DROIT POLONAIS CONTEMPORAIN
POLISH CONTEMPORARY LAW
1988 n° 3/4 (79/80)
PL ISSN 0070 - 7325

THE APRIL 1989 CHANGE OF THE CONSTITUTION

*Wojciech Sokolewicz**

The Act on Amendment of the Constitution, passed by the Seym on April 7, 1989,[1] entered into force as promptly as the following day, essentially modifying the contents of the valid fundamental statute. Throughout the Constitution's validity, it was the most profound of its changes. The 1976 amending admittedly had a somewhat broader range : but the last change which corrects and supplements the system of the State's supreme authorities has greater consequences for the entire mechanism of exercise of power. Such were also its prerequisites : the change is after all to reflect what has recently been given the nice name of a "new philosophy of government," and legally to guarantee the practical realization of that "new philosophy."

I

The fact should be mentioned that for the last few years, with advancing reforms of the economy and political system, a critical attitude towards the 1952 Constitution increased ; the belief as to its inadequacy to the new social conditions and needs grew ; and the opinion became more and more general that also a constitutional reform was necessary. A large-scale scientific research was undertaken : in its course, the postulate that an entirely new Constitution of Poland should be prepared won a general support. Naturally, also in the opinion of the followers of that postulate, this would not necessarily rule out the possibility of previous partial changes should they prove indispensable for some reasons, provided they did not clash with the main directions of the planned

* Professor of Constitutional baw in the Institute of Law Studies of the Polish Academy of Sciences.

[1] *Journal of Laws,* No. 19, item 101.

In course of the political turnover in Poland in 1989, the Constitution has been again essentially amended on December 29, 1989. This amendment will be subject of separate examination in one of the next issues of our Review.

general reform. Discussed were, among other things, both the prospects of the form of government evolving towards a variant of the presidential system,[2] and the advisability of establishment of the second chamber of parliament.[3] The opinions as to both these questions varied : this concerned both the principles themselves and the way of their possible fulfilment. Most of the debaters, however, seem to have inclined towards a one-man presidency fitted into the parliamentary system of government, and the second chamber as the forum where the interests and opinions of particular social groups and circles holding the right to self-government could be expressed and participate in the shaping of the State's will ; but voices could also be heard which questioned those trends of changes in principle.[4] The augury of certain constitutional changes seemed to follow from the turn in the Polish United Workers' Party's political strategy prepared as early as the summer of 1988 which consisted in the opening of the political system for non-socialist oppositional forces whose programme was alternative in relation to that of the PUWP and the coalition in power as a whole. In the resolution of the 8th Plenary Assembly of PUWP's Central Committee (1988), the problem of presidency and the second chamber of parliament was touched upon, though admittedly most cautiously : firstly, the possible future shape of those institutions was not settled beforehand, and secondly, they were treated as issues "to be considered."[5] [6]

What directly politically incited constitutional changes was the "Round Table" Conference (February — March 1989) with its concluding agreements of which the Standpoint as to political reforms is related most closely to the matters discussed in the present paper. Whatever the opinion about the "Round Table" Agreements' legal import—the once made attempts at characterizing the Gdańsk social agreements included in particular[6]—it no doubt politically determined the constitutional and, more broadly, legal reform carried out in April 1989 ; it might therefore

---

[2] It should be stressed in this connection that the proposition to create the office of President, and the postulate to introduce a presidential form of government should be carefully distinguished. According to its situation in the system of state agencies and to the competences granted, the institution of President may function within a parliamentary republic or become the axis of a variant of the presidential one.

[3] I deal with those questions in : "Prezydent i druga izba" [The President and the Second Chamber], *Prawo i Życie,* October 1, 1988, No. 40.

[4] B. Zawadzka, "Stare wzory" [The Old Patterns], *Polityka*, November 26, 1988, No. 48, p. 3.

[5] *Trybuna Ludu,* August 20, 1988, p. 1.

[6] L. Garlicki, "Refleksje nad charakterem Porozumienia Gdańskiego" [The Nature of the Gdańsk Agreement : Some Reflections], *Państwo i Prawo,* 1981, No. 1, pp. 3ff.

be concluded, among other things, that the new regulations should be interpreted and applied in full accordance with the Agreements. At least to this extent, the legal sense of the Agreements cannot be questioned.

What is, therefore, the most general sense of those Agreements ? They assume a broadening of the principle of political and trade union pluralism to include oppositional groups ; a creation of possibilities for those groups to take part—though within definite limits — in the next parliamentary elections and thus get included in the institutional structures of State authority (the actual developments were farther-reaching) ; and a transformation of the former and construction of new mechanisms which would guarantee the observance of the principle of pluralism and at the same time secure the maintenance, during the transition period, some of the former political prerequisites of exercise of State authority, preventing situations which — in the opinion of the political forces assembled in the coalition in power — might lead to the shaking of State structures and, briefly, to impairment of the State. I believe these are the basic assumptions of the legal changes made, the change of Constitution included.[7] Their immediate political effect explicitly predominated over doctrinal reasons. Hence one can hardly agree with the arguments that quote somewhat indefinite "national traditions" to justify one change or another.[8] The truth must be faced even if it is hardly attractive and fails to satisfy the otherwise comprehensible aspirations of theoreticians and ideologists.

An obvious conclusion can be drawn from the above : the constitutional changes may and should be interpreted in the context of the whole of legislative decisions taken by the Seym on April 7, 1989 as they reflected the essence of the "Round Table" Agreements. This concerns in particular the expected and possible consequences of political and trade union pluralism as provided by new statutes : the Law on Associations[9] (which is to provide grounds for lawful activity of oppositional political groups) and on trade-unions of individual farmers,[10] as well as the amended act on trade-unions[11] and new electoral regulations : to the Seym[12] and the

---

[7] See W. Sokolewicz, ''Nowy ład polityczny" [The New Political Deal], *Kultura,* April 5, 1989, No. 14, pp. 1 and 5.

