

**Karol Kopczyński**

Uniwersytet Warszawski  
(University of Warsaw, Poland)  
e-mail: karolkopczynski2000@gmail.com

ORCID: 0000-0003-3474-1520

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## **The Concepts of Jan Kopczyński, President of the Supreme Administrative Tribunal, Regarding the Formation of the Council of State in the Second Polish Republic<sup>1</sup>**

### **ABSTRACT**

The paper focuses on a proposal to reform the lawmaking process in the Second Polish Republic through the establishment of a Council of State. The idea of creating a Council of State to improve the quality of legislation was widespread among the Polish legal elite of that time; many representatives of the legal profession presented their ideas in various periodicals. Particularly prominent among the supporters of this concept was the president of the Supreme Administrative Tribunal, Jan Kopczyński, who submitted for discussion by his fellow lawyers several proposals he

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<sup>1</sup> Jan Kazimierz Kopczyński (born on June 24, 1876 in Warsaw, died on February 5, 1939 in Warsaw) – a Polish lawyer, attorney, judge, and President of the Supreme Administrative Tribunal (SAT). In 1918, shortly after Poland regained its independence, he took up a job in the justice system and was appointed as a judge of the Zamość District Court. In 1919, he moved to the Legislative Department of the Presidium of the Council of Ministers, where he was charged with the duties of the head of the Legislative Proposals Department. In this capacity, he participated in the drafting of laws and regulations, including the act on the Supreme Administrative Tribunal, the pensions act, and the act on the state civil service. He was appointed as judge of the SAT in 1922 and as its president in 1924. From 1933 to 1939, he was the head of the Competence Tribunal. He is the author of several commentaries on acts concerning, among other things, the state civil service relationship and the pension rights of state officials and military personnel. The author of this paper is the great-grandson of Jan Kopczyński. He would like to thank Prof. Andrzej Zakrzewski and Prof. Krzysztof Koźmiński for their valuable and critical comments.

had prepared for the establishment the Council of State. The paper describes the debate over Kopczyński's proposals by juxtaposing them with the concepts of other representatives of the legal doctrine of the Second Polish Republic and the solutions that were applied by the government in that period. The ideas for the creation of the Council of State focused on two foreign models. The first was the French *Conseil d'État*, which combined legislative and administrative-court powers. The second model was the Romanian Legislative Council, whose tasks were strictly limited to legislation, without the administrative-court functions. Jan Kopczyński's concepts were closer to the Romanian model. Kopczyński submitted three proposals to establish a Council of State, but none of his proposals was implemented. A substitute for the Council of State was to be the Legal Council to the Minister of Justice, established in 1926 by a regulation of the President of the Republic, but it quickly ended its activities encountering both reluctance of the parliament and a frigid reception by the ruling elite. The fact that the Council of State was never established, although it enjoyed widespread approval in the legal community, proves that politics always has the upper hand in a clash with legal idealism.

**Key words:** Council of State, legislation, Second Polish Republic

## 1. Introduction

In his article *Udoskonalenie ustawodawstwa* [Improving legislation], Stanisław Estreicher stated that the democratic system is characterized by exceptional weakness in the field of legislation.<sup>2</sup> This conclusion is not surprising, since being elected a member of parliament does not depend on professional qualifications, but rather by a good propaganda, popularity, and party influence. No wonder, then, that a collective body made up of bickering people is unable to write good laws. Therefore, outside professional help is essential. The first solution is to involve the executive branch of the government in lawmaking. The vast majority of the most important bills are brought by the government, which commissions subordinate officials-professionals to draft the legislation. However, as Estreicher noted, there is no guarantee that those officials are knowledgeable about the matter to be regulated by a particular piece of legislation and that they are outstanding legislators. Moreover, the author pointed out that the subsequent approval of such a piece of legislation by the minister and the Council of Ministers is limited to political approval without considering the formal side, i.e. the correctness of the legislative technique.<sup>3</sup> Not surprisingly, the legislation

<sup>2</sup> S. Estreicher, *Udoskonalenie ustawodawstwa*, [in:] S. Estreicher, *O naprawę Rzeczypospolitej*, Kraków 1922, pp. 51ff.

<sup>3</sup> *Ibidem*, p. 53.

of the Second Polish Republic, especially in the first years of its existence, was of low quality<sup>4</sup>. Therefore, in the legal doctrine of the Second Polish Republic, there were calls for the establishment of an external centre hiring impartial specialists whose task was to assist the government and the parliament in passing good laws.

Originating in France, the concept of Council of State has reemerged time and again in the legal discussions of the Second Polish Republic. In fact, this institution was not foreign to the Polish political tradition. It was first established in Poland in the Duchy of Warsaw by virtue of the Constitution of July 22, 1807 granted by Napoleon. The Council of State became again part of the Polish system in the Constitutional Law of the Kingdom of Poland of 1815. In the classic French model, the Council of State has fulfilled a dual systemic role<sup>5</sup>. On the one hand, it is an advisory body dealing with legislative matters, and its competencies include, first and foremost, the preparation of bills before they go through the parliament. On the other hand, the Council of State acts as an administrative court that controls the legality of the administration's actions.

The legislative function of the French Council of State may have been attractive to the newly formed Second Polish Republic, which was facing the problem of legal unification.

## 2. The first attempts to improve legislation in the Second Polish Republic

The first step toward improving the quality of Polish legislation was the Act of June 3, 1919 establishing the Codification Commission<sup>6</sup>. It should be pointed out that the purpose of the Codification Commission was primarily to unify and codify judicial law (both civil and criminal – Article 2 (a) of the Act). It is true that Article 2 (b) of the Act mentioned the preparation of other draft legislation, but the Commission's lack of action in other areas of legislation leads to the conclusion that its work was limited to judicial law. For this reason, the Codification Commission should not be equated with a *Conseil d'État*, as it did not support ongoing legislative work in all areas<sup>7</sup>. Moreover, the Codification Commission was intended to be a transitional institution. There is no indication

<sup>4</sup> K. Koźmiński, *Technika prawodawcza II Rzeczypospolitej*, Warszawa 2019, p. 357.

<sup>5</sup> See: R. Puchta, *Rada Stanu jako organ sądowej ochrony konstytucji we Francji*, Warszawa 2017, pp. 199-204; interestingly, the dual constitutional role of the Council of State in the context of the allegation that this arrangement is incompatible with the principle of judicial impartiality was commented on by the European Court of Human Rights; see: judgment of the ECtHR of November 9, 2006 in the case *Sacilor Lormines v. France*, application no. 65411/01 (sec. 64-74).

<sup>6</sup> Act of June 3, 1919 on the Codification Commission (Journal of Laws of the Polish State of 1919 no. 44, item 315).

<sup>7</sup> K. Koźmiński, *op. cit.*, p. 270.

that the Commission was to work on a permanent basis. It is also believed that its transitional nature was evidenced by the lack of mention of the Codification Commission in the March and April Constitutions, although in practice it functioned until the outbreak of World War II. Adam Lityński points out that the absence of the Codification Commission among the constitutional bodies should be explained more by its auxiliary and non-autonomous nature than by its anticipated impermanence at the time<sup>8</sup>. Certainly, however, the Codification Commission should not be equated with an equivalent of the Council of State due to its limited scope of work and transitional nature.

