

THE IMPACT OF THE SUBSIDIARITY PRINCIPLE ON POLISH DEMOCRATIC REFORMS

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I. Introduction

The Republic of Poland is a state where, following the subversion of the Communist regime in 1989, radical transformations of the political system have taken place which are still today at the stage of the building of the civil society and seeking the proper constitutional shape of the system. This specific situation where society have the chance to choose independently, unrestricted by the local systemic tradition, the mechanism of power, poses both an immense intellectual challenge and a most responsible historic task

The Parliament appointed in free elections, as well as the Constitutional Committee established in November 1993 and charged with the task of preparing a draft of the first complete Constitution of the Republic of Poland after the fall of the Communist regime, are both guided in the legislative activity by their adopted systemic priorities consistent with the generally recognized standards of democracy and human rights, and by the practical experience of the functioning of individual constitutional and statutory solutions at home and abroad.

In search of the right model of state and its functions best to correspond with the needs of post-Communist society, one could hardly accept without any greater objections the model of a welfare state which — as shown by the recent West-European experience — failed due to its overdevelopment of the administration, impoverishment of the public sector, and growing passiveness of the citizens. What seems just as ill-suited to the social situation of Poland is another model initially thought to be an effective remedy against the negative social phenomena inherited from the former system: that is, the model of a liberal state in the classic sense with the state's organizational functions restricted to the minimum.

A valuable point of reference and general directive in Poland's reformatory ventures of recent years is the idea of subsidiarity which offers an exceptionally pertinent answer to a fundamental question about the desired extent and tasks of state authority. According to the principle of subsidiarity, the chief function of power is to satisfy the needs of its subordinate communities or persons who shape their fates

independently and bear the related responsibility but are incapable of full development. The aims and tasks of power should not go beyond those of its subordinate individuals or groups. What justifies the existence of power is the lack of self-sufficiency on part of those individuals and groups. Therefore, the role of power is secondary and auxiliary as it is nothing but a means to the achievement of aims by individuals and communities.

The idea of subsidiarity — a specific "common sense" principle relating to the nature of all social organizations, has been known for many ages now and can be found repeatedly in the history of philosophy and in political thought. Its name, however, was only given to it quite recently, in the latter half of the 19th century, with respect of the federal states of Europe: Germany and Switzerland. An important contribution to conceptual development of the principle of subsidiarity has been made, since the 1930s, by the social teaching of the Catholic Church which related that principle to the philosophy of personalism.¹

Until recently subsidiarity was not a familiar part of the contemporary legal lexicon. That it has become so is largely due to controversy within the European Community over the terms on which it should progress towards some form of European Union. It has been employed in recent years in the debates over the division of competence between the Community and its Member States. That process eventually resulted in a statement of the principle being incorporated in the European Community Treaty (Article 3b) as amended by the Treaty on European Union (Maastricht) 1992. There an attempt is made to allocate competences partly in terms of their exclusivity and non-exclusivity and partly in terms of the criterion of achieving the objectives of the Community. With regard to the latter, subsidiarity applies in the sense that action to achieve an objective should be taken by the member States unless there are objective reasons which require action by the Community itself. In that connection subsidiarity has been variously understood so as to suit the purposes of proponents of alternative versions of union. Some have hailed it as guiding principle for future relations between the Community and its Member States;² others regard it as a mere facade and doubt its value as a legal concept.³

Putting aside the specific application of the principle of subsidiarity with respect to the mechanisms of European integration, the fact of its introduction to the legal terminology contributed to its considerable popularity and theoretical development. As discussed at the 14th International Congress of Comparative Law held in Athens in August 1994. In recapitulation of the works of 12 national reporters, Prof. John W. Bridge (University of Exeter, U.K.) stated that:

¹ Ch. Millon-Delsol, *Le principe de subsidiarité*, PUF, Paris 1993, pp. 3 - 8.

² *Subsidiarité: défi du changement*, Actes du colloque J. DeIors, Maastricht 1991; V. Constantinesco, *La subsidiarité comme principe constitutionnel de l'intégration européenne*, Aussenwirtschaft 1991, pp. 439-459.

³ R. Dehousse, „Does Subsidiarity Really Matter?“, European University Institute of Florence, Working Paper, LAW, 1992, N° 32.

“subsidiarity is not generally found as an express principle of constitutional law, other than in context of the European Union. But either the principle or the underlying concept from which the principle is derived is generally implicit or inherent in constitutional law and/or structures. In some cases the principle or concept has informed or is informing the constitution-making process. In others it is used as a tool of constitutional implementation and interpretation in relation to the allocation of decision-making power”.⁴

II. Philosophical background of subsidiarity

Subsidiarity's roots lie in Aristotelian political science and Thomist doctrine and philosophy. In the former, it appears as a principle of justice implicit in the notion that association is not an end in itself but serves to help participants in the association to help themselves. This has been expressed in terms that since in large organizations the process of decision-making is more remote from the initiative of most of those many members who will carry out the decision, the same principle requires that larger associations should not assume functions which can be performed efficiently by smaller associations. In the latter, it not only forms part of the Thomist notions of hierarchy and order but is also to be found in the notion of social and rational collaboration and the diversity of individual and collective capacities essential to such collaboration.⁵

In accordance with the formulations of Catholic social science, the principle of subsidiarity bases on the assumption that man is the sole independent being.⁶ Just like man who only seeks community's help through organization of or participation in communities created by nature if he cannot perform his life tasks himself, and only to the extent necessary, also any smaller or “inferior” community only resorts to the help of larger or “superior” communities if it cannot perform its tasks as determined by the needs of all its members. Hence all “superior” communities are obliged to respect the rights of “inferior” communities, thus securing to them the possibility of performing their natural tasks.