[8] Such features could be found in the pronouncement of Deputy T.W. Młyńczak who reported in the so-called first reading on the draft act on changing the Constitution at the session of the Seym on March 22, 1989. Professor J. Zakrzewska polemized, in my opinion quite rightly, with a similar approach during the proceedings of the group for political reforms of the "Round Table" Conference.

[9] *Journal of Laws,* No. 20, item 104.

[10] *Journal of Laws,* No. 20, item 106.

[11] *Journal of Laws,* No. 20, item 105.

[12] The act, under a rather queer title "Electoral Regulations to the Seym of the

Senate.[13] The change of the Constitution is part of that "package" of statutes, its nature being complementary in relation to the other statutes from the material point of view, which of course does not debilitate the legally superior force of its provisions.

The statutory decisions were taken hastily which public opinion found particularly inappropriate in the case of constitutional changes and which was bound to have bad repercussions for the legislative correctness of the acts thus passed. Works on the draft of act on changing the Constitution were carried out parallel at the "Round Table" Conference and in the Seym. The "Round Table" Agreements were only signed on April 5, 1989, with adjustments concerning among others the constitutional and political matters being made till then, while the first reading of the draft of Amendment took place at the session of the Seym on March 22, 1989, and the Seym appointed an Extraordinary Commission for its examination on that same day. As was generally known, it was possible that the bill would be changed, among other things by means of self-corrections submitted by the Council of State as its initiator at the suggestion of participants of the Round Table Conference. That indeed happened. Due to the great number of such corrections, the second reading of the bill on April 7, 1989 took rather. an unusual course: the Extraordinary Commission's reporter presented a new draft of changes and not corrections to the draft submitted in the course of legislative initiative. According to some opinions the Seym indeed "ratified" the decisions taken at the "Round Table" Conference. The Socio-Economic Council reproached the Seym with haste of parliamentary works ; [13] [14] also the deputies themselves expressed their discontent both at meetings of clubs and during plenary debates. There is, however, an explanation which might help us understand—but not necessarily justify—that haste. It may be supposed (since such explanation has never been made officially) that the leading political groups wanted parliamentary elections carried out according to new principles to take place not later than in June 1989 as a next step in the process of reforming the political system and State structures. Thus the necessary statutory and constitutional regulations had to be completed in due time in advance. On the other hand, the haste can by no means be excused by the above-mentioned previous discussions and studies on constitutional reform as they were still not too far advanced

---

Polish People's Republic of the 10th Term for the Years 1989—1993" was published in *Journal of Laws,* No. 19, item 102.

[13] *Journal of Laws*, No. 19, item 103.

[14] This is why the Socio-Economic Council refused to assume an attitude as a whole towards the draft, and submitted the opinion of a working group only.

and used but to a limited extent while drafting the now introduced changes.

As a whole, therefore, the April 1989 change of the Constitution is hardly an intentional stage of an adopted far-reaching programme of constitutional reform : it will not necessarily be included as a whole in the Constitution in its future shape which is to emerge as a result of works of the parliament elected in June 1989. Its solutions are designed for a shorter run, so to say : they are to secure an easy transition from the former monocentric political regime to one saturated with pluralism and manifesting it. The transitory and temporary nature of changes follows both from the contents of the "Round Table" Agreements, the intentions of the initiator, and from the Seym's own opinion expressed during the Extraordinary Commission's proceedings. Hence the limited range of issues which has been restricted to those most indispensable only.

It was therefore only right that the will was repeatedly expressed while introducing the changes to insist on the planned preparation and passing of an entirely new Constitution which should take place relatively soon. The April 1989 changes should not be considered sufficient for modernization of the Constitution now in force (next amendment has been adopted in December 1989—see footnote 1). Moreover, those changes should induce more intense preparations of the new act, at least for the reason that they increase, as will be shown further on, the incoherence of many provisions of the now valid one, making it less readable and more difficult to be applied in practice. This does not mean, however, that none of the new formulations and constructions are worth preserving, particularly if they prove correct in practice. What is however necessary before the solutions introduced by the April reform, most of them intentionally temporary, can be transferred to the new Constitution, is a sound, comprehensive, and free discussion in which the opinions of representatives of the doctrine of constitutional law should be heard.

II

As has been mentioned above, the changes are both numerous and diversified. One might even say that—although there are too few changes for all the defects of the valid Constitution to be removed—not all of those introduced were indeed indispensable for the achievement of the assumed immediate political aim. From the point of view of their contents and consequences, they can be reduced to four basic directions : 1) establishment of the institution (office) of President ; 2) establishment of the Senate

as the second parliamentary chamber ; 3) modification of the system of elections ; and 4) strengthening of the constitutional guaranties of independence of the judiciary. Their scrupulous examination would be a grateful task for scholars but could hardly be made in a single paper.