The second attempt to solve the legislative problems was Article 2 (6) of the Act of July 31, 1919 on the establishment of the General Counsel to the Republic of Poland,<sup>9</sup> which stipulated that the scope of activities of the General Counsel include "(...) evaluating, at the request of the Council of Ministers or individual ministries, bills, laws, and general regulations of the central state authorities from the general-law, organizational, and legislative technique standpoint, and in particular from the standpoint of private-legal, public-law, and administrative-law interests of the State." Estreicher rightly noted that this idea was incorrect due to the multitude of tasks that this body performed.<sup>10</sup>

The first proposals to establish an expert body for legislation emerged as early as in 1919. "Kwartalnik Prawa Cywilnego i Karnego" published the *Memoriał Wydziału Prawa i Umiejętności Politycznych Uniwersytetu, Towarzystwa Prawniczego i Związku Adwokatów Polskich we Lwowie w sprawie techniki ustawodawczej* [Memorial of the Faculty of Law and Political Skills of the University, the Lawyers' Association, and the Union of Polish Lawyers in Lviv on the Legislative Technique].<sup>11</sup> The memorial called for the establishment of a legislative section in each ministry and a separate central legislative office. That office was to examine legal acts prepared by the ministries in terms of "codification technique" and "their compatibility with legislation already in force in the three former partitions or in the partition in which the law is to take effect." In addition, the office was also supposed to draft legislation by order of the Sejm *with the content expressly specified by the Sejm*. In addition, member of parliament Stanisław Głąbiński submitted a proposal to the Sejm to establish a Legal Watch

<sup>8</sup> A. Lityński, *Pół wieku kodyfikacji w Polsce (1919–1969). Wybrane zagadnienia*, Tychy 2001, p. 15.

<sup>9</sup> Act of July 31, 1919 on the establishment of the General Counsel to the Republic of Poland (Journal of Laws of the Polish State of 1919 no. 65, item 390).

<sup>10</sup> S. Estreicher, op. cit., p. 56.

<sup>11</sup> M. Mohyluk, *Porządkowanie prawa w II Rzeczypospolitej: Komisja Kodyfikacyjna i Rada Prawnicza*, "Czasopismo Prawno-Historyczne" 1999, vol. 51, p. 288; *Memoriał Wydziału Prawa i Umiejętności Politycznych Uniwersytetu, Towarzystwa Prawniczego i Związku Adwokatów Polskich we Lwowie w sprawie techniki ustawodawczej*, "Kwartalnik Prawa Cywilnego i Karnego" 1919, vol. 2, pp. 227–228.

(Straż Praw), the role of which would be to examine the laws submitted to it from a formal and substantive point of view, and most importantly from the point of view of compliance with the constitution and other statutes.<sup>12</sup>

At the start of Poland's independence, legislative work was centred around the Legislative Department at the Presidium of the Council of Ministers. In 1920, the then-minister Stanisław Wojciechowski presented a proposal to strengthen the legal department of the Presidium of the Council of Ministers and to abolish separate legal departments in ministries. As Romuald Kraczkowski points out, according to Wojciechowski's idea, the tasks of the legal department were to include drafting laws at the initiative of the prime minister and the Council of Ministers, editing regulations, and preparing government editions of the texts of statutes and regulations.<sup>13</sup>

The above tendencies to strengthen the professional element in lawmaking were not taken into account by the legislature in the March Constitution, which lacks any mention of a body corresponding to the idea of a Council of State. During the work on drafting the new constitution, only one of the drafts provided for the establishment of the Council. Article 47 of the Draft Constitution of the Republic of Poland prepared by the so-called Survey (Ankieta) appointed by the government provided for the creation of a Council of State to prepare and evaluate bills.<sup>14</sup>

The initiative to strengthen professionalism at the legislation drafting stage was launched in February 1923 by the then-minister of justice Waław Makowski. He sought to make the Ministry of Justice a kind of legislative centre for the government, where all legislation would be drafted. Makowski believed that caring for the legal side and reconciliation with current legislation of all acts coming from the government as a whole was the responsibility of the minister of justice, acting as the representative of law in the government.<sup>15</sup> Prime Minister Władysław Sikorski disagreed with that opinion and believed that taking away such important powers of legislative initiative from the prime minister and transferring them to the minister of justice would lead to a situation in which there would be a "supra-minister" alongside the prime minister, which would contradict the constitutional principle of the equality of all ministers.<sup>16</sup>

<sup>12</sup> P.B. Zientarski, E. Mreńca, *Koncepcje eksperckiego organu do spraw legislacji w II Rzeczypospolitej*, [in:] *Administracja państwowa i samorząd w Polsce w ujęciu historyczno-prawnym. Wybrane zagadnienia*, eds. E. Mreńca, P.B. Zientarski, B. Czwojdrak, Warszawa 2018, pp. 145-146.

<sup>13</sup> R. Kraczkowski, *Aparat legislacyjny rządu w II Rzeczypospolitej*, "Państwo i Prawo" 1982, no. 7, p. 86.

<sup>14</sup> *Projekty Konstytucji Rzeczypospolitej Polskiej*, Publishing House of the Civilian Chancellery of the Chief of State, Warszawa 1920, p. 146.

<sup>15</sup> R. Kraczkowski, *Aparat...*, p. 87.

<sup>16</sup> *Ibidem*, p. 88.

### 3. The concepts of a *Conseil d'État* – the French and Romanian models

The need to rationalize the legislative process was recognized by the entire legal elite of the Second Polish Republic at the time. As a result, the idea of establishing a professional body involved in the legislative procedure was popular, and many representatives of the doctrine presented their concepts of how the new Council of State would function. The projects can be divided into those following one of two concepts: French and Romanian.

The first concept was to transfer the French prototype to the realities of Poland at the time, which means that the Council would combine the legislative function with the administrative-court function, and there were even voices declaring the usefulness of expanding the powers of the Council of State compared to the French model. For example, Antoni Peretiatkowicz suggested that the Council of State should have a competence court and a disciplinary court of the highest instance in cases against officials.<sup>17</sup> The rationale behind this idea was to be the reduction of costs associated with maintaining several separate offices and the ability to ensure uniformity of state administration.<sup>18</sup> The bill establishing the Council of State according to the first concept was drafted by Eugeniusz Starczewski.<sup>19</sup> The Council was to perform three tasks: a) preparation of draft laws; b) systematization and dissemination of laws; and c) observance of the due enforcement of laws.<sup>20</sup> In Starczewski's bill, the Supreme Administrative Tribunal and the Competence Tribunal were to be "absorbed" by the new institution and become its departments. Władysław Leopold Jaworski's alternative idea also envisaged granting legislative functions to the Council of State in the form of consultation of draft legislation by the Constitutional Tribunal, which did not exist at the time but the establishment of which was recommended by Jaworski.<sup>21</sup>

However, there were opinions challenging the sense of combining so many different functions within a single body. Stanisław Estreicher rejected the idea of combining the legislative function with the administrative-court function, arguing that this type of "fusion" was not necessary due to the existence of the administrative tribunal considered by him to be "one of the most valuable and

<sup>17</sup> A. Peretiatkowicz, *Rada Stanu w Polsce*, "Ruch Prawniczy i Ekonomiczny" (hereinafter referred to as RPEiS) 1922, no. 2, p. 236.

<sup>18</sup> Ibidem.

<sup>19</sup> E. Starczewski, *Nowe instytucje*, [in:] ed. W.L. Jaworski, *Ankieta o Konstytucji z 17 marca 1921 r.*, "Czasopismo Prawnicze i Ekonomiczne" (hereinafter referred to as CPiE) 1924, year XXII, pp. 49-54.

<sup>20</sup> Ibidem, p. 54.