The principle of subsidiarity can be reduced to the following two basic postulates that refer to the individual — community — state relation:

1. as much freedom as possible, as much collectivization as absolutely necessary;
2. as much society as possible, as much state as absolutely necessary.

Even if they have never been formulated as explicitly in official documents, these postulates formed the foundations of the Polish reformatory movement aimed at subversion of the totalitarian system.

⁴J.W. Bridge, *Subsidiarity as a Principle of Constitutional Law*, General Report, International Academy of Comparative Law, XIV Congress, Athens 31 July - 6 August, 1994, p. 30.

⁵Ch. Millon-Delsol, *L'Etat subsidiaire*, PUF, Paris 1992, pp. 28 - 60.

⁶In particular, the encyclical *Quadragesima Anno* by Pope Pius XI (1931) and the encyclical *Mater et Magistra* by Pope John XXIII (1961)

The position of subsidiarity in constitutional law follows from the principles of organization of socio-political life that can be reduced from it. The first of them is the principle of organic construction of state community, in other words — of state pluralism. It postulates a multi-level organization of society where, situated between individual and state, there are many varied intermediate communities: professional (trade unions, employers' unions), local (local government), political (political parties), and cultural (associations). This conception sees state as the supreme social organization which coordinates and manages the whole of the social system, and not just atomized society of individuals through its machine of coercion. What follows from the principle of pluralism are principles of self-government and of federation, a special case of national self-government.

Another principle of organization of social life that follows directly from subsidiarity is the principle of decentralization of state authority. It consists in the state's renouncement of a part of its rights to inferior communities: national, local, professional organizations, unions of families etc. The minimum postulate of decentralization is the separation of powers between the legislative, executive, and judicial authority which prevents accumulation of power with its demoralizing effect and the danger of abuses, and guarantees mutual supervision of the functionally separate elements of the state machine. Real decentralization depends also on the structure and range of competences of administrative authorities, and in practice also on the professional level and moral standards of the administrative machine.

The third and probably most important principle deduced from subsidiarity is the principle of democracy expressed in a real and not just formal participation of broad masses of society in government. For genuine democracy to be introduced, it is indispensable that all citizens should be made equal and given the opportunity to participate in all spheres and manifestations of state activity.⁷

To recapitulate the importance of the principle of subsidiarity, it has to be stated that what should be the basic source of law in a democratic state is subjective freedom of individuals based on their equality before the law. This provides the foundations for social justice which meets the requirements of personal dignity and bases on the moral sense and free cooperation of community members. In genuine democracy, the community of interests of the rulers and the ruled is derived not only from the rulers' awareness of being plenipotentiaries of society but also from the two groups' profound inner moral bond that unites them in their trend towards common weal.⁸

⁷ Pope Paul VI called this "two forms of human dignity and freedom", *Speech*, 1972, 23 September.

⁸ See more: Cz. Strzeszewski, *Katolicka nauka społeczna* [Catholic Social Teaching], Warszawa 1985, pp. 508-521.

III. Constitutional provisions regarding subsidiarity

The Republic of Poland is a unitary state where in recent years a radical transformation of the political and socio-economic system took place and the autocratic totalitarian system was controlled by the communist party and centrally planned economy was abandoned. For this reasons, manifestations of subsidiarity in Poland's constitutional system should be sought not exactly in the repartition of the powers of decision between the separate levels of state machine but rather, and predominantly, in the radical and multi-plane subjectivization of society which resulted from the adopted principles of political pluralism and free market.

The two principles follow from the profound re-valuation of the mutual relations between individual, society, and state that proceeds in the ideological sphere. The idea of subjection of individual to the laws of history is replaced by that of inalienable human rights, the philosophy of collectivism — by that of personalism, and the conception of state control — by that of civil society.⁹

The principle of subsidiarity has not been introduced expressly into Polish constitutional law. Yet the whole of reforms launched in recent years which aimed at transformation of the system from autocracy into liberal democracy and at submission of state to the rigours of law and of the Constitution above all are of paramount importance to the position of individual in society and state; they guarantee the rights and liberties of individuals, define the functions of state with respect to society as a whole and to individuals as elements of that society. It therefore seems indispensable at this point to discuss the basic reforms of the Polish political system and also the present complex and temporary shape of Polish constitutional law, composed of numerous legal acts from different periods.

Between new constitutional regulations determining the radical democratization of the system, those which should be mentioned here first and foremost are the amendments of 7 April, 1989 and 29 December, 1989 which changed the Constitution of People's Republic of Poland. By force of those amendments, the principle of political pluralism replaced the former institutionalized hegemony of one party, the Polish United Workers' Party (PZPR), and market economy with unconditionally guaranteed property rights superseded planned economy with limited guarantees of individual ownership. Elements of separation of powers were introduced (the Sejm's superiority still preserved, though) to replace the former principle of unity and uniformity of state authority with the Sejm's supreme position within the system of state organs. The collective Council of State — emanation of the Sejm — was replaced with the institution of President of Republic of Poland who is elected in general elections and has a democratic legitimation of his own. At the local level, the people's councils as agencies of uniform state authority were replaced by local government which is separated from state administration. The former single-chamber Parliament (Sejm),