As a result of the April 1989 Amendment, the constitutional system of state organs has been decomposed which, as is well known, was originally based on a fundamental distinction between "state authority" and "state administration" organs, the separate "sections" of the agencies of legal protection preserved. While as regards its structure, that system could make one think of the "separation of powers," it was to be an opposition of that separation as regards the function, introducing separation of competences to replace that of powers and assuming an unconditional supremacy of the state authority bodies over the remaining categories of organs of the state machine throughout the entire hierarchy. The initially clear construction—clear, at least, in its constitutional regulation—grew more and more complex and less and less distinct and coherent with time. As early as 1957, a new category of state supervision agencies emerged which went beyond the hitherto existing patterns (the Supreme Board of Supervision). In the 1970s, people's councils as local state authority agencies lost, temporarily in part, some of the attributes due to that category of bodies. In the decade that followed, still other institutions were added to the legal system that depart from the constitutional pattern : the Constitutional Tribunal and the Tribunal of State, and beside them other institutions of importance for the state's system but not provided by the Constitution at all and thus outside of the system initially specified in it : the Supreme Administrative Court, Spokesman for Civic Rights, Chief of the Armed Forces and Committee for National Defence.

For many years, literature of the subject pointed to the groundlessness of the sharp and categorical opposition of the conception of "uniform state power" to the classic formula of "separation of powers."[15] Following the "Round Table" Agreements, the authors of the present Amendment declare their attraction to that formula stating without a more detailed explanation that the changes introduce „germs" of separation of powers in the structure of the system of state agencies.[16] It seems to follow from some political statements that a development of those "germs" in the future new constitution is intended. But before this approach can at all

[15] *E.g.* Z. Rykowski, W. Sokolewicz, "Konstytucyjne podstawy systemu naczelnych organów państwowych w Polskiej Rzeczypospolitej Ludowej" [The Constitutional Grounds of the System of Chief State Agencies in the Polish People's Republic], *Państwo i Prawo,* 1983, No. 5, pp. 37*ff*.

[16] T.W. Młyńczak in the report quoted above (footnote 8).

be appraised, the exact interpretation of "separation of powers" used in it should be defined. If what is meant here is an interpretation which recognizes priority of the nation's state will, and hence—of a freely elected parliament—this approach will probably meet with no opposition. Thus a "separation of powers" should not be interpreted in a way to assume logically the balance and equivalence of the separate "powers." It should be observed, however, that the amendment did introduce elements of such balance and equivalence.

The hitherto existing constitutional system of state agencies underwent the farthest-reaching transformation through the introduction into it of the institution of President and elimination of the Council of State. As if in anticipation of the classical "triple division," the President is to consolidate executive authority, as follows explicitly both from the contents of the "Round Table" Agreements and some political interpretations, and from the clearly stated intentions of originators of the draft.[17] Yet the President, and the intentionally designed „strong" President in particular, fails to correspond with the status and characterization of administrative agencies. Influenced by the fact that the newly created office was to take over a major part of competences from the Council of State, however, authors of the first draft inserted provisions concerning the President in Chapter 3 of the Constitution: "Chief Organs of State Authority," thus suggesting that the President should be classified as a supreme state authority agency. In the course of further legislative works, rightly and not without the influence of the doctrine, this most twisted formulation was abandoned, the respective provisions grouped in a new Chapter 3a : "President of the Polish People's Republic." On the one hand, this indicates that the hitherto operative constitutional classification of state agencies, based on the idea of narrowly interpreted unity and uniformity of state authority, has now lost its timeliness (and more such indications will follow) ; on the other hand, it helps avoid the redundant and in fact fruitless doctrinal disputes.

Also the newly created "second chamber" (the Senate) poses difficulties as regards interpretation. While the amended provision of Art. 2 part 1 may justify the inclusion of that chamber among the state authority agencies, the wording of Art. 20 parts 1 and 2, preserved in keeping with the "Round Table" Agreements for that matter, indicates that the Senate, although a chief state authority agency, is not to be the "supreme" one ; in this case as well, the change of title of Chapter 3 ("Chief Organs of State Authority" being replaced with "Seym and Senate of the Polish People's Republic") which according to the reporter of the Extraordinary

[17] *Ibidem.*

Commission has a deeper structural sense, seems actually to express the intended abandonment of the initially assumed classification. In spite of its somewhat misleading name, the Senate is neither the higher chamber of the parliament nor even one equal to the Seym : this follows both from Art. 20 of the Constitution and from the whole of constitutional competences (see below). Also joining the Seym to form the National Assembly (Art. 32b), the Senate can easily be outvoted due to the two chambers' respective numerical forces (100 senators as compared to 460 deputies). Characterization of the National Assembly is a separate problem. Is it just a form of operation of two independent bodies—the Seym and the Senate—as can be judged from the formulation of Art. 2 part 1 which deals with elections of representatives of the nation to the Seym and Senate and not to the National Assembly? Or is it a new structural quality, and should thus be treated as a separate though specifically composed state agency, as indicated by the statements of the reporters of the Extraordinary Commission, T. Szelachowski and E. Gacek, who reported on the corrected drafts of electoral regulations ?[18] Personally, I am inclined to accept the first of the above interpretations as it is more in character with the whole of provisions of the Constitution, the above-mentioned new title of Chapter 3 included ("Seym and Senate" and not "National Assembly".)

On the occasion of those constitutional changes, so to say, the regulation of the system of chief organs of state was supplemented with the hitherto omitted agences : Spokesman for Civic Rights, Chief of the Armed Forces and Committee for National Defence, and with an entirely new one : National Council of Administration of Justice. The legal existence of Spokesman for Civic Rights and Committee for National Defence was based before on ordinary statutes ;[19] now they have gained a constitutional characterization (less developed in the latter case) and been situated in the constitutional system of state agencies, thus becoming constitutional organs. As may be concluded from the distribution of the respective provisions, the constitutional legislator modified the former divisions in both cases, including the Spokesman among the most broadly interpreted supervision agencies (together with the Supreme Board of

[18] T. Szelachowski spoke of the National Assembly as a body meeting to elect the President ; E. Gacek twice used the expression "both chambers of the National Assembly" meaning the Seym and Senate as such. See *Trybuna Ludu,* April 8—9, 1989, p. 3.