<sup>21</sup> W.L. Jaworski, *Prof. Jaworski Władysław Leopold: Trybunał Konstytucyjny* [in:] W.L. Jaworski, *Ankieta o Konstytucji z 17 marca 1921 r.*, CPiE 1924, year XXII, pp. 54-59.

glorious achievements of a law-abiding state.”<sup>22</sup> Estreicher stressed that the combination of the legislative and judicial functions had no logical justification and, even in France, remained a mere historical legacy and institutional tradition, which there was no reason to copy in Poland. Contrary to Peretiatkowicz’s assurances, he believed that such an expanded Council of State would not help reduce costs, and on the contrary, would be a very costly undertaking.<sup>23</sup>

Tadeusz Hilarowicz’s bill was an attempt at compromise.<sup>24</sup> He assumed that instead of creating a new institution, judges of the Supreme Administrative Tribunal (SAT) should be engaged to evaluate government administrative statutes<sup>25</sup> as part of the General Assembly of the SAT expanded to include law professors and other lawyers with experience in the field of administrative practice, particularly in the field of legislative technique. The fundamental problem with Hilarowicz’s bill was its possible incompatibility with Article 73 of the March Constitution that was raised by representatives of the doctrine.<sup>26</sup> In addition, Jan Kopczyński believed that the idea would put too much of a burden on the SAT.<sup>27</sup>

The second concept drew inspiration from the Legislative Council (*Consiliul legislativ*) established in Romania under Article 76 of the 1923 Constitution.<sup>28</sup> The competence of that institution covered only legislation and the publication of legislation. It was described in the Polish press by Prof. Annibal Theodoresco of the University of Bucharest in 1926.<sup>29</sup> The Romanian Legislative Council was mentioned by Edward Neymark, who compared it with the Council of State from the 1926 bill prepared at the initiative of the Permanent Delegation of Legal Associations and Institutions of the Republic of Poland and with the

<sup>22</sup> S. Estreicher, op. cit., p. 57.

<sup>23</sup> Such an argument was used by Tadeusz Hilarowicz; see: T. Hilarowicz, *Projekt ustawy w sprawie opiniowania projektów ustaw administracyjnych przez rozszerzone Ogólne Zgromadzenie Najwyższego Trybunału Administracyjnego*, “Gazeta Sądowa Warszawska” (hereinafter referred to as GSW) 1924, no. 48, p. 747.

<sup>24</sup> *Ibidem*, pp. 746-748.

<sup>25</sup> From the minutes of the special subcommittee on the establishment of the Council of State at the Permanent Delegation of Legal Associations and Institutions of the Republic of Poland (which is described in more detail below) whose works included an analysis of Hilarowicz’s bill, it appears that administrative statutes were understood as everything except for civil and criminal law; see: *Wiadomości Stałej Del. Zrzeszeń i Instytucji Prawniczych R.P. Protokoły posiedzeń podkomisji specjalnej komisji II w sprawie projektu utworzenia Rady Stanu Rzeczypospolitej Polskiej*, GSW, 1926, no. 1, p. 11.

<sup>26</sup> *Ibidem*, p. 10.

<sup>27</sup> *Ibidem*.

<sup>28</sup> For the text of the 1923 Romanian Constitution, see: Julian Makowski, *Nowe konstytucje*, Warsaw 1925, pp. 317-358. The Romanian Constitutions were translated by Z. Litauer.

<sup>29</sup> A. Theodoresco, *Rumuńska Rada Prawodawcza*, “Gazeta Administracji i Policji Państwowej: tygodnik poświęcony prawu publicznemu, zagadnieniom administracji politycznej, samorządu i policji państwowej” (hereinafter referred to as GAiPP) 1926, no. 17, pp. 268-269.

Polish Legal Council (the aforementioned institutions will be discussed below).<sup>30</sup> Theodoresco himself once again introduced the Romanian Legislative Council to Polish lawyers during a discussion of a paper by Jan Kopczyński and Jan Jakub Litauer<sup>31</sup> (also discussed below).

The Romanian Council of State was established in 1864 at the initiative of Prince Alexander Cuza. However, by 1866 it had already been eliminated. It was not until 1884 that the constitution was amended by adding a provision prohibiting the establishment of a Council of State with powers over the administrative court system, but allowing the creation of a permanent committee to study and draft statutes and regulations.<sup>32</sup> That institution - despite its constitutional basis - did not come into being, as none of the bills was finally passed. In 1923, a new constitution was adopted, which in Article 76 stated: "a Legislative Council shall be established for advisory cooperation in drafting and agreeing on statutes originating either from the executive branch or at the initiative of parliament, as well as for drafting general implementing regulations."<sup>33</sup> The Constitution also stipulated that it was mandatory to submit bills to the Legislative Council for its evaluation within a statutorily defined period of time, with the exception of statutes on budget credits. The act introducing the Legislative Council was not promulgated until 1925.

The Legislative Council in Romania was established to advise on the process of drafting laws, and all bills, regardless of whether they originated at the initiative of the legislature or the executive, had to be evaluated by it.<sup>34</sup> In addition to the classic tasks of the *Conseil d'État*, the Romanian Legislative Council was to draw the attention of the government and legislative bodies to unconstitutional, outdated *per desuetudinem* laws, as well as point out errors in judicial interpretation of laws. The statute establishing the Legislative Council introduced the principle that no bill could be submitted to the legislative bodies without an evaluation by of the Legislative Council. The opinion was to be mandatory even for bills drafted by the government and based on prior work by the Legislative Council. The statute also included two safeguards to prevent the new body from delaying legislative work. First, the Legislative Council had a deadline set by either the ministries or the legislative bodies to issue an opinion on a specific bill, which could not be more than 10 days, or five days for urgent bills, and in the case of evaluation of amendments to a bill, it could not exceed

<sup>30</sup> E. Neymark, *Rada Prawnicza*, GAiPP 1926, no. 39, p. 617.

<sup>31</sup> *Pamiętnik II-go Zjazdu Prawników Polskich*, Warsaw 1930.

<sup>32</sup> A. Theodoresco, *op. cit.*, p. 268.

<sup>33</sup> *Ibidem*.

<sup>34</sup> *Ibidem*, p. 269.



24 hours. Secondly, in the absence of an opinion from the Legislative Council within the time limit, the government and the parliament had the right to proceed with deliberations on the bill without an opinion.<sup>35</sup> The Legislative Council was to be composed of distinguished lawyers selected from among scholars, officials, and attorneys with lengthy experience in their respective fields.

Similarly, the compromise idea proposed by Eugeniusz Starczewski a few years after the publication of his first bill on the Council of State was not to establish a new institution, but to reorganize the Codification Commission so that, in addition to writing new codes, it would also work on current legislation.<sup>36</sup> The idea of reorganizing the Codification Commission was attractive, as such a reorganization would be easier than creating an entirely new institution. In addition, it would be convenient to engage prominent lawyers from the Codification Commission to work on current legislation. The reorganization could be a transitional stage on the way to the creation of a *Conseil d'État* in its maximum form, which was considered to be the Council of State of the Republic of Poland presented in the bill written by Kopczyński (more information on this is given below).<sup>37</sup> On the other hand, the prospect of expanding the powers of the Codification Commission seemed unrealistic, due to the meager financial resources available to the Commission, especially in the early years of its existence,<sup>38</sup> and the burden associated with its work on codifications. Doubts also arise as to whether Poland at the time had enough professionals to staff such an institution.

In 1925, a proposal similar to the one where the Council of State was a legislative body was made by Stanisław Posner, who advocated for the establishment of a Legislative Council at the Ministry of Justice assuming that the most important stage in the legislative process was the first one, i.e. the construction of the statute itself.<sup>39</sup>

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35 Ibidem.

36 E Starczewski, *W sprawie utworzenia Rady Stanu. Wyniki obrad specjalnej Komisji II Stątej Delegacji Zrzeszeń i Instytucyj Prawniczych R.P.*, GAiPP 1926, no. 1, pp. 12-13.

37 *Wiadomości...*, p. 11. Kopczyński himself believed that his bill was not the most far-reaching at all, but actually provisional, and he considered T. Hilarowicz's bell to be such.

38 At the outset, the Codification Commission was given two empty rooms in the building of the Ministry of Justice without any support staff. Members of the Commission had to furnish the rooms with furniture, typewriters and paper, paying for all the associated expenses out of their own pockets. Moreover, membership in the Commission did not entail any remuneration and only per diems and reimbursement of travel expenses were paid; see: A. Lityński, *Kodyfikacja prawa w II Rzeczypospolitej*, [in:] *Oblicza niepodległej*, eds. W. Kalwat, M. Kopczyński, Warsaw 2018, p. 157.