⁹ W. Sokolewicz, "Democracy, Rule of Law and Constitutionality in Post-Communist Society of Eastern Europe", *Droit Polonais Contemporain — Polish Contemporary Law*, 1990, N° 2, pp. 5-6.

elected in "controlled" elections, was replaced by a bicameral one, composed of Sejm and Senate and elected in free democratic elections. Finally, the "democratic state ruled by law which implements the principles of social justice" was proclaimed, this formulation replacing the former constitutional definition of state as the "socialist" one. Thus a free democratic state was created to replace the one designed to implement the so-called dictatorship of the proletariat.¹⁰

The basic and main source of Polish constitutional law is the so-called "Small Constitution" of 17 October, 1992, a Constitutional Law on the mutual relations between the legislative and executive authorities of the Republic of Poland and on local government. Its name follows from the intentionally limited scope in respect both of its subject matter (regulation of the relations between the Parliament, President and Government and of the basic principles of organization of local government only), and of time (it is but a temporary law which is to stay in force until a complete new constitution can be passed). With the introduction of the Small Constitution, the Polish Constitution of 22 July, 1952 lost its binding force; yet a number of its provisions still remain valid, including its communist chapter on the basic rights and duties of citizens and those other chapters that were radically changed by way of constitutional amendments starting from 1989.

The "Small Constitution" developed the systemic principles proclaimed in the constitutional amendments, basing the organization and competences of the supreme authorities of state on the principle of separation of powers as the condition of "balance and mutual restraint" of state authorities. Despite the departure from its supremacy, distorted in practice by the "leading role of the communist party", the Parliament has preserved its special position within the system as representation and exponent of the supreme authority, that is sovereignty of the nation.¹¹ This way, organization of the supreme state authorities can meet the requirements of democracy, pluralism, and separation of powers which make it possible for individuals and "inferior" communities regularly to exert influence on decisions concerning them that are taken at the state level.

As a result of the latest parliamentary elections of 19 September, 1993, won positively, by the leftist parties, post-Communist Democratic Left Alliance (SLD) and peasant Polish Peasant Party (PSL) of communist origin, a Government emerged that was formed by a coalition of those two parties. Both that fact which evidences a full acceptance of the democratic rules of the game and systemic principles, and the Government program as well as the Cabinet's political and economic moves, manifest stability of Poland's transformations towards democracy and free market.

The broadly conceived sources of constitutional law include also those statutes, ordinances, and resolutions of the two Houses that regulate the state system, such

¹⁰ See more: Idem, "La Constitution polonaise à l'époque des grands changements", *Revue d'études comparatives Est-Ouest*, 1992, N° 4, pp. 63-78.

¹¹ M. Kruk, *Mala Konstytucja z komentarzem* [Small Constitution with Commentary], Warszawa 1992, pp. 15-16.

e.g. the law of elections, acts on the Constitutional Tribunal, Tribunal of State, Commissioner for Civil Rights Protection (the Ombudsman), the system of common courts. Their discussion in detail is beyond the scope of this paper, nevertheless, they greatly influence the position of individual with respect to the state machine. What is worth mentioning here is that some institutions for protection of citizens against abuses and arbitrariness of state administration were introduced into the Polish legal order even before the radical systemic change of 1989; despite the unfavorable political conditions of those days, they played a most important part in promoting democracy and civil education of society (Act of 26 March, 1982 on Tribunal of State; Act of 29 April, 1985 on Constitutional Tribunal; Act of 6 May, 1987 on social consultations and referendum; Act of 15 July, 1987 on Commissioner for Civil Rights Protection).

The discussion of the basic acts of Polish constitutional law should also deal with the constitutional Law of 23 April, 1992 on the procedure of preparation and promulgation of the Constitution of the Republic of Poland which provides that the Constitution should be passed by the National Assembly composed of the two Houses of Parliament and accepted by a national referendum. The works of the Constitutional Committee appointed to prepare a draft constitution basing on submitted drafts were stopped as a result of dissolution of the Parliament by the President in May 1993. The new Constitutional Committee formed after the elections on 19 September, 1993 was constituted in November, 1993 and seven drafts have been submitted to it so far. In this situation, it is impossible to speculate on the basic features of the new basic statute.

The latest legal act of importance for realization of the principle of subsidiarity in Poland is the Convention on Protection of Human Rights and Fundamental Freedoms: Poland signed it on 26 November, 1991 at the same time becoming member of the Council of Europe. In the context of subsidiarity, it may seem paradoxical that the Convention is adduced under which protection of the citizens' rights lies in the last instance with an international body, that is one that belongs to a "superior" community. On the one hand, though, that protection is subsidiary of its very nature to the system provided for by domestic law; on the other hand, it serves as additional protection of individuals against authoritarian actions of the state machine, also in the sphere of law-making.

IV. Legal provisions regarding pluralism as element of subsidiarity

What contributed to the consolidation and development of democracy with the participation of "inferior" communities in Poland was a change in the status of social organizations which resulted first of all from their acquisition of genuine independence of the no longer politically monocentric state.

As opposed to the state machine, appointed by its very nature to protect the general social interest, the social machine as the former's supplement in social organiza-

tion protects the interests of the separate social classes, strata, and groups in that it facilitates the shaping of those interests and renders it possible to exert real and effective influence on the state machine through mechanisms such as its supervision, promotion of activities accepted by the community concerned, or opposition to activities that are not accepted. Successful performance of this latter function of the social machine depends on its independence of the state machine; for this reason, the introduction of the systemic principle of political pluralism created the basis for the development of genuine representation of social interests in social organizations. What can be treated as such organizations in this context are also local governments (to be analysed in greater detail further on), political parties, and trade unions.