[19] Act of July 15, 1987, on the Spokesman for Civic Rights, *Journal of Laws,* No. 21, item 123 and Act of November 21, 1967, on the general duty to defend the Polish People's Republic (for uniform wording, see *Journal of Laws,* 1984, No. 7, item 31). Both acts should be amended according to the new constitutional solutions.

Supervision, Constitutional Tribunal and Tribunal of State), and the Commitee for National Defence among executive agencies but not those of state administration. What should also be mentioned is the fact that the Supreme Administrative Court has not been constitutionalized despite the repeated postulates of the legal circles. It was probably decided that the Court could only be regulated in the future new constitution, while in the case of the Spokesman, the new mode of appointment to that office required a prompt regulation.

The National Council of Administration of Justice has been established in the Constitution (Art. 60 part 1) to submit to the President motions concerning the appointment of judges ; it is to be an additional guaranty of independence of the judiciary. Its powers, composition and mode of operation will be defined by an ordinary statute provided by the Constitution. It may be supposed that in this case as well, the legislator will implement the provisions of the Round Table Agreements, which means that the "majority" of the Council's members will be judges delegated by the general assembly of the Supreme Court, the Supreme Administrative Court, and common courts, the Council's competences including also promotion of judges which the Constitution fails to mention.[20]

III

The constitutional regulation of the national representation of a parliamentary kind underwent changes not only due to the creation of a new body, the Senate, but also to some essential corrections in the electoral system and the regulations concerning the Seym. As we know, there is—or at least should be—a strong logical interdependence between the way of establishment ("creation") of a given body (not only a representative one ; the same concerns e.g. the President) and that body's position in the system of state organs and range of competences. It is doubtful whether it has been sufficiently taken care of in the draft of the April 1989 constitutional amendment.

With some exceptions which will be discussed further on, the principles of electoral regulations laid down in the Constitution are nearly identical whether the elections concerned are those to the Senate, the Seym, or local elections. Corresponding with this is the technical solution that consists in a broad reference of the electoral regulations to the Senate (Art. 1 part 1) to that to the Seym.[21] The former regulates the discrepant

[20] In fact a respective law has been adopted in December 1989.

[21] A penetrating analysis of the two regulations has been made by Z. Jarosz,

and specific solutions only which relate to the senators. An exception here is the principle of equality, not provided in the case of elections to the Senate (Art. 94 part 2). This results from the fear of inconsistency between the contents and consequences of that principle on the one hand, and the way of forming electoral districts, adopted in the electoral regulations to the Senate : each province, irrespective of the size of population (that is, the number of voters) forms by force of law a two-member electoral district, three-member districts being formed by the City of Warsaw and by the Katowice province only. This electoral system, criticized for that matter by representatives of the Opposition during the "Round Table" Conference who postulated that the norm of representation of one senator per one million of the population should be adopted,* [22] favours provinces with a smaller population, that is less industrialized where most inhabitants live in villages and small towns. If we separate the immediate political aims of this solution, related to the expected greater conformity of such groups of the population, the more general sense of the discussed operation proves most doubtful. The resulting system would suit the structure of a federal state with an assumed equality of its components ; in a unitary state, instead—the competences delegated to the Senate considered—it may at most be considered an experiment whose usefulness will only be verified by the practice of the oncoming months and years. From the point of view of such demographic representation, so to say, the electoral system to the Senate is at any rate less democratic than that to the Seym; it is, however, more democratic from another and more important perspective, that of political representation : the senatorial electoral regulations contain no limitations of the kind found in their parliamentary counterpart (Art. 39 part 1). Thus reverting to what has been above, it might be said that if we consider this problem on the plane of constitutional norms only, we find a logical interdependence between the less democratic mode of elections of senators and the Senate's position in the system of power. But if we give it a broader consideration and take not only the constitutional but also the statutory regulations into account, the situation grows more complicated : the Senate, elected in a more democratic way and more accurately reflecting the voters political preferences in its composition, is situated below the Seym.

The amended Constitution overcomes the exclusivity of political and social organizations as the only subjects authorized to put forward

---

"System wyborczy do Sejmu i Senatu" [The System of Elections to the Seym and Senate], *Państwo ɛ Prawo,* 1989, No. 5.

[22] See statement of B. Geremek at a press conference, March 10, 1989.

candidates for deputies and senators (as well as councillors of people's councils), granting that right to the voters as well which reflects the implementation of the "Round Table" Agreements. All candidates for senators must gain the backing of a group of 3000 voters (Art. 6 of the electoral regulations), whether they are nominated by an organization or by the voters themselves. As regards candidates for deputies, instead, parties and organizations that belong to the coalition then in power (signatories of the Declaration of the Patriotic Movement for National Rebirth) are freed from the duty to secure the voters' backing for their candidates (Art. 41 point 1).

The probably temporary relinquishment[23] of the fulfilment of the Constitution's explicit order (Art. 102 in connection with Art. 2 part 2) that the mode of recall of deputies and senators should by defined by a statute can only be explained by a fear of a fierce political campaign which might be unleashed if a deputy were recalled : what might also be feared is the danger that proceedings for recall could be instituted for political reasons only. It should be stressed, however, that in this respect[24] of temporary irrevocability the status of a senator approximates that of a deputy.