39 S. Posner, *Rada Prawodawcza przy Ministerstwie Sprawiedliwości*, RPEiS 1925, no. 4, pp. 997ff.

#### 4. Jan Kopczyński's first bill from 1925

Deliberations over the Council of State were carried out as part of the work of the Permanent Delegation of Legal Associations and Institutions of the Republic of Poland (hereinafter referred to as Permanent Delegation). The Permanent Delegation was established at the beginning of 1924 as “the supreme opinion-giving body of the Polish legal professions in all matters relating to legal life and the activities of the affiliated legal professions.”<sup>40</sup> The Permanent Delegation formed subcommittees focused on to particular issues. In 1925, one such subcommittee discussed a bill intended to create a Council of State of the Republic of Poland, the author of which was Jan Kopczyński, President of the Supreme Administrative Tribunal.<sup>41</sup> The Council of State was an important issue for lawyers, as evidenced by the idea that the problem should become the main topic of the 2nd Congress of Polish Lawyers planned for 1925. The speaker presented his own bill,<sup>42</sup> in which the Council of State was to operate under the Prime Minister, and his permanent deputy on the Council was to be the Minister of Justice. According to Kopczyński's idea, individual ministries were to send materials to the Council of State on the basis of which bills would be created. Stanislaw Rappaport was skeptical about the placement of the Council of State under the Prime Minister, fearing that it would become too bureaucratic. In addition, he asked Kopczyński whether it was at all possible for an official to simultaneously hold the position of a member of the Council of State. Kopczyński did not consider this to be a problem.

During the deliberations of a subcommittee of the Permanent Delegation, Waclaw Bitner put forward a bill aiming to create the Council of State as a Legislative Commission under the Minister of Justice, which would take over the relevant powers of the Legal Department existing at that time under the Prime Minister and of the General Counsel to the Republic of Poland. Kopczyński criticized that idea, pointing out that the Constitution provided for only one “supra-minister” – the Prime Minister, and entrusting such important powers to the Minister of Justice would be unconstitutional. In the end, it was decided that the subject of discussion by the Permanent Delegation would be Kopczyński's bill.

After the discussions by the Permanent Delegation and amendments to that bill,<sup>43</sup> the Council of State was to be charged with four tasks:

<sup>40</sup> Article 1 (1) of the General Regulations of the Permanent Delegation, *Miscellanea*, RPEiS 1923, no. 3, p. 554.

<sup>41</sup> Minutes of the meetings can be found in GSW, see footnote 25, pp. 9ff.

<sup>42</sup> J. Kopczyński, *Projekt ustawy o utworzeniu Rady Stanu R.P. (pierwotny)*, GSW 1925, no. 52, pp. 832-833.

<sup>43</sup> Amended bill, *W sprawie utworzenia Rady Stanu. Wyniki obrad podkomisji specjalnej Komisji II Stalej Delegacji Zrzeszeń i Instytucji Prawniczych II R.P.*, GAiPP 1925, no. 50, pp. 1005-1006.

- a) preparing, or evaluating, bills and draft regulations of the President of the Republic and the Council of Ministers,
- b) evaluating ministerial regulations before they are promulgated in the Journal of Laws,
- c) systematizing the existing legislation,
- d) editing and administering the Journal of Laws,
- e) issuing legal opinions on other matters which, due to their importance to the state, were submitted to the Council of State by its President or one of its Vice Presidents at their own initiative or at the request of the Sejm or the Senate.

The President of the Council of State was to be the Prime Minister, and the Vice Presidents were to be the Minister of Justice (“First Vice President”) and a person appointed by the President of the Republic at the request of the Council of Ministers (“Second Vice President”). In addition, the members of the Council of State were to be:

1. 5 judges or presidents of the Supreme Court,
2. 5 judges or presidents of the Supreme Administrative Tribunal,
3. 30 members from among professors of “law faculties of academic schools,” attorneys, and other persons with legal education or knowledge of economic relations; and
4. heads of departments of the Council of State.

All members were to be appointed by the President of the Republic of Poland at the request of the Council of Ministers. The term of office of the members of the Council of State, as well as of the second Vice President, was to be 3 years. An outgoing member of the Council of State was eligible to run for another term.

In Kopczyński’s concept, the Council of State was to consist of two departments: Department I – the Legislative Department and Department II – the Codification Department. The departments were to be run by department heads, and those positions could be held exclusively by people with legal education.

The Legislative Department was to be in charge of preparing or evaluating draft legislation. The Codification Department, on the other hand, was to be tasked with systematizing the existing legislation, designing changes necessary to eliminate contradictions therein, and promulgating systematized collections of laws after their adoption by the Council of Ministers with the approval and upon the signature of the President of the Republic of Poland. Doubts about the collections of laws raised during the discussion of the bill concerned whether the Council of State could remove contradictions apparent in the legal system on its own, as Kopczyński envisioned in the original bill. It was concluded that this power would be too broad, so it was decided to limit the competence of the Council of State only to designing the changes necessary to eliminate contradictions. Due to doubts about the legal nature of the collections of laws, it was decided that

they would be announced in the Journal of Laws as an appendix. The idea of creating a Codification Department that would systematize legislation stemmed from the widespread belief that this field was neglected in Poland, and Eugeniusz Starczewski even claimed that Poland was the only country that did not conduct such systematization.<sup>44</sup>

Changes in the projects of acts or regulations which had been considered by the Council of State would be presented for its consideration by the Council of Ministers and the conclusions would be presented during the government's next meeting, where the final decision would be made. This meant that amendments or additions to bills already evaluated by the Council of State that were finally passed by the Council of Ministers could only be brought to the parliament after an additional opinion from the Council of State.

In emergencies, the Council of Ministers could refer a bill to the legislature without the opinion of the Council of State, but at the same time it was obliged to send the bill to the Council, which was to submit its opinion directly to the legislature. This solution was well thought-out because, on the one hand, it prevented the process of submitting a bill to the legislature from becoming protracted, and on the other hand, the Council of State still was able to express its opinion on the bill (which was lacking, for example, in Tadeusz Hilarowicz's bill).

The members of the Council of State were also to be able to attend meetings of the relevant committee of the Sejm or Senate on an equal footing with government representatives, as well as to speak at plenary sessions of the Sejm and Senate in defense of bills and opinions of the Council of State. This provision was controversial for some, because, as they pointed out, it made the Council of State *the fourth branch of government in the country*.<sup>45</sup>

In order to avoid protracted work of the Council of State, the author of the concept introduced a time limit for giving an opinion on a bill or a regulation. It was equal to one month for ordinary cases and one week for urgent cases. Longer time limits could be agreed on a case-by-case basis. Identical solutions in terms of time limits were contained in Eugeniusz Starczewski's bill on the Council of State. Time limits were also in place for the Romanian Legislative Council, although they were shorter than those proposed by Kopczyński.

## 5. Jan Kopczyński's second bill from 1926

In 1926, the legal elite believed that the pace of parliamentary work was too slow, and the solution to that problem was to be a constitutional amendment expanding the powers of the executive branch. On June 2, 1926, the Permanent

<sup>44</sup> E. Starczewski, *W sprawie...*, p. 12.

<sup>45</sup> *Wiadomości...*, p. 12.

Delegation passed proposals to amend the March Constitution (they included expanding the powers of the President, changing electoral law, and reducing the number of members of the Sejm and the Senate<sup>46</sup>). One of the demands was to grant the President the right to issue “decrees with the force of a statute” during breaks between the sessions of the Sejm and the Senate. The Permanent Delegation concluded that it would therefore be necessary to establish a Council of State as an advisory body composed of members appointed by the President, whose task would be to evaluate the draft decrees before they are issued.<sup>47</sup> A special subcommittee on *repair of the 1921 Constitution* was established under the Permanent Delegation to prepare proposals for the implementation of the recommended changes.