Beside the radical change of the ideological climate, the factor that determines the new social role of associations and other unions is the new legal regulation of their status. At this point, some attention should be given to the new law on associations and those kinds of organizations which play a certain role in the functioning of the system, that is political parties, trade unions, and employers' unions.

The law on associations (the Act under this title of 7 April, 1989) which replaced the former repeatedly amended ordinance of the President of the Republic of Poland of 1932 regulates the legal existence of all social organizations that fall under its rigour and defines an association as a voluntary, autonomous and permanent non-profit union. In the preamble, the authors provide the grounds of the law on associations as an act passed

"with the aim to create the conditions for full exercise (...) of the freedom of association in accordance with the Universal Declaration of Human Rights and the international Covenant on Civil and Political Rights, to secure to citizens equally and irrespective of their views — the fight actively to participate in public life and to express their different opinions, and also to pursue their individual interests".

The feature of autonomy was not included in the former legal definition of an association. The reason was that, under the former law, some associations had their statute bestowed upon by the Council of Ministers which in practice meant the Minister of Internal Affairs who thus determined the association's aims and rules of activity. The present law states explicitly that the association defines its program and organizational structures, and passes internal regulations concerning its activity all by itself. Beside the requirement of independence, the law also demands that the association should base on democratic principles where the members' will is the supreme law (Art. 11 section 1: "an association's supreme authority shall be the general assembly of its members"). Apart from the stipulation that an association's aims should be non-profit, the law does not limit the choice of those aims any further.

Finally, the most significant difference in the regulation of freedom of association today as compared to the previous law: the valid law repeats the provision of the Covenant on Civil and Political Rights which states that "the law is subject to limitations provided solely by statutes, to the extent that is absolutely necessary for secu-

ring the interests of state security or public order, or for protection of public health or morals or the rights and freedoms of other persons" (Art. 1 section 2). Thus the limitations must necessarily meet both of the following conditions: they must have the form of statutes and involve the need for protection of any of the above-mentioned interests. The situation was different with the former law on associations which provided that "the authority shall prohibit the forming of an association if its existence cannot be reconciled with the law or may jeopardize public safety, peace or order", and therefore used two alternative conditions. This was an obvious limitation of the freedom of association which was in fact conditioned upon administrative discretion. It was accompanied by still another limitation which applied to registered associations: to form them, an additional condition had to be met — of the association's social usefulness.

The law now in force charges the supervision over associations to heads of provinces — local authorities of state administration — and to provincial courts. It does not specify, though — which is no doubt a defect — what is the intended purpose of such supervision. As can be concluded from systemic interpretation, that purpose is to secure the associations' observance of provisions of the law and of their statute. The supervisory competence of heads of provinces is limited to the right to demand that the association's files in its office and with a representative of its authorities present; and to demand the necessary explanations from the association's authorities. Thus the supervision over associations exercised by the heads of provinces is but a limited supervision of their activity, as compared in particular to the system in force under the former law on associations which permitted profound penetration aimed at the state administration acquiring inside knowledge of an association's activity, and intervention in its routine work. Having ascertained faulty acts, the heads of provinces may approach the association concerned with a request that such infringements be removed; warn the association's authorities; or move to the court for application of a supervisory measure at its disposal. The measure in question include: admonition of the associations's authorities; quashing of a resolution that is against the law or the associations's statute; putting the authorities under the obligation to remove the defects within a specified time-limit; ordering a temporary suspension in service activities of the association's board; the dissolution of the association if its activity involves a glaring or persistent infringement of provisions the law or statute and activity that would comply with those provisions cannot be restored.

Let me now discuss the legal status of political parties. The fact has to be stressed here that the Polish State, revived in 1918, is based on the principle of completely free formation of political parties without their duty to register. Until 1939, the Polish legal system lacked a statute regulating this subject matter. After World War II, the actual dictatorship of PZPR was only reflected in the Constitution in 1976, its Art. 3 stating that "PZPR is the leading political force of society in the building of the socialist system". The role of the other two political parties resolved itself into cooperation with PZPR. The agreement negotiated with the authorities in 1988 and

1989 by the socio-political forces that struggled for independence, with Solidarity as the converging point, led to partly free elections whose outcome revealed the complete lack of social legitimation of the former political forces. The passing over of PZPR's former allies to the Solidarity coalition resulted in formation of the first non-communist Government, and the passage on PZPR's political leadership was deleted from the Constitution (*Law of 29 December, 1989 on amending the Constitution of the Polish People's Republic*); soon the party dissolved itself.

Under the Act on political parties, passed by the Sejm in its final wording on 28 July 1990, political party is a social organization under a definite name which aims at participation in public life through, in particular, influencing the policies of state and the exercise of power. The party's name and symbols enjoy legal protection as personal interests. The act provides for no limitations of the freedom of association in political parties. Such limitations have been introduced, with the aim to free administration of justice and the services for protection of the legal order of the political element, by other acts concerning judges, public prosecutors, and also — to a smaller extent — the police, the State Protection Office, and the Border Guard. This solution can be contrasted with the former act of 1985 on Security Service and Civic Militia of the Polish People's Republic which expressly obliged their staff to "loyalty to the program of PZPR" (Art. 1 section 2). The act now in force forbids political parties to form organizational units at workplaces and in the army which is to prevent intensification of political activity at those institutions.