The conception of creation of the second chamber of parliament, the Senate, met with resistance : it was motivated by arguments that concerned both the formal legal issues and the merits. Thus it was argued—in the circles of the Polish United Workers' Party and the United Peasant Party—that the entire nation had been for abolishment of the Senate in a 1946 voting. It may be said to refute this argument that, firstly, the actual nature of the 1946 referendum had never been statutorily defined[25] and the question remains open whether it had been decisive or

---

[23] According to what Deputy E. Gacek, the reporter, announced in her report. She limited the period of "renouncement" of the institution of recall to the 10th term (1989—1993), stating however immediately afterwards, "This does not mean, however, that this institution will be relinquished, nor does it interfere with its regulation in another legal act." One passed before the expiration of the 10th term as well ? It would be interesting to know the legislator's intentions.

[24] As in others, namely, the suggestion—which originated in the so called independent circles that a half of the senators should be appointed by the President—was rejected. See L. Mażewski, "Mechaniżm rządzenia w nowej konstytucji" [The Mechanism of Government in the New Constitution. A Controversial Article], *Ład,* February 26, 1989, No. 9, p. 11.

[25] See the act of April 27, 1946 on national referendum *Journal* of *Laws*, No. 15, item 104. In my opinion, the reasoning which justifies the legally binding nature of the results of referendum with the essence of the nation's supreme power and people's democracy is controversial. Its author has been S. Rozmaryn, *Polskie prawo państwowe [Polish Constitutional Law],* second edition, Warsaw 1951, pp. 266—267.

just advisory. Secondly, the electorate had meanwhile been replaced, two entirely new generations having emerged during the last 43 years. Thirdly, modem historians are inclined to question the official results of that voting, citing the fact of numerous corrupt practices. Besides, it would be improper to submit to general voting the fact of creation of the second chamber alone, not explaining its intended role in the process of wielding power in the state. Advocates of the second chamber conceived it as a representation of producers, self-governments, or self-governments and other economic subjects ;[26] many were also against the second chamber in any form whatever.[27] Also the name "Senate" was objected to as inadequate.[28] In this case as well, however, the disputes were settled in the "Round Table" Agreement : not only the question of creation of the Senate was settled but also the sphere of its activity defined as including "essential supervision, especially in the field of human rights and the rule of law, and of the socio-economic life." This political directive has been partly transformed into legal norms.

What are therefore the Senate's competences in the light of the amended Constitution ? Firstly, as a result of discussions, the Senate was granted the power of legislative initiative.[29] Invested with it is the Senate as a whole and not the separate senators, unlike the deputies in the case of the Seym. It may therefore be supposed that a draft of law will be relegated, on the grounds of the Senate's resolution made according to the regular procedure, to the President of the Seym by the President of the Senate. Having been passed by the Seym, the draft—now the law—will be handed over back to the Senate to be examined according to a procedure followed also in the case of other statutes.

That will be so as, secondly, according to Art. 27 part 1, the Senate examines all statutes (except the budget act) passed by the Seym irrespec-

---

[26] Which option found backing not only of some political circles (see pronouncement of the United Peasant Party representative at the plenary session of the Seym on April 7, 1989), but also of a considerable part of the doctrine. See S. Ehrlich, "Refleksje nad drugą izbą" [Reflections About the Second Chamber], *Rzeczpospolita*, November 28, 1988 ; Z. Jarosz, "Problem drugiej izby parlamentu (Zarys koncepcji)" [The Problem of the Second Chamber of Parliament. An Outlined Concept], *Państwo i Prawo,* 1989, No. 1, pp. 16*ff*.

[27] Of political circles—the Democratic Party. Of theoreticians—the most explicit was the article by B. Zawadzka quoted in footnote 4.

[28] *E.g.* S. Gebethner in a press interview : "Sejm, senat, prezydent..." [The Seym, the Senate, the President...], *Zycie Warszawy*, March 17, 1989, p. 3.

[29] The draft originally submitted to the Seym failed to grant that right to the Senate which was criticized in the first reading by a Democratic Party representative. The draft was supplemented according to the "Round Table" discussion and the negotiated Agreements.

tive of their contents and of the subject which made the legislative initiative in a given case : that is to be the Senate's "main task" (T. W. Młyńczak). If the Senate fails to inform the President of the Republic about its unqualified acceptance of the statute at an ealier date, it may submit its proposed changes to the Seym or move for its rejection within one month. For the Seym to dismiss the Senate's motion, a qualified majority of votes is required which has eventually been settled at two-thirds of votes,[30] with at least a half of the overall number of deputies present. This procedure gave rise to particular controversies ; at one point, its discussion even caused an impasse of the Round Table Conference. The chief question here is : will the application of this, procedure yield a rationalization of the legislative activity or render any rational legislation impossible? The fact should be taken into account that the extreme measure to overcome a conflict between the Seym and Senate, that is a dissolution of the Seym (and Senate) by the President of the Republic, may only be applied under conditions specified in Art. 30 part 1. Thus the only solution here would be a self-dissolution of the Seym[31] [32] where such conditions have not been provided.

The Senate's participation in the passing of the most important acts concerning the "socio-economic life," that is the National Socio-Economic Plan, the budget act, and the state's financial plans has been defined somewhat differently (Art. 27 part 2). Namely, we deal here with two stages of that participation. First, the Senate examines drafts of those acts and submits to the Seym its "standpoint" which in fact is a mere opinion not legally binding. The Seym should, however, reckon with that opinion quite a lot since—after hesitation[32]—the Senate was granted the right to examine in the next stage of passing those very same acts after they have been passed by the Seym, and to formulate proposals concerning specific changes. As may be concluded from the wording of this provision, in this case as opposed to statute-laws, the Senate has not been given powers to move for rejection of a given act as a whole. The Senate's opinion must be submitted within seven days—and not a month as in the case of statutes—and its rejection by the Seym requires the same qualified

[30] That majority was finally negotiated during the Round Table Conference, as the original draft imitated Art. 35 of the 1921 Constitution and provided for a majority of eleven-twentieths. The meaning of this change will be more clear if we realize that the "Round Table" Agreements granted 65 per cent of seats in the Seym to the coalition then in power : that is, somewhat less than two-thirds.