Jan Kopczyński prepared a bill on the Council of State, taking into account the resolutions of the Permanent Delegation.<sup>48</sup> As in the 1925 bill, Kopczyński called the institution the Council of State of the Republic of Poland, although there were doubts during the discussion whether Council of State was an appropriate name (the same doubts also arose during the discussion in 1925). According to the bill, the Council of State was obliged to evaluate the Presidents decrees and optionally to evaluate government bills and draft regulations. This solution was adopted due to doubts as to whether the Council of State could, in addition to mandatory evaluation of presidential decrees, also provide advice on other issues. During the discussion, concerns were raised that this would shift moral responsibility for official acts from the government to the Council of State. In the end, it was decided that the most prudent thing to do would be to grant the power to evaluate, at the request of the President of the Republic or the government, bills and draft regulations of the President of the Republic or “supreme authorities on the basis of the authorizations of the relevant statutes”.

The Chairman of the Council of State was to be appointed by the President at the recommendation of the Council of Ministers. Here, too, the idea of filling the post with the Minister of Justice resurfaced due to the minister’s alleged special constitutional position. However, the view that the Chairman of the Council of State should be the Minister of Justice, as the guardian of the law with high authority to ensure the authority of law and respect for the rule of law in society, did not win the support of the majority of the members of the committee. A similar appointment procedure to that of the Chairman of the Council of State was provided for the Deputy Chairman of the Council of State, except that the latter would be appointed at the recommendation of the Chairman of the Council of State. The term of office of the Chairman of the

<sup>46</sup> E. Neymark, *O rewizji Konstytucji Rzplitej Polskiej*, GAI PP 1926, no. 25, p. 415.

<sup>47</sup> Ibidem.

<sup>48</sup> The assumptions of the bill were presented by E. Neymark, *O Rewizji Konstytucji Rzplitej Polskiej (Projekt ustawy o Radzie Stanu Rzplitej Polskiej)*, GAI PP 1926, no. 28, pp. 463-465.

Council of State was to be 5 years. In addition to the Chairman of the Council of State, the new institution was to have 30 members – a number that was a compromise between the protractedness of the work of bodies that are very numerous and the seriousness and scope of the matters to be dealt with by the Council of State - appointed by the President of the Republic of Poland at the request of the Council of Ministers, chosen from among the presidents and judges of the Supreme Court and the Supreme Administrative Tribunal, attorneys, law professors of universities, and experts in administration and economic life, with a minimum of half of the members to have a university degree in law.

The term of office for the members of the Council of State was to be 3 years. The members of the Council of State (with the exception of the Chairman) were not to receive salaries related to their functions. The President could dismiss a member of the Council of State before the expiration of his or her term only by a resolution of the Council of State passed by an absolute majority of votes in the presence of at least half of the members. Members of the Sejm and the Senate could not be members of the Council of State.

The Council of State was to have two weeks to evaluate a draft decree, although this time limit could be shortened or extended by the President due to special circumstances. Also, it was mandatory to resubmit draft legislation to which the Council of Ministers had made amendments for an evaluation by the Council of State. The principle was adopted that any draft decree not previously evaluated could not be presented to the President for signature.

The most controversial aspect of the organization of the new institution was the question of whom to entrust with the implementation of the bill's provisions. Jan Kopczyński recommended that this function should be entrusted to the Prime Minister, in consultation with the Minister of Justice. However, the Permanent Delegation concluded that, due to the extraordinary role of the Minister of Justice as "the guardian of law and the rule of law,"<sup>49</sup> it should be up to him to implement the bill in question. Therefore, contrary to Kopczyński's comments, it was decided that the bill would ultimately assign this task to the Minister of Justice. Moreover, the subcommittee decided that the work of the Council of State should be linked to the legislative work underway at the Ministry of Justice.

Despite the bill being sent to Kazimierz Bartel's government, the initiative of the Permanent Delegation of Legal Associations and Institutions of the Republic of Poland did not gain political support. At the same time, draft amendments to the Constitution by the National Populist Union (ZLN) and the Christian National Party (SChN), as well as a joint bill by the ZLN, SChN, and the Christian Democrats providing for the establishment of a Council of State were also rejected

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49 Ibidem, p. 464.

during a constitutional debate in the second reading in the Sejm.<sup>50</sup> The then Minister of Justice – Waław Makowski noted that under those circumstances, the introduction of a Council of State was unrealistic. These events resulted in the formation of the Legal Council. According to Władysław T. Kulesza, the Legal Council was Waław Makowski's attempt to create an acceptable alternative to the Council of State in Poland.<sup>51</sup>

## 6. Legal Council

In 1926, at the initiative of Minister of Justice Waław Makowski, the Legal Council was established at the Ministry of Justice by a Regulation of the President of the Republic of August 12, 1926. This institution was composed of prominent lawyers, including Jan Kopczyński.<sup>52</sup> According to Article 1 of that Regulation, the Legal Council was tasked with providing opinions on bills and draft regulations *at the request of the Government*. The Regulation severely limited the capabilities of the Legal Council because, unlike in the case of the Romanian Legislative Council, it was possible to completely skip the stage of evaluation of draft legislation by the Legal Council. Article 5 stipulated that the President's bills and draft regulations *should be* forwarded to the Minister of Justice for evaluation by the Legal Council before they were considered by the Council of Ministers.<sup>53</sup> As for other types of draft regulations, the Regulation stated that their submission to the Legislative Council for evaluation was a discretionary decision of the Council of Ministers. The criteria for the evaluation of an act by the Legal Council were to be its compliance with the Constitution, the body of existing legislation, and the principles of legislative technique.<sup>54</sup>

In the formation of the Legal Council, the idea of entrusting legislative matters to the Minister of Justice as a unique minister who cared about the rule of law definitely prevailed. The Minister of Justice was the chairman of the Legal Council and led its work. His decision determined whether a piece of draft legislation would be submitted for deliberation to the Council's committee session or whether an analysis by a rapporteur would suffice (however, Article 6 of the Regulation stipulated that the submission of a piece of

<sup>50</sup> W.T. Kulesza, *Państwo w myśli politycznej i ustrojowo-prawnej Waława Makowskiego*, Warszawa 2014, p. 230.

<sup>51</sup> Ibidem.

<sup>52</sup> R. Kraczkowski, *Aparat...*, p. 90, footnote 42.

<sup>53</sup> This obligation arising from the use of the words "should be" was eliminated by an amendment to Article 5 of the Regulation; see: Article 1 (1) of the Regulation of the President of the Republic of March 23, 1927 amending the Regulation of the President of the Republic of Poland on the establishment of the Legal Council (Journal of Laws of 1927 no. 29, item 234).

<sup>54</sup> Regulation of the President of the Republic of Poland of August 12, 1926 on the Establishment of the Legal Council (Journal of Laws of 1926 no. 83, item 466).

draft legislation to the Council's committee could also be ordered by a resolution of the Council of Ministers). In addition, if the Minister of Justice disagreed with the Council's opinion, he could also enclose his own opinion with it. The rapporteurs who were to present the draft legislation under discussion and the opinions on them at meetings were designated officials of the Ministry of Justice. In accordance with the rules of procedure of the Legal Council, the Minister of Justice also managed the timing of the Council's work.