Political parties can be formed freely: no consent of any state authority is required. To acquire the status of legal person, a party has to apply for registration at the Provincial Court in Warsaw; it is the application and not registration that has the legal effect. Neither the party's statute nor even a definition of its aims have to be enclosed to the application. It is therefore somewhat inconsistent that the Provincial Court in Warsaw has been given the right to submit cases of unconstitutionality of a party's statute would also be justified as the means of preventing parties that do not respect the principles of democracy in their internal organization from acquiring the status of legal persons. The act regulates the sources of financing of political parties (banning, among other things, their use of foreign grants), and the system of supervision over parties. As has been mentioned above, the competences to supervise political parties, most limited at that, have been vested in the Constitutional Tribunal. On motion of the Provincial Court in Warsaw or the Minister of Justice, the Tribunal adjudicates in cases of unconstitutionality of a party's aims or activity, and may order adequate changes to be introduced within a specified time-limit into that party's statute or program. Should the party's activity aim at subversion of the political system of the Republic of Poland by force or resolves itself into the use of violence in public life organized by that party's authorities, the Constitutional Tribunal orders, on motion of the Minister of Justice, that the party's activity should be banned and its name struck off the register whenever applicable.

Under the act on political parties, over 270 of them have already been registered in Poland so far (September, 1994). This might evidence Polish society's rapid sti-

mulation to political activity; in fact, however, it seems rather to result from the limited formal requirements involved in registration and the incomplete awareness of the essence and specific nature of activity of political parties on part of their most numerous founders. Quite obviously, participants of the real "struggle for power" are but a few political parties.

Another manifestation of the principle of pluralism as an element of subsidiarity in Polish constitutional law is pluralism in formation of trade unions. The first regulation of the status of the unions in Poland, dating from 1919, was replaced in 1949 by an act which made them formally independent of state administration, relating them directly to the party. The act remained in force until 1982; yet before that date, in the autumn of 1980, the union structure raised on the basis of that act actually disintegrated, and new unions emerged: chiefly Solidarity and autonomous unions. They were legalized by way of registration at the Provincial Court in Warsaw basing on a resolution of the Council of State, a supreme collective authority which acted i.a. as head of state. A short period of syndical freedom ended abruptly with the imposition of martial law on 13 December, 1981. The Act of 8 October, 1982 on trade unions, passed under martial law, was to have many amendments, including the paramount one of 7 April, 1989 which resulted from the "round table" negotiations: it re-established the principle of union pluralism and restored Solidarity of official socio-political life.

The now valid Act of 23 May, 1991 on trade unions defines trade union as "a voluntary and autonomous organization of the working people, formed to represent and defend their rights and professional and social interests", also at the international forum. The unions should participate in creation of proper conditions of work, existence, and rest; they have the right to review the observance of provisions dealing with the interests of employees, retired and disabled persons, the unemployed, and their families.

A trade union is independent of employers, state administration, and local government in its statutory activity. The act has put the agencies of state administration and local government under the obligation to give equal treatment to all unions. The right to form and join trade unions has been vested in all employees irrespective of the legal grounds of their relation of employment, as well as in retired and disabled persons; the unemployed preserve their right of membership and may also join the unions according to the principles set forth in the given union's statute. The act now in force has reduced the scope of limitations of the rights to form and join trade unions to several categories of employees, soldiers in active service, members of young men's labor brigades who do their basic military service in civil defence, and persons of rank employed at state offices, the list of posts being specified by an ordinance of the Council of Ministers.

The principle of voluntary association in trade unions has been consolidated by the provision that no person should suffer negative effects of either membership of or abstention from the union. In particular, it is forbidden to condition employment or promotion on a person's membership or non-membership of the union. The act on

trade unions preserves the principle of union pluralism and of the unions' free association into federations.

The conditions of formation of a trade union have been reduced to the minimum: it is now formed by force of a resolution taken by at least 10 authorized persons. They should pass the union's statute and appoint the founding committee which then applies within 30 days to the provincial court competent with respect to the union's seat for registration. On the day of registration, the union and its organizational units mentioned in the statute acquire the status of legal persons.

In the light of the act, the trade unions' competences include: the right to give opinion on the grounds or drafts of normative acts and decisions affecting the rights and interests of the working people and their families, as well as — in cases of special importance — to participate directly in the preparation of such acts; the right to move for the passing or amending such legal acts; the right to conclude collective labor agreements on the national scale; the right to conclude agreements with agencies of state and economic administration concerning joint action in fulfilment of the tasks related to working conditions, wages, and living standards, and the right to social control over the working conditions and living standards of employees and their families and over the observance of employee rights. This latter function is performed, among other things, through the trade unions being charged with the social inspection of work and participation in the supervision over the State Inspection of Work and Social Insurance Institution.

A national trade union which represents a majority of workplaces, as well as a national organization of unions, has the right to lodge extraordinary appeals against all valid and final decisions in cases under labor law and the law on social insurance. These two types of subjects are also entitled to move to the Supreme Court for guiding principles of the interpretation of labor law, the law on social insurance, and judicial practice.

Supervision over the activity of trade unions is exercised by provincial courts competent for the seats of those unions. Is a union agency found to act glaringly against a statute, the court sets forth a time-limit of at least 14 days for that agency's activity to become adjusted to the law in force. Proceedings are instituted on motion of the competent provincial public prosecutor. Should this measure prove ineffective, the court may apply a fine, imposed on individual members of the agency concerned, and demand new elections to that agency on pain of suspension of its activity. If the above measures prove ineffective, or the union's activity is unconstitutional or inconsistent with other statutes, the court — on motion of the Minister of Justice — orders the union concerned to be struck off the register of trade unions. The decision can be sued before the appellate court.

