

CENTRAL IDEAS OF THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2 APRIL 1997*

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1. 25 May 1997 was the first time in the history of Poland that a constitutional referendum took place. As a result of it a new Constitution was finally adopted. The strenuous work on its text conducted by the National Assembly (both houses), the Constitutional Committee of the National Assembly and its subcommittees was characterised by reoccurring discussions about the same problems that every now and again resulted in the formulation of new solutions many of which meant a return to the settlements that had previously been discarded. These procedural windings, the lengthening of the work, served the attainment of the final constitutional compromise. The Constitution - as it was mentioned from the initial stage of the work on its text¹ - refers to variety ideological currents and expresses values belonging to different axiological systems. However, as it was aptly indicated, this “axiological variety” makes the Constitution an entity that, is not necessarily eclectic.² The above-mentioned compromise, therefore, was not dilatory - i.e. consciously omitting all controversial matters it was a “positive” compromise constitutionalising all values that were advocated by a sufficiently representative parliamentary group provided the remaining groups were willing to consent.

2. The constitutional compromise was possible to reach thanks to the fact that while the new Constitution was formulated, those constitutional achievements and notions were reminded and developed on an exceedingly large scale that had rooted in Poland since the historic turn of 1989. The above refers both to the notions already expressed in the constitutional amendments adopted between 1989 and 1996, and to the ones though formally uninstitutionalised, yet almost universally accepted. The tarse

* Provisions quoted in this article without any further explanation refer to the Constitution of the Republic of Poland of April 2, 1997.

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¹ Cf. e.g. P. Winczorek: “Nowa Konstytucja Rzeczypospolitej Polskiej. Problem aksjologii” [The New Constitution of the Republic of Poland. Problem of Axiology], *Przegląd Sejmowy* 1996, no. 4, p. 9-19, and other writings cited therein.

² See S. Gebethner, statement in the discussion in *Konstytucja RP. Oczekiwania i nadzieje* [The Constitution of the Republic of Poland. Expectations and Hopes], Materials from the Scientific Conference at the Department of Journalism and Political Science of the University of Warsaw, November 14-15, 1996, edited by T. B o d i o and W. J a k u b o w s k i, Warszawa 1997, p. 214.

regulations of the constitutional amendment of 29 December 1989, besides, were much more important for the constitutional changes than the extended regulations of the new Constitution which are rather a continuation of these changes. Therefore, the new Constitution, largely, plays an arranging role and integrates the constitutional notions that have already existed. With reference to the new institutions, on the other hand, it fulfils a codifying role, consolidating in the regulations of the highest legal power the earlier achievements of the constitutional idea, legislation, and jurisdiction. Even though the opinion (actually concerning the draft version of November 1996) that “the constitution introduces nothing new and moreover attempts, unfortunately, to be both constitution and a balance sheet”³ seems a little exaggerated, one must admit that the completely innovative settlements, which would open new routes to the Polish constitutionalism, are not exceptionally numerous. Nonetheless, what must necessarily be emphasised is the willingness to make use of all major trends of the international, and especially European, constitutionalism that were present throughout the formation process of the Constitution.

It does not seem, however, that the new constitution could bring any major constitutional change in comparison with the situation it originated in. It seems also impossible that the significance of the Constitution - adopted in the period of a relative appeasement in politics, with a considerably wide-spread social approval of its basic notions - could be any different.

The new Constitution surpasses the idea of “a Constitution and a balance sheet in one” in this respect that it declares *expressis verbis* “the principle of constitutionalism”,⁴ i.e. the principle of direct applicability of all constitutional regulations unless it itself “provides differently” (Article 8 Section 2). This principle, besides, is formulated in the context of another principle that defines the status of the Constitution itself as the “fundamental law of the Republic of Poland (Article 8 Section 1). Previously, the principle of constitutionalism was formulated in the doctrine as well, however due to the lack of its normative articulation, it was omitted in court jurisdiction. The situation in current regulations is contrary, as - apart from the above-mentioned Article 8 - Article 178 Section 1 contains the principle of (direct) subjection of judges to the Constitution. All above might be expected to increase considerably the significance of the basic law in our legal system.⁵ Therefore, the Constitution is not only a balance sheet (understood as a synopsis of the past), but also a route laid for the future.