Of note is also the fact that some staff of the Legal Council were simultaneously on the staff of the Codification Commission (18 of the 52 counselors in the Legal Council worked for the Codification Commission<sup>55</sup>). Romuald Kraczkowski believes that this fact may indicate the intent to implement a particular concept or simply the lack of a sufficient number of professionals<sup>56</sup>. Grzegorz Ławnikowicz is of the opinion that the fact that members of the Codification Committee were on the Legal Council testifies to the implementation of the goals of stability, consistency, and non-contradiction of law by Makowski.<sup>57</sup> However, the explanation that this situation was due to staff shortages is more convincing, especially that no people associated with the political opposition to the government were appointed to the Legal Council.<sup>58</sup>

The institution did not quite resemble the French *Conseil d'État*. The Legal Council unsuccessfully sought to strengthen its position by introducing the customary requirement to obtain its prior approval for issuing regulations with the force of statutes. The Legal Council was considered by some to be a compromise between the demand formulated by the legal community for the creation of a Council of State and the opinions of politicians – the members of the government and the parliamentary majority – who were concerned about possible limitation of their existing powers.<sup>59</sup> Ultimately, however, the government did not allow the Legal Council to consolidate its position, which contributed to the undermining of its role as the government's internal consultative body. As a result, the Legal Council was reduced to the role of a body that legitimized the government's legislative actions, including those causing controversy in public opinion and the Sejm.<sup>60</sup> For this reason, the Sejm expressed its protest against the functioning of the Legal Council by not allocating any funds to it in the

55 R. Kraczkowski, *Rozporządzenia Prezydenta Rzeczypospolitej z mocą ustawy w latach 1926–1935*, Warszawa 2007, p. 125, footnote 77.

56 Ibidem.

57 G. Ławnikowicz, *Między koniecznością państwa a pochwałą autorytaryzmu. Koncepcja państwa społecznego Wacława Makowskiego*, Lublin 2014, p. 375, footnote 251.

58 R. Kraczkowski, *Rozporządzenia...*, p. 121.

59 R. Kraczkowski, *Aparat...*, p. 92.

60 Ibidem, p. 91



1927/1928 budget. This caused a practical halt to the Council's activities, which finally stopped functioning in March 1928.<sup>61</sup>

The blame for this state of affairs lies with the excessive subordination of this institution to the Minister of Justice, as manifested, for example, in the fact that it was the Minister who decided which pieces of draft legislation were to be evaluated.<sup>62</sup> This problem also had an impact on the relations within the Council of Ministers. According to Grzegorz Ławnikowicz, the Justice Minister was able to dominate both the other ministries and the Prime Minister himself.<sup>63</sup>

Jan Kopczyński's project for the Permanent Delegation of Legal Associations and Institutions of the Republic of Poland was not used at all.<sup>64</sup> To continue with Władysław Kulesza's line of thought, it can be assumed that Waclaw Makowski could not take advantage of these proposals, because the Sanacja regime was not interested in creating an institution with the power to control its own legislative work. This appears to be confirmed by the fact that the actual activity of the Legal Council ended as early as October 2, 1926, with the establishment of the government of Józef Piłsudski, when the role of ministers significantly diminished and all important decisions were made at the Belweder Palace.<sup>65</sup>

## 7. Paper by Jan Kopczyński and Jan Jakub Litauer at the Second Congress of Polish Lawyers in 1929

As a result of the failure of the Legal Council, the topic of the Council of State was revived. In 1929, during the long-awaited and repeatedly postponed Second Congress of Polish Lawyers, Jan Kopczyński once again attempted to raise the topic of the Council of State in the legal forum, by presenting a paper together with Jan Jakub Litauer with another proposal for its creation.<sup>66</sup>

The speakers based the concept of the Council of State on two assumptions. First, the Council of State was to be an independent institution with its own permanent staff. Second, it was to perform only advisory functions.<sup>67</sup> At the same time, the speakers based their vision solely on the legislative function of the proposed Council of State, declaring that it should be separate from the Supreme Administrative Tribunal.

<sup>61</sup> Ibidem, p. 93.

<sup>62</sup> A. Mohyluk, op. cit., p. 297.

<sup>63</sup> The author even writes about an "incapacitation" of the Prime Minister; G. Ławnikowicz, op. cit., pp. 375-376.

<sup>64</sup> A. Mohyluk, op. cit., p. 297.

<sup>65</sup> Ibidem.

<sup>66</sup> J. Kopczyński, J.J. Litauer, *Czy należy utworzyć Radę Stanu R.P. i jak ją zorganizować*, "Themis Polska" 1929, pp. 44ff.

<sup>67</sup> *Pamiętnik...*, pp. 32-33.

The paper emphasized that the purpose of creating the Council of State was to advise the government and the two houses of the legislature on the development and systematization of statutes and regulations with the force of a statute.<sup>68</sup> The advisory role meant that the Council of State was not to have sovereign powers, a fact that was obvious and present in every draft and concept recommending the introduction of this body. Moreover, the paper went on to emphasize that the Council of State was to be established only as an advisory and consultative body on legislation, and therefore its competition with the parliament was unacceptable.<sup>69</sup>

The Council of State was to evaluate legal acts in terms of their compliance with the constitution and the body of existing legislation, as well as the principles of legislative technique.<sup>70</sup> However, the Council's opinions were to deal only with the technical and legal aspect of the acts, not the political one. The paper also mentioned that budget laws, laws on the conscription of recruits, and international treaties were to be submitted to the Council of State only in cases in which the Council of Ministers, the Sejm, or the Senate deemed it necessary to consult the Council of State, and only on matters of a legal nature.<sup>71</sup> The authors of the paper argued that these legal acts did not require examination in terms of legal professionalism. This limitation probably resulted from concerns that the new institution would exercise excessive control and challenge the government's policies.

The biggest difference compared to earlier drafts was the significant reduction in the Council of State's power to draft legislation at the request of other institutions. The authors of the paper felt that the task of drafting all statutes and regulations would be too time-consuming for the Council of State and would interfere with its focus solely on reviewing already-finished drafts from a technical and legal perspective. Therefore, they suggested that the future Council of State should replace the previously existing Codification Commission.

The paper also shows that Jan Kopczyński's new concept differed from his previous ideas also in terms of the composition of the Council of State. The members of the Council of State could not hold any other office, except for membership in the Competence Tribunal and, if one was to be created, the Constitutional Tribunal. Such a strict limitation was intended to ensure the institution's independence. It is possible that there were also more mundane, but no less important, issues behind this idea, which resulted from the experience associated with the operation of the Legal Council. Member of the Sejm Adam

<sup>68</sup> J. Kopczyński, J.J. Litauer, op. cit., p. 44.

<sup>69</sup> Ibidem, p. 46.

<sup>70</sup> Ibidem, p. 44.

<sup>71</sup> Ibidem, p. 46.

Pragier criticized the Legal Council at a session of the Sejm by mentioning, among other things, that "(...) The Legal Council does not seek to replace the Sejm in practice, for it is a group of Old Men, some of them very qualified and even outstanding, who, after their all-day work, which sometimes lasts 7-8 hours, are called upon to work on current legislation between 7 and 10 or 11 o'clock in the evening, and to perform in that time of their supplementary work the legislative task that the Sejm allegedly cannot handle."<sup>72</sup>

Another noticeable change can be seen in the recommendation to evaluate bills drafted not only by the government, but also at the initiative of the parliament. This is because according to previous bills authored by Jan Kopczyński, the Council of State was to perform the role of an auxiliary body for legislation drafted at the initiative of the executive branch. Another change is seen in the proposal to require seeking an additional opinion from the Council of State on amendments introduced by the Sejm or the Senate before their final passage by the two houses. According to Kopczyński's earlier concepts, the Council of State performed an advisory function only for the executive branch. The possibility of interfering with draft legislation would end when a bill was brought before the parliament (an exception was provided for in Kopczyński's 1925 bill, for members of the Council of State to appear at sessions of the Sejm and the Senate to defend draft legislation). In contrast, the concept indicated in the paper meant expanding the powers of the Council of State by allowing it to control legislative changes made by the houses of the legislature. This proposal was intended to ensure the elimination of contradictions, ambiguities, and misunderstandings created by amendments made by parliamentarians who often lacked legal expertise.<sup>73</sup>

The authors of the paper suggested that the Council of State should replace the Codification Commission and the Legal Council. In their opinion, the latter proved to be a failed idea due to its limited powers and lack of authority.<sup>74</sup> Moreover, the authors of the paper suggested amending the Constitution to guarantee the independence and raise the authority of the Council of State externally, by making its members non-removable in the same way as judges<sup>75</sup> and by introducing the aforementioned *incompatibilitas* principle for members of the Council of State.<sup>76</sup>

During the discussion of the paper, Peretiatkowicz<sup>77</sup> noted that Kopczyński and Litauer's bill more closely resembled the Romanian model than the

<sup>72</sup> Quoted after: W.T. Kulesza, op. cit., p. 235.