On 23 May 1991, together with the act oil trade unions, two other closely related acts were passed: the Act on organizations of employers — a novelty in Polish law which allowed employers to form their own unions as counterbalance to trade unions, with provisions highly similar to those contained in the one discussed above; and the

Act on resolving collective disputes which regulates the rights and duties of those two types of unions in resolving conflicts at workplace, the right to strike included.

The new legislation in the sphere of labor law is a consequence of the transformations of Polish economy where the private sector continues to expand, and of the adopted systemic principle of pluralism and the trend towards securing to the union movement its due status under the International Labor Organization conventions ratified by Poland.

V. Criteria for allocating decision-making power

Beside the above reference made by the constitutional provisions to the principle of separation of powers as the criteria for distribution of powers of decision at one and the same level, the "Small Constitution" also states in its Chapter One, "Foundations of the Political and Economic System", that the "Republic of Poland guarantees the participation of local government in the exercise of authority, as well as freedom of activity of other forms of self-government" (Art. 5). The rank given by the "Small Constitution" to the institution of self-government is also manifested by the inclusion of that term in the constitutional statute's full official title ("(...) on mutual relations between the legislative and executive authorities of the Republic of Poland and on local government"), and by the fact that a separate chapter has been devoted to this issue.

The Constitution defines self-government "as the basic form of organization of public life at the local level" (Art. 70 section 1). Under the law now in force, the only level of operation of local government is the commune — the basic unit of the country's administrative division. As stated by the Act of 8 March, 1990 on local government, "inhabitants of the commune form a self-government community by force of law" (Art. 1 section 1). Resigning the doctrinal notion of "subjectivity under public law", the constitutional legislator gave this status to the commune directly, providing that "the units of local government perform their due public tasks in their own name and on their own responsibility" (Art. 71 section 2). This provision which constitutes local governments's political and legal autonomy is confirmed by the "Small Constitution" as many other its provisions as e.g. Art. 52 section 1: "The Council of Ministers decides on all matters of State policy that have not been reserved by a constitutional or other statute for the President of another authority of state administration or local government". The constitutional provisions also differentiate clearly between the competences of the Council of Ministers with respect, on the one hand, to authorities of state administration whose work the Council "heads, coordinates, and supervises, reporting to the Sejm" (Art. 52 section 2 point 3) and on the other hand, to local government and other forms of self-government which it "supervises within the limits and forms specified by the constitutional and other statutes" (Art. 52 section 2 point 6).

The "Small Constitution" defines the status of the commune, making it a legal person "as a community of inhabitants which exists by force of law" (Art. 71 section 2); municipal property that is ownership and other property rights (Art. 70 section 3); sources of income in the sphere of public tasks as guarantees by the law (Art. 73 section 2); and the self-government system, that is political freedom of referendum ("The inhabitants may decide in a local referendum") and elections ("Elections to constitutive agencies of local government shall be general and equal, and shall involve secret voting" — Art. 72). The units of local government perform their tasks through their constitutive and executive agencies, freely defining their own internal structures within the limits of statutes (Art. 71 section 4). The Constitution limits the means of supervision over the communes to those provided for by statutes (Art. 74). On the other hand, while the constitutional amendment of 8 March, 1990 expressly provided for judicial protection of the autonomy of communes (Art. 44 section 2), the "Small Constitution" has left this provision out. The legislator seems not to have intended to resign this important guarantee of local government's autonomy, as an analogous provision has remained unchanged in the Act of 8 March, 1990 on local government as a natural supplement of the commune's status as defined by the Constitution.

Local government has been created at one level of administration only which has previously been called *basal* — in communes. The term commune is used to designate not only rural communes but also the whole of urban settlements with the exception of Warsaw. In all those highly diversified units, local government has the same organization, tasks, and statutory competences. Despite the commune's freedom in adjusting its internal organization and the structure of its executive agencies to the specific tasks that follow from its scope of activity, the adjustment being done in the commune's statute, this imposition on all communes of a uniform statutory scheme gives rise to certain reservations of both theorists and practitioners.¹²

What some critics of the present system consider to be a defect of the now valid regulation is the failure to appoint units of local government at the level of provinces (beside a regional council as a substitute of such units). At that level, the only authority is the head of province, a one-man authority of the general state administration. The head of province is appointed and dismissed by the Prime Minister to whom he is also fully subordinated as representative of the Government within his province. The head's of province auxiliary agencies include, beside the provincial office as his machine, also district offices of general state administration organized as intermediate administrative levels between the commune and the province.¹³

¹²See more: B. Zawadzka, „Pozycja ustrojowa samorządu terytorialnego w świetle regulacji ustawowych” [Systemic Position of Local Government in the Light of Legal Provisions], *Państwo i Prawo*, 1990, N° 8, p. 22; Z. Niewiadomski, „Kierunki rozwoju samorządu terytorialnego” [Developing Trends of Self-Government], *Samorząd Terytorialny*, 1991, N° 1 -2, pp. 81 -86.

¹³See more: M. Kułesza, „Zagrożenia reformy (w sprawie zadań i kompetencji samorządu terytorialnego)” [Threats to the Reform (About the Issue of Tasks and Competences of Local Government)], *Samorząd Terytorialny*, 1991, N° 1 -2, pp. 86-91.