³ Ibid., p. 213.

⁴ Concerning the principle of constitutionalism compare recent writings by A. Pułła: “Idea konstytucjonalizmu w systemie zasad prawa konstytucyjnego” [Idea of Constitutionalism in the System of Rules of Constitutional Law], *Przegląd, Sejmowy* 1996, no. 5, p. 9-22; and “Zasada konstytucjonalizmu (prolegomena)” [The Rule of Constitutionalism], in: *Przeobrażenia we współczesnym prawie konstytucyjnym*, edited by K. Działocha, Wrocław 1995, p. 59-65.

⁵ About direct applicability of the Constitution in the key area of civil rights wrote recently A. Labon-Jabłońska in: “Zasada bezpośredniego obowiązywania konstytucyjnych praw i wolności jednostki. Analiza prawnoporównawcza” [The Rule of the Immediate Binding of Constitutional Laws and Freedom of Individuals. Comparative Analysis], in: *Podstawowe prawa jednostki i ich ochrona* [Basic Rights of Individuals and Their Protection], edited by L. Wiśniewski, Warszawa 1997, p. 64-81.

3. In the new Constitution - if one wanted to characterise it generally - what is brought to the foreground is the building of a state “serving” its residents, and especially, though to a large extent not exclusively, its citizens. The state authority, on the basis of the Constitution, possesses practically no autonomous aims and all its objectives indicated in the Constitution consist either in the direct satisfying of both individual and collective human needs or in the creating of the conditions appropriate for self-satisfying of these needs by everybody interested therein. One of the phrases (defining the community of “all citizens”) of the so-called introduction to the Constitution and its first article clearly testify to such attitude. Both of them contain the proclamation of the Polish state as the common good of all its citizens, i.e. such a state that everybody can make use of for their own advantage as well as such a State that, according to its powers, is to an equal extent at everybody’s disposal.⁶ The above is by no means incompatible with the constitutional obligations of citizens - both of loyalty to the state and of responsibility for the common good (see Article 82). On the contrary, those obligations find their justification only when accompanied by the serving character of the state. On the level of constitutional values this characteristic seems to be the most important and fundamental. Article 1 also contains phrases concerning the “social dialogue” or the obligation of citizens of “solidarity with others”.

The acknowledgement of the anthropocentric or perhaps individualistic character of the state sprouted already during the constitutional changes of 1989 and was associated with the rejection of the so-called class awareness of the state, understood as the ruling instrument of a single social class. However, the articulation of the above mentioned character for the first time took place in the new Constitution. It did not evoke any opposition during the work on the text of the Constitution and therefore can be regarded as an element of compromise of great significance. Such a character of the state, nonetheless, is not contrary to the good of the state itself. This would be contradictory to our political tradition which is, after all, particularly supportive of the state and which appreciates the significance of the state in the development of the nation. Therefore, in the introduction to the Constitution, speaking on behalf of the Polish nation and addressing all who apply the constitutional regulations “for the good of the Third Republic”, its authors call upon them to act upholding human dignity, rights, and freedoms. The reference to the history of the nation, including the meaningful “numbers” of the Republic (“First” and “Second”), further emphasise Polish tradition of support for the state.

4. A particularly clear articulation of the above-described character of the new Constitution are the regulations concerning the rights and freedoms of an individual - both a citizen and any person remaining in the territory of applicability of this legal act. Solely from the purely formal point of view one’s attention is attracted to the fact that

⁶ Cf. accurate comments on state as a common good in A. Grześkowiak: “Aksjologia projektu Konstytucji RP” [Axiology of the Draft of the Constitution of the Republic of Poland], in: *Ocena projektu Konstytucji RP Komisji Konstytucyjnej Zgromadzenia Narodowego. Materiały z sympozjum*. Lublin, 16 XII 1995 [Evaluation of the Constitutional Committee of the National Assembly’s Draft of the RP Constitution. Materials from the Symposium], edited by J. Krucki, Lublin 1996, p. 24 and following.

many parts of the introduction are concerned with the issue of the rights of an individual. Numerous phrases referring to those rights are present in Chapter One, containing a general characteristic of the state shaped by the Constitution, and in Chapter Two devoted to the systematics of the Constitution.