[31] But also requiring a qualified majority of two-thirds of votes ! (Art. 30 part 1).

[32] This was provided for neither by the original draft, nor even by the draft included in the Extraordinary Commission's report, only supplemented with the respective provision immediately before the plenary debate.

majority of votes as in the case of the Senate's proposals concerning statutes. It should be mentioned here that the Senate does not participate in any matter whatever in the Seym's passing of resolutions that "define the state's basic lines of activity" (Art. 20 part 3).

Moreover, despite the discussions of this issue, the Senate was not granted powers of initiative in the sphere of recall of the government or its separate members, nor any chance to participate in that procedure initiated by the Seym according to Art. 37 part. 1. Instead, what clearly reverts to the Senate's supervisory functions comprised in its specific competences is the fact that the appointment by the Seym of definite persons to the posts of President of the Supreme Board of Supervision (Art. 36 part 1) and Spokesman for Civic Rights (Art. 36a part 2), requires the Senate's consent.

Apart from its direct impact on definite decisions, the Senate—particularly one elected as provided—will no doubt become a centre contributing to the shaping of public opinion, broadly and freely informed about the course of the Senate's debates and the opinions expressed in it ; this follows from the adopted principle of openness of its sessions (Art. 29 part 3)—in fact they are fully covered by radio and television.

The Seym's supreme position in the hierarchy of state agencies has admittedly been preserved : but it is reduced by the competences of the newly crated organs : the Senate and the President of the Republic whose role will be considered further on. The fact cannot be disregarded, however, that there are among the changes of the Constitution also those advantageous for the Seym's position. Its status has been enhanced by the desistance of sessions in favour of permanent operation at sitting convened independently by the Seym's own organ (Art. 22 part 1). Among other circumstances, this augurs an intensification of parliamentary works : in this connection, it is planned to grant a greater number of deputies a leave of absence from their professional work. A grave consequence of the Amendment is the elimination from the system of sources of law of decrees with force of law-acts passed beyond the Seym but equal to statutes as regards legal force : thus the statute-law becomes the only possible form of primordial law-making in Poland.

In keeping with the postulates which the doctrine had been propounding since a long time, the Seym was granted participation in the ratifying of international agreements but only those involving a considerable financial burden for the state or a need of legislative changes (Art. 32g part 2). The sense of this limitation will probably be defined accurately by the future practice, as the preciseness of the above two expressions may give rise to doubts. The Constitution fails to specify the actual form of the "Seym's consent" required in such cases ; yet since the Seym only

has been mentioned here, it may be supposed that the form of a resolution has been assumed (a statute, as we know, would have to be passed with participation of the Senate). In my opinion, also this question remains open for different settlements based on different interpretations of the text.

Moreover, the Seym now appoints, on motion of the President of the Republic and for an undefined term, the President of the Supreme Court, chosen from among judges of the Supreme Court (Art. 61 part 4) which is to constitute an additional guaranty of independence of the judiciary and adds to the Supreme Court's authority as an institution; instead, the suggestion that the Public Prosecutor General should also be appointed according to a similar procedure was rejected. The Seym, whenever it is at session, is also to appoint the Chief Commander of the Armed Forces in the case of war (Art. 26 part 2); the legal status of that Commander will be specified by a statute provided by the Constitution.

Finally, among the ways of shortening the four-year term of the Seym, the Constitution now mentions its dissolution before time by force of its own resolution taken by a qualified majority of two thirds of votes ; no additional conditions have been provided here except that this cannot be done in state of emergency (Art. 32i part 4). A deputy's immunity has been strengthened instead : according to the new provision it can only be set aside by a resolution taken by the Seym with a qualified majority of two thirds of votes ; the hitherto statutory requirement of qualified majority has become a constitutional one.

IV

The primary source of the President's of the Republic great power—which makes it possible for him to influence practically all of the remaining chief state organs to a different extent and in different forms (see below)—is the will of the parliament (National Assembly) which elects him. This circumstance is expressed in the form of the President's oath ("Taking over the office of President of the National Assembly's will..."), and—indirectly—in the provision stating that the President exercises his powers on the grounds of and within the Constitution and statutes (Art. 32d part 1). But on the other hand, the President of the Republic is elected for the term of six years[33] and therefore longer than the parliament's four-year term which is to make it easier for him to hold his office independently of the parliament.

[33] Which may be repeated only once; yet the possibility of a repeated election is a factor which influences the need for the President to reckon particularly with the Seym's and Senate's opinion as long as he holds his office for the first time.

There are two constitutional conditions of eligibility for President's office : Polish citizenship and full electoral rights to the Seym. This is in fact one condition only, as nobody but Polish citizens enjoy "full electoral rights to the Seym". Thus the suggestion was rejected that the President should be elected from among deputies and senators only ;[34] nor are there any constitutional restrictions related to the political affiliation—or a lack thereof—of a candidate for President. The candidatures are effective—that is, involve the duty to be put to vote—if submitted by at least one fourth of the total number of members of the National Assembly, that is 140 persons. This way, a candidature cannot be put forward by the senators only (of whom as we know there are only 100). The National Assembly elects the President by an absolute majority, with at least a half of deputies and senators present. A part of the doctrine promoted the election of President in general voting ; this proposal was backed by some political groups (United Peasants' Party, Democratic Party), and found justification in some trends of modern constitutionalism which manifest themselves in the East and West alike ;[35] but the procedure of election by the National Assembly was finally adopted : according to the "Round Table" Agreements, it is to be temporary only, concerning the President of the "first term." It seems that the future authors of the new Constitution are bound to face a dilemma : should the mode of election be conformed to the President's competences as they are shaped more or less today, and consequently, general elections to that office organized, or the other way round, should the mode of election by the National Assembly be preserved, but the President's competences and situation in the system of chief state organs modified ?