VI. The allocating of decision-making power

Although not contained specifically in the Polish Constitution, the principle of subsidiarity is expressed by the constitutional status of local government. It has to be stressed that the "Small Constitution" explicitly confirms the departure from the principle of uniformity of state authorities, introduced previously by the constitutional amendments of 29 December, 1989 and of 8 March, 1990. Beside the monopoly of uniform state authority, the reform of local government that, was carried out parallel to the country's systemic transformations made it possible to break four other kinds of monopoly that existed in the former political and institutional system: political monopoly (the 1990 elections to local government having been the first completely free elections in postwar Poland); the monopoly of state ownership, through introduction of a new category of municipal (public but not state) property; financial monopoly through statutory introduction of budget autonomy of local authorities; and monopoly of state administration which used to deprive local authorities of their own executive agencies.

This strengthening of the position of local government is an important part of decentralization of public administration, introduced since 1989. The reform here consists in a radical transformation of the mechanism of exercising public administration: the communes (and, in the future, also districts as higher level units) take over all the organizational tasks related to the satisfaction of collective needs of local communities (Art. 71 sections 1 and 23 of the "Small Constitution"), and the government (central and local) administration performs mainly the functions of regulation as well as those of control, supervision, and intervention.¹⁴

Under the "Small Constitution", the tasks of local government include, first, "their own due public tasks performed in their own name and on their own responsibility with the aim to satisfy the inhabitants' need and second, tasks of state administration"

performed within the scope regulated by statutes; to perform the latter, the communes obtain adequate financial means (Art. 71 sections 2 and 3). The following matters have been included in the former category by the Act on local government: land development; land economy and environment protection; communal roads, streets, bridges, and organization of road traffic; water supply system and its operation; sewage system; removal utilization of municipal wastes; supply of electric and heat energy; local transport; health protection; social welfare; municipal housing; education, culture, and physical education; markets and covered markets; municipal lawns and parks; municipal graveyards; public order and fire-control; as well as maintenance of communal buildings, administrative buildings included. Statutes provide a list of the commune's obligatory own tasks (Art. 7 sections 1 and 2).

Therefore, the discussed Act on local government has opened up the possibilities of that government's extensive competences in public matters. This position was

¹⁴ J. Regulski, „Samorząd terytorialny: skąd i dokąd?” [Local Government: Where From and Where To?], *Samorząd Terytorialny*, 1991, N° 1—2, pp. 104 - 109.

largely limited, though, by subsequent statutes regulating local government. This concerns first and foremost two legal acts: the Act of 17 May, 1990 on division of the responsibilities and competences specified in detailed statutes between the commune and government administration, and on amending certain statutes, and the Act of 30 November, 1990 on the communes' income and the principles of their subsidizing by state and on amending the Act on local government.

The former act which relates to the competences changed the former legislation redistributing the former tasks and competences of agencies of state administration and people's councils between the new structures: agencies of state administration and those of local government. As a result, the commune's own tasks were made to include about 300, and commissioned tasks — about 100 responsibilities and competences. At the same time, about 200 responsibilities and competences that had formerly rested on people's councils and local agencies of state administration were handed over to heads of province and district administrative agencies; a great proportion were then taken over by the communes as commissioned tasks (basing on agreements concluded with the agencies of state administration). Not going into detail, it can be stated that those shifts in competences resulted in the situation where the commune has but few own tasks in whose performance it enjoys full political and administrative authority within the bounds of the law; instead, it has been greatly burdened with commissioned tasks performed under the supervision of state administration. Further, a part of specifically local tasks are performed by agencies of state administration, general and special alike. This situation which undergoes gradual changes with the passing of new statutes in the separate branches of substantive administrative law results from maladjustment of that law's former provisions to the new philosophy and new structures of public administration. What seems also to have contributed to it are the attitudes of the separate Ministries which tried to secure themselves against responsibility during the works on the act on competences. Unable to understand or reluctant to support the local government reform, the Ministries were afraid to hand over to the communes some of the responsibilities and competences which would become the communes' own tasks. For this reason, those responsibilities and competences were handed over indirectly as commissioned tasks; their performance and financing makes the communes dependent on the supervision of state administration. The adopted principles of division of responsibilities and competences between state administration and local government are reflected in the system of allocation of funds under the other of the above-mentioned statutes. In practice, it greatly impedes the local government's performance of its basic task, the purpose of its appointment: satisfaction of the inhabitants' needs.¹⁵

The hiatus between the legal and actual position of local government in Poland illustrates the difficulties in radically transforming the system in a postcommunist state: reforms are only effective if complex. At the same time, the discussed example shows the leading role of constitutional law in the transformation of the legal system and introduction of new institutions.

¹⁵ M. Kulesza, *op. cit.*

What aims at decentralization of public administration is a so-called pilot project, adopted by way of an ordinance of the Council of Ministers, where 46 town communes (population over 100 thousand) have taken over, starting from 1 January 1994, a number of functions and buildings formerly belonging to government administration: post-elementary schools, centers of culture, health institutions, roads, land economy, building, fire-control. The competences are handed over to towns together with the necessary funds and property. The funds for performance of the new tasks are provided by the head of province as intentional subsidies; the communes, however, are free to decide how to spend the money, and to shift it between sectors; all that can be saved will aid the local budget. The administrative reform is tantamount to a shift of about 15 billion zlotys from the state budget to commune budgets: the money is at the communes' sole disposal and not at the Government's as was the case before. Implementation of the pilot project which largely extends the rights and possibilities of local government has been stopped immediately after the formation of the Cabinet by Prime Minister W. Pawlak. The decision to stop the project was motivated by the need for further analysis and appraisal of the reform. The pilot project was finally resumed on 30 November, 1993, after the Government had introduced two radical changes: local governments were relieved of the duty to take over post-elementary schools, and the list of culture centers not to be handed over to communes was extended. The two modifications aimed at protection of selected services of public administration against being deprived of their means by autonomous communes, and manifest the Cabinet's realistic attitude. This fact shows that Polish society's education towards reasonable and proper self-government has not been completed yet, and the state's rectifying role may sometimes prove advantageous for the progress of that education.