The introduction to the Constitution regards “the guaranteeing of the rights of the citizens” as one of the main objectives to the pursuit of which the Constitution has been dedicated. It contains also - as it has already been mentioned - a call upon those who will apply this Constitution in the future to act “paying respect to the inherent dignity of the person” and “his or her right to freedom”. The obligation to respect this principle, among others, is considered in the introduction as “the unshakeable foundation of the Republic of Poland”.

Chapter One among the main objectives of the Polish state proclaimed in Article 5 enumerates “the freedoms and rights of persons and citizens”. Furthermore, some of the constitutional principles present in the chapter remain in a direct correspondence to the citizens’ rights. The above refers, among others, to the principles of political and social pluralism (Articles 11 and 12), the freedom of the media (Article 14), preserving the ownership rights and the freedom to conduct business (Articles 21 and 22), the obligation to preserve and take care of families (Article 18), the neutrality of the state in the matters concerning religious and philosophical beliefs of citizens as well as the autonomy and the mutual independence of the state and churches (Article 25). We should emphasise once more that what we consider here are constitutional principles and therefore, these rights of an individual must be regarded in the same manner. Certain elements of the said passages are repeated in the next chapter, so there is no doubt about the actual articulation of all these rights in the Constitution.

Chapter Two, devoted exclusively to the status of an individual, his freedoms, rights, and obligations, is one of the longest in the whole Constitution. It is composed of three passages concerning three groups of rights, a passage regarding the formal guarantees of these rights, and an initial passage comprising general principles applied to all specific provisions. The chapter is concluded with a passage stating constitutional obligations of an individual. In compliance with the current trends in international constitutionalism as well as in international protection of human rights, Chapter Two encompasses the majority of the rights of the so-called first (individual and political rights), second (economic and social rights), and third generation (rights associated with the development of contemporary science and technology).

Not only the length of the chapter, but also its clear separation from the rest of the structure of the Constitution testify to the will of its authors to make it a sort of “a charter of citizens’ rights”. One should also notice the particular formal protection of citizens’ rights with a higher level of “rigidity”. Any change of any of the regulations in this chapter (this refers as well to the chapters I and XII) might be conditioned - on the basis of a motion of the entities that are allowed to put forward a bill on the change of the Constitution - by its acceptance in an approving referendum (see Article 235 Section 6). This single fact alone proves the importance attached to the issue of the status of an individual.

However, one should remember that regulations concerning this issue are often verbalised assertively and are formulated rather as directions that the state should follow and not as subjective rights of an individual. The limits of specific claims resulting from these regulations are to be settled by means of an Act of Parliament, which refers especially to the so-called social rights. This procedure, however, remains in contradiction with the principle of constitutionalism that is simultaneously being proclaimed.

5. All rights and freedoms are rooted - in accordance with the article opening the analysed chapter - in the inherent (repetition from the introduction) and inalienable (a new element) human dignity which is declared as their source. This is undoubtedly a reference to certain natural laws - also in their Catholic version.⁷ Thus, the Constitution declares a basically libertarian status of an individual who cannot be forced to do anything that is not required by the law (see Article 31 Section 2). Fortunately, the phrase “everybody can do, what is not prohibited by the law”, which was repeated in the earlier versions of the draft, has been dropped, as it bore a flavour of ethical relativism.

The possibility of introducing - by means of an Act of Parliament - any restrictions on the freedoms and rights is defined most restrictively and supplemented with the requirement of the preservation of their “essence”, clearly in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. Article 31 Section 3 of the Constitution and among others Article 8 Section 2, Article 9 Section 2, Article 10 Section 2, and Article 11 Section 2 of the Convention). This restrictiveness, however, might evoke doubts concerning its adequacy for some of economic regulations, and especially for the ownership right. Perhaps these rights require certain further restrictions surpassing the ones described in Article 31 Section 3.

