the Constitutional Committee of the National Assembly.

Conclusions

The results of the study indicated that factors related to the democratisation process and historical experiences influenced to some extent both tolerant and militant approaches towards anti-democratic parties in Poland. However, political motivations were decisive in shaping and changing the approach to anti-democratic parties. The study also showed that individual factors are interrelated and reinforce each other.

The analysis presented a significant impact of the democratisation process on shaping both the tolerant and militant approach to the protection of democracy in Poland. This was particularly evident in the period of transition. At that moment the main challenge was the pluralisation of political life. However, the political elites had different visions of how to ensure the development of political parties and where to set the limits of freedom for anti-democrats. The division was between the communist and opposition parties. Both sides used arguments related to the democratisation process to justify different solutions – repressive and tolerant. Democratic consolidation brought different challenges, among other things, the fragmentation of the party system, hence the desirability of comprehensive regulation of party formation and their activities, which were conducive to the formation of repressive instruments towards anti-democratic parties. This time the political elites were fairly unanimous on how to stabilize the party system and the democratic culture. Although arguments connected to the democratisation process contributed to the development of various instruments of democratic defence, other factors were instrumental in determining which concept ultimately prevailed.

Similarly, the study shows that historical experience with authoritarianisms provided justification for both tolerant and militant approach to anti-democratic parties in one country. During the democratic transition, historical experiences with communist regime were primarily used to justify aversion to the repressive solutions and treatment of political parties. Conversely, in 1997, references to the experiences of totalitarian systems (Nazism, Fascism, Communism) were used to justify a need to create repressive instrument towards anti-democratic parties. The above results lead to the conclusion that arguments referring to historical experiences of authoritarianism are an important factor shaping instruments of democratic defense, but how they are used depends on other variables. And these variables can lead to fundamentally different solutions. Concerns related to the democratisation process were undoubtedly significant. The case study showed among others that, at the beginning of systemic transformation, there were fears

among communist opposition circles that repressive instruments would be used arbitrarily to restrict the freedom of political parties. Hence, the instrument of tolerance was to be a guarantor of freedom and the development of democracy. With the consolidation of the democratic system, this risk has diminished and references to history as well as present and future anti-democratic challenges dominated the arguments justifying the banning of political parties. The above research results weaken the argument present in the literature that experiences of authoritarian systems are a determining factor of the (repressive) concept of democratic defence.

Political factors, influenced by institutional conditions, were the main and direct determinants of the adoption and change of a the approach to anti-democratic parties in Poland. There were many meaningful political triggers such as power-sharing, policy and votes motivations, however fundamental was the strategic choice to compromise in order to foster the development or stabilisation of the democratic order in Poland.

Research has shown that there was no consensus among the political elite on how to respond to anti-democratic parties. However the adoption of amendments to the 1952 Constitution of the People's Republic of Poland, as well as the establishment of the new Constitution of 2 April in 1997 required a broad political consensus. The conditions of regime change in Poland negotiated in the Round Table Agreement not only enabled the peaceful transition to democracy but also forced a compromise in the shaping of the political system in Poland. The division of seats in the contracted Sejm meant that the parties of the communist regime did not have the two-thirds majority necessary to adopt the constitutional amendments and to override the veto of the Senate dominated by the opposition. Thus, they had to negotiate to find an agreement. This has resulted in the adoption of compromised, yet ambiguous approach in the legal provisions from 1989 and 1990. In 1997, the regulations related to the adoption of the new constitution forced a compromise involving both political elites and society in general. Veto-players in charge of the draft constitution were subjected to pressure from major extra-parliamentary rivals, who forced substantive conception of party ban. As those rivals sought to polarise public opinion on the draft constitution in order to gain support in the upcoming elections, the decision-makers agreed to include the militant toll in the constitution. However, it should be emphasised that the provision of Article 13 was one of the few compromise solutions agreed to by the veto-payers of the time. As the discourse analysis indicated the militant toll turned out not to be highly controversial. This suggest that shred historical experience of Poland shaped favourable conditions allowing for a compromise on implementation of the repressive instrument of defence of democracy in Poland.

The overriding goal of the above-mentioned compromises was to establish constitutional and legal norms that were key to the stabilization of democracy in

Poland. It seems, therefore, that the decisive factor in the adoption of a tolerant and then repressive response to anti-democratic parties was what Downs defined as the *perception of democratic responsibility* of the veto-players.⁸⁴ Yet the study also points at a broader spectrum of actors shaping the instruments of democratic protection, namely civil society organisations, whose influence on the substance and thus the scope of the militant tool in Poland turned out to be important.

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