VII. Control of subsidiarity

The autonomy of local government agencies — the chief manifestation of subsidiarity in Polish constitutional law — has been guaranteed by force of statutes and is therefore subject to judicial protection. What seems to be lacking, however, are other mechanisms to guard that autonomy or to supervise its observance. In particular, this task is not vested in the Commissioner for Civil Rights Protection who has been appointed to guard the rights and freedoms of citizens. Local government agencies have the right, however, to move to the Commissioner for action in cases of protection of the rights and freedoms of citizens (Art. 1 section 1 and Art. 9 section 2 of the Act of 15 July, 1987 on Commissioner for Civil Rights Protection).

Although the "Small Constitution" does not formulate a constitutional guarantee of autonomy of the commune, yet such guaranty is contained in the Act on local government and in other legal provisions. In particular, the following are subject to judicial protection:

— organization of the commune, as the constitution of its agencies is local government's exclusive powers where no intervention on part of state administration is possible. The commune's agencies can only be suspended in their activities by way of supervision in cases specified by statutes; suspension can be sued;

— the competences handed over to the commune by statutes: only a statute may grant the right to decide on public matters of local importance to agencies other than local government, and resolution taken lawfully by the commune's agencies are inviolable;

— the right to acquire municipal property.

The communes are protected against intervention on part of definite authorities of state administration: the Prime Minister, head of province as a local authority of general state administration, and the district revenue office who is an authority of special administration; the Act classifies them as supervisory agencies. The communes are protected against their intervention taken in a definite legal form: the agencies' decision, "supervisory settlement", or "standpoint" on matters requiring ratification, adjustment or opinion. However, the communes are not protected against supervisory actions of the Sejm which is the sole authority empowered to dissolve a commune council on a motion of the Prime Minister, nor against the actions of the regional council of local governments.

To protect the autonomy, a generally valid construction of appeal to the administrative court has been applied. Thus the administrative court is the guarantor of autonomy of the commune. The basic reason for appeal is unlawfulness of an administrative agency's intervention (Art. 98 section 1); the administrative court may settle the matter in this case only. The appeal here may be lodged by a commune or union of communes whose legal interest, right, or competence has been infringed (Art. 98 section 3).

Protection of the commune's autonomy may also concern the scope of its competence. This is particularly important with the present lack of full harmony between the Act on local government and Act on competences. The appointment of local government resulted in amendment to provisions of the code applies in cases for resolving disputes as to competence between authorities of state administration and agencies of local government, and between those agencies and courts (Art. 1 point 1 of the Act of 24 May, 1990 on changing the Act: Code of Administrative Procedure). Disputes as to competence between agencies of local government and local agencies of Government administration are settled by the administrative court. This secures equal positions of the local and Government agencies, and impartiality of decision. After the hearing, the administrative court passes a decision appointing the agency competence to settle the matter. From the commune's viewpoint, this procedure of settling disputes as to competences is a guarantee of that commune's scope of activity.¹⁶

¹⁶ See more: T. Rabska, „Sądowa kontrola samodzielności gminy” [Judicial Control of Community's Autonomy], *Samorząd Terytorialny*, 1991, N° 1-2, pp. 46-51.

Provisions of the Act on local government implement the principle of judicial protection of autonomy of the commune. They constitute a guarantee of autonomy within the scope instituted by legal provisions. Yet both the effectiveness of that protection, and the efficiency of functioning of the entire machine can only be demonstrated by a longer practice.

VIII. Conclusions

Admittedly, the principle of subsidiarity — the core and essence of a democratic and truly citizen-friendly state — is not yet a constitutional principle in the Republic of Poland; nevertheless, in all its variety of meanings, it is an excellent point of reference for appraisal of the legal and actual state of the country's systemic transformation. The conclusion emerges that constitutionalization of that principle, where the duty would be imposed on state authorities to observe it in all their actions of control, would probably contribute to a fuller development of civil society and prevent arbitrariness on part of the state machine. While, however, institutionalized and particularly judicial review of observance of the principle of subsidiarity is common in the sphere of distribution of competences between the separate levels of public administration, it is difficult to find the appropriate means and instruments of such review with respect to broader obligations that follow from that principle: this is shown by the force of controversies and doubts as to the practice caused by the introduction of subsidiarity into the Maastricht Treaty.

One last reflection to end with: no doubt, the realization in constitutional law of the principle of subsidiarity is conducive to the development of civil society, one that is aware of its rights and duties and able and willing to defend them, and also one that respects the rights and freedoms of others. On the other hand, though, the success and effectiveness of legal solutions inspired by that principle depends largely on the citizens' civic maturity and political culture, e.g. on their willingness to compromise, respect for minority rights and so on. In countries that were deprived of the democratic political practice for many decades, it is most important that those restructuring state and society should be guided by the postulates which together make the principle of subsidiarity, yet achievement of the full effect is bound to take time.