The principle of equity in law is associated with the prohibition of discrimination “for any reason whatsoever” (Article 32), without - controversial, as it proved - enumerating any of those reasons. Only the necessity to emphasise the equality of rights irrespective of the sex of an individual proved significant enough to have been verbalised in the next article devoted solely to this issue. That article, overgrown and - in the light of the provisions included in the previous one - devoid of any profounder normative content, is a good example of the eagerness for a compromise and partly explains the lengthiness of the new Constitution (such articles are quite numerous). Of the more specific regulations, characterising particular groups of rights of citizens, what attracts one’s attention is the peculiar verbalisation of the issue concerning the right to life which postulates “legal protection of the life of every human being”, which practically leaves the issue open and subject to the jurisdiction of the Constitutional Tribunal.

Among the social rights, there is a striking absence of the constitutionalisation of the right to work; the freedom to choose profession and a place of work (see Article 65)

⁷ Cf. J. Krukowski: “Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki” [Human Dignity as the Basis for the Constitutional Catalogue of Rights and Freedoms of Individuals], in: *Podstawowe prawa...*, p. 38 and following.

is only a very imperfect palliative.⁸ The protection of work by the Republic of Poland, proclaimed in Article 24 and therefore one of the constitutional principles, does not have any equivalent among the subjective rights of citizens, which is contrary to other analogous situations (cf. e.g. Articles 11 and 12 - Article 58, Article 21 - Article 64, Article 25 - Article 53). The above is a significant flaw of the Constitution, as it seems that even the acknowledgement of the so-called structural unemployment does not necessarily exclude both the subjective right of citizens to apply for work and the obligation of the state help in this matter, which - paradoxically - is described in the concluding part of Article 65 (of which Section 1 deals with the freedom to choose profession and the place of work.⁹ After all, had it been constitutionalised, the right to work would not have been less guaranteed than it is the case with the right to protect health or the right to education both of which have been included in the Constitution. Probably, similarly to many other social rights, the analysed right would be subjected to the clause of Article 81 ("the rights specified in Article 65 Sections 4 and 5, Article 66, Article 69, Article 71, and Articles 74-76 may be asserted subject to limitations specified by statute"). It seems also that the acknowledgement of the right to work is the central element of "the social free market economy" that is declared as the basis of the economic system of the Republic of Poland (see Article 20).

6. The Constitution of 2 April 1997 introduces many new and significant notions in the sphere concerning the procedures of protection of the rights of an individual. As it has already been mentioned, this question is dealt with in a separate passage in Chapter Two, which in itself is a good and characteristic legislative manoeuvre. Among the recently introduced guarantees of this kind, the most important seems to be the institution of the constitutional complaint, even though it has been restricted - hopefully only for the time being - to the complaints about normative acts. Another institution worth mentioning is the universal right of a citizen to a trial by court, considered as one of the rights of an individual (see Article 45 Section 1), which naturally includes also the right to a court complaint about administrative decisions. The right to a trial by court is significantly reinforced due to the explicitly articulated prohibition of any exclusion from court procedures by means of legal acts (see Article 77 Section 2), which has its complete verbalisation¹⁰ in the principle of procedure "of at least two instances" (Article 176 Section 1) described in the chapter on courts and tribunals. The restrictions of the right to trial by courts have been reserved in the Constitution itself only as provisional arrangements with a specified deadline and they pertain exclusively to the petty

⁸ Cf. e.g. T. Liszcz: "Przyszła Konstytucja Rzeczypospolitej Polskiej a prawo pracy" [The Future Constitution of the Republic of Poland vs. Labour Law], in: *Projekt konstytucji. Wartości i prawo* [Draft of the Constitution. Values and Law], [Annales UMCS, Sectio G—lus, 1997], vol. XLIV, p. 75-85.