<sup>73</sup> J. Kopczyński, J.J. Litauer, op. cit., p. 45.

<sup>74</sup> Ibidem, p. 46.

<sup>75</sup> Ibidem, p. 47.

<sup>76</sup> Ibidem, p. 48.

<sup>77</sup> *Pamiętnik...*, pp. 37-38.

French model, due to the restriction of the powers of the Council of State to legislative ones only. Peretiatkowicz concluded the speakers' concept had one major flaw: each piece of draft legislation was to be evaluated twice: the first time before it was submitted to the Sejm and a second time after the parliament had made changes. According to Peretiatkowicz, this would unnecessarily lead to complexity and prolongation of the legislative process. The polemicist believed that the problem could be easily solved by shifting the point at which draft legislation was submitted to the Council of State for evaluation from the moment it is brought before parliament to the moment when it had already been considered but not yet enacted. Peretiatkowicz also considered it expedient to add to the powers of the Council of State the ability to draft bills at the request of the government. In Peretiatkowicz's opinion, the otherwise correct assumption that members of the Council of State should focus solely on legislative work was unrealistic, since Poland did not have a sufficient number of outstanding lawyers who could abandon their previous careers to work in the Council of State. This topic was also raised by Alfons Parczewski,<sup>78</sup> who thought that, in addition to the judges of the aforementioned tribunals, the exceptions to the ban on holding positions outside the Council of State should also include professors of universities. Bohdan Wasiutyński<sup>79</sup> noted that it was necessary to include a provision in the future law that would force the government to make the opinions of the Council of State known to the legislative body, in order to avoid a situation in which the government would withhold information about the opinion for political reasons. In addition, he argued that the interest of the state required expanding the powers of the Council of State to include evaluating ordinances, as well as drafting them.

Jan Kopczyński and Jan Jakub Litauer responded to these concerns by<sup>80</sup> concluding that it was right to abolish the *incompatibilitas* principle for university professors. In addition, they agreed with Wasiutyński's remark on the obligation to communicate the opinion of the Council of State to the Sejm. On the other hand, they disagreed with Peretiatkowicz's argument and stated that repeated consideration of the same bill seems inevitable due to the fact that changes made by the houses of the legislature during the course of the readings could nullify the original meaning of the bill and the purpose it was intended to serve. Also, they considered the suggestions that the Council of State should be responsible for drafting all bills and regulations to make no sense (they thought that the Council should focus on codes only), since overly extensive powers could result in lower efficiency of the Council's work and overloading it with duties.

<sup>78</sup> Ibidem, pp. 38-39.

<sup>79</sup> Ibidem, p. 39.

<sup>80</sup> Ibidem, pp. 39-40.

All participants in the discussion agreed on two things.<sup>81</sup> First, they recognized the need to improve the method of legislative work by introducing professional expertise in the form of a new institution such as the Council of State. Secondly, there was no doubt that the new institution was intended to be an advisory body and perform technical and legislative functions. The Council of State should be permanent, independent, and professional, and perform an advisory role.

## 8. Conclusion

The basic division of the concept of the Council of State into, on the one hand, the classical French model and, on the other, the model of an institution focusing solely on legislative matters, of which the Legislative Council in Romania could be a model, was evident at the beginning of the existence of the Second Polish Republic. Over time, the discussion focused solely on the Council of State as a legislative body. From this perspective, the basic problem was the question of its location in the system of government of the Polish state. Very popular among lawyers at that time was the concept where the Minister of Justice would act as a “supra-minister” wielding all legislative tools. This concept was apparently opposed by Jan Kopczyński, the most active participant in that discussion. His ideas on where to locate the Council of State in the system of government that existed then changed over time. In the first bill he authored, the Council of State was subordinated to the Prime Minister, which made it an expert body within the government. In the second bill, influenced by lawyers’ demands to expand the President’s constitutional legislative powers, the Council of State constituted - first and foremost – an advisory body evaluating the President’s draft regulations with the force of a statute. The author of the bill imagined that the Prime Minister would be charged with the implementation of the statute, but most lawyers protested against it, striving to have this task assigned to the Minister of Justice. Anyway, Jan Kopczyński’s first two concepts defined the Council of State as an advisory body for the executive branch of government.

Seeing the failure of the Legal Council, which was an advisory body for the government and was heavily dependent on the Minister of Justice, Jan Kopczyński, together with Jan Jakub Litauer, proposed another bill that was significantly different from the previous ones. The concept of the Council of State indicated in their paper went beyond the mode linking the Council of State to the executive branch. The authors concluded that the Council should be an advisory body for the legislative branch of government as well. In addition, the

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<sup>81</sup> Ibidem, pp. 40-41.

speakers advocated very strongly for the independence of the members of the Council of State and even suggested entrenching it in the constitution. Making the Council of State merely an advisory body with no authority to draft laws (except for codes) may have been justified by fears that the new institution would be used in the current political struggle. The authors of the concept may have feared that in the future politicians would try to impose their ideas by using the authority of lawyers who would put these ideas into legislation. Also, overly broad powers of the Council of State in the context of drafting legislation would certainly not please the parliament, which may have seen the institution as both a competitor and a threat.

Paradoxically, although a significant part of the legal elite of the Second Polish Republic spoke unanimously about the need to create a *Conseil d'État*, such an institution never came into being. The only attempt made to improve the legislative technique was the Legal Council. However, as a result of its narrow powers and the fact that it was involved in the political struggle between the government and the parliament, it quickly ceased to exist. The atmosphere of those events is very well reflected in the statements of parliamentarians made in that period<sup>82</sup>. Member of the Sejm Emil Sommerstein emphasized “the authority of the Legal Council, a team of outstanding theoreticians and practitioners in the State, can become dangerous if it is a protective shield for the Government, which will only put forward this authority when it is convenient for it, but will not listen to this authority when it feels that it does not follow its line.” Adam Pragier emphasized more harshly: “As if to abuse the law, an advisory body was set up, which was called the Legal Council, so that it would advise the Government on how to apply the law. The Sejm as a legislative body was overpowered, so some substitute had to be found for it.” At the same time, Waclaw Makowski’s good intentions concerning the rationalization of the developing administrative legislation in the form of presidential regulations with the force of a statute were not shared by the rest of the Sanacja regime (the so-called Colonels Group). Pilsudski perceived the new instrument more as a means to crush the parliament than as an idea to improve legislation. A telling justification for this thesis is provided in the statements made by the Marshal himself, for example: “It is now necessary to go through the decree phase. They can reduce the possibility of doing mischief” and “Let this Sejm rot. Let it have as little to do as possible.”<sup>83</sup>

Similar solutions that have been adopted in the Republic of Lithuania, which were not noticed by Polish lawyers, are worth mentioning. In the years 1920–1928, Lithuania had the Commission of Legal Advisors of Ministries (*Ministeriju*

<sup>82</sup> For statements by politicians and an assessment of the activities of the Legal Council, see: W.T. Kulesza, op. cit., pp. 235ff.