The general constitutional characterization of the office of President has been contained in provisions of Art. 32 which states that the President is "the supreme representative of the Polish State" (part l),[36] and that he takes care of the observation of the Constitution and upholds "the state's sovereignty and security, the inviolability and indivisibility of its territory, and the observance of international political and military

[34] Such suggestions were considered in the Socio-Economic Council in March 1989.

[35] This is *e.g.* the solution adopted in assumptions of the new Constitution of Hungarian People's Republic ; such is also the trend of the constitutional changes now prepared in Finland.

[36] It seems therefore that, the new conception of state and philosophy of government adopted, it is not—as a rule—advisable to combine the office of President who is to represent the state as a whole with his function of the leader of any party, that function involving the representation of that very party by the very nature of things.

alliances" (part 2). The normative meaning of those provisions is highly controversial. If we treat them as nothing but a characterization—and the wording seems to point to this interpretation, with the unprecise expressions "takes care," "upholds," repeatedly criticized by the doctrine—we should assume that they become fully realized in the detailed competences specified by other provisions of the Constitution, such as the right to call the passed statute-laws in question, to dissolve the parliament or to proclaim the state of emergency, as ratifying international agreements, but create no new competences themselves. However, the wording of Art. 30 part 2 seems to point to the authors' different intentions. The provision mentions the President's constitutional powers specified in Art. 32 part 2. At once, the question arises what are the legal measures by means of which the President might exercise those powers ? Those measures are probably those mentioned in other provisions of the Constitution which define his detailed competences. Thus we reach the conclusion that, irrespective of the authors' possibly different intentions, the provisions of Art. 32, including those of part 2 of that Article, should be interpreted as providing a general characterization of the President's functions, and not dealing with his competences.

In relation to the Seym (and indirectly to the Senate as well), the President's main powers include : 1) legislative initiative ; 2) questioning (veto) of the passed statute-laws; 3) dissolving the chambers ahead of term.

Despite of the fact that this solution is controversial in the light of opinions of the doctrine, the right of legislative initiative granted to the President is not limited in any manner in the Constitution. Thus from the constitutional point of view, the President can make an initiative for a statutory regulation of any matter whatever. The care for the particularly high authority of his office, however, which might be put to a test in the course of parliamentary legislative works in the new conditions, would rather demand moderation in this respect. This is not going to be easy : after all, which of the remaining agencies should initiate statute-laws the contents of which refer to the President's competences? The answer can be expected of the nearest future.

The questioning (veto) of a statute passed by the Seym (with the Senate's participation, of course—see above) may assume either of the two independent forms : a motion submitted to the Constitutional Tribunal for ascertainment of that statute's constitutionality ; and a motion to the Seym for a repeated examination of the statute. The use of the former procedure does not exclude that of the latter. Should the Constitutional Tribunal find the statute constitutional, the President nevertheless may transfer it for repeated examination to the Seym. The two procedures differ from each other fundamentally but are also similar in some points

(e.g. they both have to be initiated within one month only after the statute has been submitted to the President for signing, or at least this is how I interpret the discussed provision).

Initiating the first of the above-mentioned procedures, the President causes the Constitutional Tribunal to pronounce an appropriate decision. A decision finding the statute unconstitutional is then examined by the Seym (Art. 33a part 2) which either removes the elements pointed out as unconstitutional, or dismisses the Tribunal's decision by a qualified majority of two thirds of votes with at least a half of the total number of deputies present.[37] It may be assumed basing on the inner logic of this construction that the President's motion to the Tribunal will contain an extensive explanation of the reasons for his reservations as to constitutionality of the statute concerned.

For the statute-law to be transferred to the Seym for repeated examination, substantial grounds are constitutionally required, although the Constitution itself contains no criteria for the President's appraisal of the statute, and in particular does not limit the use of this measure to situations where the statute's contents clash with the values which the President is to "uphold" (Art. 32 part 2). The choice of criteria for supervision lies within the President's discretionary powers. For the statute to be passed again by the Seym, the same qualified majority of votes is required as in the case of dismissal of an unfavourable decision of the Constitutional Tribunal.

The President's most severe measure in relation to the parliament is the dissolution of both chambers ahead of term (Art. 30 part 2). It is no doubt interesting that the Constitution does not provide for a separate dissolution of just one chamber, e.g. the Senate. Dissolution of the Seym also terminates the Senate's term (Art. 30 part 3). I perceive this to be an expression, among other things, of the recognition of the parliament's integrality as a whole, which results from the complementary nature of the two electoral regulations and, as a consequence, from representative character of both chambers together. In the course of legislative works on the draft act on changing the Constitution, the conditions in which the parliament may be dissolved ahead of term were defined accurately in the spirit of the "Round Table" Agreements ; initially, their formulation afforded possibilities for too broad an interpretation. At present, dissolution can take place if the Seym fails to apoint a government in three months or to pass the National Socio-Economic Plan or the budget act ; the Seym may also be dissolved if it passes a statute or a resolution which

[37] Art. 6 of the Act of April 29, 1985 on the Constitutional Tribunal *(Journal of Laws,* No. 22, item 98) with subsequent modificactions.