⁹ Pointed out by W. Neciuński in: "Prawa socjalne w konstytucji - spojrzenie polityka społecznego" [Social Rights in the Constitution - the Outlook of a Social Polititian], in: *Konstytucja RP Oczekiwania...*, p. 204.

¹⁰ Cf. analysis of various aspects of the right to trial by court, in: *Podstawowe prawa...*, passim.

offences courts that operate temporarily and to the postponement of the introduction of two-instance procedure in administrative courts.

To the constitutional novelties among the analysed guarantees belong also: the principle of two instances in all kinds of individual cases (which seems to include the constitutionalisation of the right to appeal), as well as the right to a compensation for any unlawful action of the state. The right to put forward “petitions, motions, and complaints”, both individual and on behalf of a community, which has been acknowledged as one of the political rights, might - nonetheless - be included among the analysed guarantees.

Finally, to the guarantees of the rights of an individual belong also all organisational and procedural regulations - both those which have already existed and the ones that have just been introduced - which are the elements of the constitutional principle of state of law. To name but a few, one can mention the institution of Ombudsman, the decisive character of the verdicts of the Constitutional Tribunal, and a two-instance procedure in administrative courts.

7. The subservience of the state authorities towards the needs of the citizens acquires a specific character due to the requirement to apply “the principle social justice” that is included in the very definition of the state provided in the Article 2 of the Constitution. In fact, it is a direct adoption of the definition of the state present in the Polish constitutional law since December 1989. Therefore, it is a particularly clear example of the constitutional continuation. One of the direct consequences of the described character of the Polish state seems to be “the social free market economy”, which is declared as the basis of the economic system (Article 20) despite the fact that such phrasing is rather uncommon in contemporary constitutions.

Both phrases quoted above indicate that the state authorities, in their character of subservience towards social needs, should aim at possible equalising of opportunities enjoyed by particular individuals and at the diminishing of negative consequences for certain groups of people, inevitable in all large-scale social processes. Therefore, the state, to a certain extent, should continue to play the intervening role and, to a certain degree, should fulfil the role of a guardian, as it is neither an institution that merely fulfills its duties in a “dispassionate” way (“a watchman’s role”) nor merely an entity which manages solving all social problems and bears full responsibility for its actions. Because as the introduction to the Constitution states, “the fundamental laws of the state” are based upon “the respect” towards both “freedom” and “justice”, which finds its continuation in the realisation of the principles of social justice (Article 2). Finally, one should acknowledge that family farms are an element of the social free market economy and the fact that they are regarded as “the basis of the agricultural system of the State” (Article 23) points to the departure from the purely economic view on economic problems.

The social free market economy, in the light of the Constitution, is based upon three principles: “the freedom of economic activity; private ownership; and solidarity, dialogue, and co-operation between social partners” (Article 20). Referring clearly to the social teaching of the Catholic Church (the above expressions were promoted by the

members of the Constitutional Committee who represented “Solidarity” trade union), the Constitution, however, remains cautious with respect to the creation of institutional solutions. In particular, the authors of the Constitution excluded the notion of the so-called workers’ participation, as well as they did not introduce - even despite lengthy discussions in the Constitutional Committee concerning this issue - any extraordinary institutions that would serve to realise the said “dialogue of social partners”. What I mean here is the Tripartite Commission for Social and Economic Issues which is concerned mostly with the issue of salaries and wages. The single institutionalising effort with regard to the “social” character of the economy, is the constitutionalisation of the right to bargaining between trade unions and organisations of employers. The social free market economy, nevertheless, is to remain an economy in the full meaning of the term, in which all economic categories retain their real substance. The above is reflected in numerous regulations - especially the ones included in Chapter Ten: “Public Finances”. One should particularly emphasize here the provisions that require from the applicants of bills to provide the estimated financial results ensuing from their realisation. The regulations that curb the size of the public debt, also prohibit to expand the budget deficit beyond the level determined in the budget, and forbid to finance the budget deficit with the money borrowed from the central bank. They restrict the presidential right of veto in the case of the budget act. Finally one should note the regulations that introduce the new government’s obligation to provide the Sejm every year with the information about the size of the public debt. The provisions concerning the National Bank of Poland constitutionalise the notion of “monetary policy” and embody the efforts to specify the responsibility for the decisions resulting therefrom (the consistency of these efforts does not belong to the issue). The concern about a healthier economy is evident in all the above-mentioned regulations.