<sup>83</sup> For statements, see: G. Ławnikowicz, op. cit., p. 63.

*juriskonsultų komisija*).<sup>84</sup> It was an inter-ministerial advisory body functioning within the Council (Cabinet) of Ministers (*Ministeriu Kabinetas*). The Commission's tasks included evaluation of bills and international treaties submitted by the government, as well as laws already in force, and providing ongoing legal advice to the government and its various ministries. In 1924, an attempt was made to grant similar powers to the then-established Ministry of Justice, but the ministry failed to use its powers, which prevented it from becoming a real competition for legal counsels. In 1928, a body called the Council of State (*Valstybės Taryba*)<sup>85</sup> was introduced by Lithuania's new constitution, which shortly thereafter replaced the *Ministerijų juriskonsultų komisija*. The new institution was to prepare bill proposals.<sup>86</sup> However, the Council of State soon started to be ridiculed and called "the seven sleeping brothers," and one of its members, Michał Römer, called it the government's pushover.<sup>87</sup> When the authoritarian regime of the time decided not to call elections to the Seimas and assumed all legislative powers,<sup>88</sup> the role of the Council of State was reduced to being a fig leaf for propaganda on how the lawyers were helping the government.<sup>89</sup> The Lithuanian equivalent of the Council of State became a useful tool of the authoritarian system, which did not happen in the Second Polish Republic due to the still quite strong position of the parliament and the lack of consent from the lawyers to limit this institution to such a role, as demonstrated in Kopczyński and Litauer's paper (a demand to secure the independence of its members).

The Codification Commission avoided the fate of the Legal Council. Mariusz Mohyluk believes that this was due to its broad autonomy set forth in its procedural rules.<sup>90</sup> However, it is also worth noting that the Codification Commission dealt

<sup>84</sup> For information about *Ministerijų juriskonsultų komisijos*, see: M. Maksimaitis, *Ministerijų juriskonsultų komisija Lietuvos teisinėje sistemoje (1920–1928)*, "Jurisprudencija" 2003, vol. 41, no. 33, pp. 16–24.

<sup>85</sup> The translation of this name as Council of State should be considered incorrect; see: P. Kierończyk, *System konstytucyjny państwa litewskiego (1922–1940)*, Gdańsk 2008, p. 80, footnote 181.

<sup>86</sup> A. Zakrzewski, *Wstęp*, [in:] *Konstytucja Republiki Litewskiej*, translated by H. Wisner, Warszawa 2006, pp. 18–19.

<sup>87</sup> J. Sawicki, *Michał Römer a problemy narodowościowe na ziemiach byłego Wielkiego Księstwa Litewskiego*, Toruń, 1998, p. 50; for information on the activities of Michał Römer in the Council of State, see: M. Maksimaitis, *Mykolo Romerio veikla Valstybės Taryboje*, "Jurisprudencija" 2005, vol. 64, no. 56, pp. 29–35.

<sup>88</sup> A new election was not called until 1936, see: A. Zakrzewski, op. cit., p. 19.

<sup>89</sup> Michał Römer wrote in his diaries about the fact that the collective nature of the work in the Council of State was abolished, and its president selected associates who would help him push through the government's ideas; see: M. Römer, *Dzienniki Tom 5 1931–1938*, Warszawa 2008, p. 44; for more information on the Lithuanian Council of State, see: M. Maksimaitis, *Valstybės Taryba Lietuvos teisinėje sistemoje 1928–1940*, Vilnius 2006.

<sup>90</sup> M. Mohyluk, op. cit., p. 291.

with judicial law, which is generally far from political controversy.<sup>91</sup> The Legal Council, on the other hand, was not limited in the scope of its work, so the political burden of certain decisions could be shifted to it.

The fact that the Council of State, although recommended, never came into being can be explained by pointing to the political struggle between the executive and legislative branches. On the one hand, the government preferred to use the subordinate Legal Council to ensure legitimacy of publicly unpopular projects, rather than have the more independent (as guaranteed by the principle of rotation of its members) Council of State as its partner. On the other hand, the parliament saw the Council of State concept as a threat and interpreted it as an attempt to limit its sovereignty. Perhaps these fears were not unfounded, as the criticism from lawyers at the time about the poor legislative quality of draft legislation focused precisely on the parliament. Thus, both the government and the parliament were reluctant to introduce an additional control mechanism. All this shows the gap between the idealistic assumptions of lawyers and the brutal political reality. Eventually, attempts to solve the problem of careless legislation were made in ways other than through the concept of *Conseil d'État*. The most famous legal acts of the Second Polish Republic, distinguished by outstanding legislative technique, were drafted by the Codification Commission and then made effective in regulations of the President of the Republic with the force of statutes. Such a systemic path based on extra-parliamentary legislation also led to the degradation of the parliament's position in the system of government.<sup>92</sup>

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<sup>91</sup> The most politically controversial work of the Codification Commission was the draft personal marriage law by Karol Lutostański, due to the fact that the draft provided for the existence of civil marriages and divorces; see: P. Fiedorczyk, *Dziedzictwo Komisji Kodyfikacyjnej II RP – w stulecie odzyskania niepodległości*, [in:] eds. W. Kalwat, M. Kopczyński, *Dziedzictwo II Rzeczypospolitej*, Warszawa 2019, p. 132.

<sup>92</sup> See: M. Pietrzak, *Stanowienie prawa w II Rzeczypospolitej według konstytucji z 1921 i 1935 roku*, [in:] A. Ajnenkiel, ed., *W pięćsetlecie Konstytucji Nihil Novi: z dziejów stanowienia prawa w Polsce*, Warszawa 2006.



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## SUMMARY

**The Concepts of Jan Kopczyński, President of the Supreme Administrative Tribunal, Regarding the Formation of the Council of State in the Second Polish Republic**

One of the main problems of the Second Polish Republic was the very poor quality of its legislation, especially in the first years after Poland had regained independence. The Polish legal community recognized this problem. One of the recommended solutions to improve Polish legislation was the introduction of a legislative body along the lines of the French *Conseil d'État* or the Romanian Legislative Council. Jan Kopczyński, president of the Supreme Administrative Tribunal, presented, over a period of several years, three concepts of a Council of State as a body with legislative powers. The concepts were discussed by the legal community. The discussions on the topic of the Council of State were particularly lively in the first half of the 1920s, when a number of prominent lawyers, such as Antoni Peretiatkowicz, Tadeusz Hilarowicz, Eugeniusz Starczewski, and others, published their ideas on the powers and location of the new institution in the system of government. At that time, Jan Kopczyński also published his bill. The topic of the Council of State returned for a second time in 1926 in connection with the debate over the necessary amendments to the March Constitution. At that time, Jan Kopczyński, at the request of the Permanent Delegation of Legal Associations and Institutions of the Republic of Poland, wrote a second bill establishing the Council of State. This project had no chance of being enacted due to the political situation prevailing at the time. In 1926, the Legal Council was established as an alternative to the Council of State. However, its excessive dependence on the actions of the Minister of Justice caused the institution to quickly die out. The topic of the Council of State was revived for the third time during the Second Congress of Polish Lawyers in 1929, at which Jan Kopczyński, together with Jan Jakub Litauer, presented a paper recommending another concept of establishing the Council of State, which strongly emphasized the independence of its members. This proposal was not implemented, either. The reason why the Council of State was never established in the Second Polish Republic was the intense political struggle between the executive and legislative branches of government. The executive branch was not interested in the existence of the Council of State as an independent control centre for legislative activities, while the parliament perceived it as competition and an attempt to undermine its autonomous powers. Eventually, the legislation of the Second Polish Republic was improved by using the output of the Codification Commission, introduced through presidential decrees. A side effect of these measures was the degradation of the parliament's position in Poland's system of government.