"makes the President unable to exercise his constitutional powers" specified in Art. 32 part 2 which have been mentioned above. This evaluation of parliamentary acts is done by the President himself but after consultation with Presidents ("marshals") of the Seym and Senate ; that consultation is obligatory before the decision dissolving the parliament can be taken, irrespective of its justification.

If the assumption of the authors of the discussed constitutional Amendment was to make the President an "element" of executive authority—and this assumption follows from the documents quoted above—then it must be stated that the President has indeed become that authority's fundamental element, so to say, and has been given broad powers to influence the whole of the government's works. The future practice will show just how those powers will actually be used, and whether the activitties of the President do not develop a course parallel in a way to that of governmental administration. Admittedly, the Amendment has not gone so far as to subordinate certain administrative departments directly to the President,[38] but on the other hand, the President has gained a decisive influence on the composition of the government. It is only on his motion that the Seym may appoint the Premier who in turn moves for appointment to other offices in the Council of Ministers "in consultation with the President." In my opinion, as we deal here with the situation of personal dependence, that consultation should be interpreted as a courteously formulated condition that the President's consent should be obtained. Admittedly, the Seym may recall both the Council of Ministers as a whole and its separate members (including the Premier) also on its own initiative, without the President's motion to this effect—but the Cabinet may only be appointed with the President's above-mentioned considerable participation. Between the terms of the Seym, the President's powers in the discussed field are broadened considerably, and the government is fully responsible and reports to the President (Art. 37 part 2).

The President's right to convene sessions of the Council of Ministers in particularly important cases and to preside at sessions thus convened (Art. 32f part 1 point 8) reverts to the traditional institution of the Council of the Cabinet. At such sessions, "matters of particular concern" are to be examined : a capacious and ambiguous expression. Also in this case, it is for the practice to show how the President chooses to exercise his powers in this sphere. The experiences of countries where "executive authority"

[38] According to the suggestion of Mażewski *(Mechanizm rządzenia...,* see footnote 24 the departments in question would be the Ministries : of Internal Affairs, of Foreign Affairs, and of National Defence. However, the actually passed change of the Constitution creates the grounds for the President's strong influence of the three above-mentioned departments.

is divided between the President and government vary. Just one observation should be made here : if the President is to play the role of an arbitrator in the case of a conflict between the separate state agencies, if he is to impersonate the majesty of the Republic and symbolize the authority of the state—he should hardly become involved too much in routine administrative matters : thus he may be expected to show moderation in initiating sessions of the government.

For the office he holds, the President bears a constitutional but not a political (parliamentary) responsibility. Constitutional responsibility consists in the possibility of the President being indicted before the Tribunal, of State, presided—as we know—by the President of the Supreme Court,[39] if the National Assembly so resolves by a qualified majority of two thirds of votes. The possible grounds for indictment include a breach of the Constitution or of statutes, and an offence committed by the President (Art. 32d part 2). The Constitution fails to specify the seriousness of either the breach of the Constitution, and of statutes in particular, imputed to the President, or the offence of which he is accused ; also the kind of that offence has not been specified. Moreover, the President enjoys no immunity similar to that granted to deputies (Art. 21 part 3) and to senators (Art. 28 part 3).

Since the President is not responsible to the Seym for the political direction of his activities and acts, the institution of countersignature has been provided for, which consists in the acts passed by the President being signed also by the Premier who is generally responsible to the Seym and who thus assumes responsibility for the President's act he signs. As compared with the provisions of the Round Table Agreements, the Constitution has limited the requirement of countersignature, relating it to executory acts of a normative character (ordinances and instructions), and only those of a "vital importance" at that (Art. 32f part 2). They are to be specified in a statute which may mean both a single statute defining a given category of acts, and mentions made in various statutes empowering the President to pass ordinances or instructions, specifying which of those acts need a countersignature.

*

The next stage of constitutional reform consisted in changes introduced into the Constitution by the Act of December 29, 1989 *(Journal of Laws*, No. 75, item 444). A detailed discussion of those changes would exceed

[39] For that reason, among others, it has been right to turn the appointment of the President of the Supreme Court over to the Seym, and not to the President of the Republic as previously planned.

the scope of the present paper, which is why I will limit myself, for the time being, to specification of those which are of the greatest importance for the system of government of the Polish State.

Firstly, that State has been defined as a democratic *Rechtsstaat* which fulfils the principles of social justice ; this definition replaced the former one which termed Poland a socialist State. Its name and emblem have also been changed. The Polish State now bears the name of "Republic of Poland" (the former name being "Polish People's Republic"), and its national emblem, the white eagle, has regained its traditional crown in its official effigy.

Secondly, the first two chapters of the Constitution and the introduction (preamble) which was not divided into chapters have been replaced with a new chapter entitled : Foundations of the Political and Economic System which decrees the following principles : a sovereign rule (authority) of the Nation ; representative democracy (though with the inclusion of the institution of referendum) ; rule of law and legality ; participation of the local government in the exercise of state authority ; freedom of action of political parties ; freedom of economic activity and a full protection of private property; fulfilment by the armed forces of their basic function of protection of sovereignty and independence of the Polish Nation.

Thirdly, the public prosecutor's office which was hitherto an agency of the State subordinated directly to the President has been subordinated to the Minister of Justice and thus included in the system of government institutions.

Also this recent constitutional amendment fails to do away with the need, recognized by all political forces in the parliament, to prepare a completely new Polish Constitution. Initial works towards this aim will be conducted by the Constitutional Commission, appointed by the Seym from among its members. As may be expected, the effects of those works will be submitted to the public opinion still in 1990.

Translated by Joanna Krahelska