8. The second central idea of the Constitution seems to be the notion of rule of law (or in other words of the law-abiding state). The idea includes the willingness to apply the principle of law-abiding state established in December 1989, which denotes both the rejection of ideological state and the wish to continue the changes that enrich the essence of this principle. As far as the rejection of the idea of ideological state is concerned, one should note that the Constitution refers to the principle of social and political pluralism (Articles 11 and 12) which is diametrically opposed to the principle of a leading role of one political formation as well as to the idea of “moral and political unity of the nation”. The wish to continue, on the other hand, is reflected in the fact that the phrasing of December 1989 (“democratic state of law, realising the principles of social justice”) was adopted directly, i.e. without any changes even though the correctness of the phrase is rather dubious (*Rechtstaat* seems a more proper term). This wish, however, is expressed in the institutions and solutions of the new Constitution that greatly reinforce this principle.

At this point I would like to point to probably the most significant fact,¹¹ that the Constitution unvocally advocates rule of law understood in material terms. The Third ¹¹

¹¹ About complementary character of the two ideas cf. R. A. Tokarczyk: “Sprawiedliwość jako naczelną wartość prawa” [Justice as the Leading Value of Law], in: *Projekt konstytucji...*, p. 166.

Republic is the state applying the principle of social justice (see Article 2), in which a functioning system of norms protecting “the freedoms and rights of persons and citizens” (Article 5) should be observed. It is the state where rights originating from “the inherent and inalienable dignity of the person” (introduction and Article 30) are to be guaranteed “for all time” (introduction), “freedom of the person shall receive legal protection” (Article 31), and “all persons shall be equal before the law” (Article 32). The constitutional idea of the law-abiding state, therefore, does not consist merely in the functioning of a highly developed system of procedural guarantees of rights, but - first of all - in the fact that it is based upon the philosophy of individualism and on the universally acknowledged catalogue of individual’s rights.

9. Among the new constitutional solutions that are to secure the further development of the idea of rule of law, to mention but a few, one should start with the systematisation of the sources of law, which directly conditions the effectiveness of the “state of law”. To the above issue a separate chapter of the Constitution (Chapter Three) has been devoted - which, though neither new nor indisputable in the Polish constitutional tradition,¹² is worth mentioning as a legislative manoeuvre. Additionally, important references to the construction of this system can be found in Chapter One (Articles 8 and 9). The method employed here consists in separating the description of the sequence of categories of law-making acts (to which the said Chapter Three was supposed to be devoted) from the respective competency clauses that are included in the chapters concerning particular state agencies equipped with the law-making powers. An unexpressed principal assumption of Chapter Three was also the aspiration to create a complete (“closed”) system of the sources of law. Both goals, however, have not been fully achieved: i.e. in Chapter Three of the Constitution one can find certain competency clauses and despite all effort put into the work on the text, the attempts to include the description of the law-making acts failed, whereas the idea of completeness was realised only to the extent of the so-called universally prevailing sources of law.

What is particularly worth mentioning is, on the one hand, the inclusion of international agreements (their various categories) in the system of the sources of law, which eliminates an important gap in the so-far-existing regulations, and on the other hand, the introduction of significant provisions concerning the so-called internal regulations. The former endeavour constitutes the concrétisation of the declaration concerning observance of the international law by the Polish state (see Article 9), which, particularly in the case of the international protection of human rights, denotes, in fact, the realisation of the material aspect of the principle of rule of law. The above-mentioned regulation, together with certain provisions of the introduction and the fact that not only the rights of citizens, but of all individuals were recognised, means that Poland is unequivocally opening to international co-operation.¹³

¹² Such tendencies, also Polish, are evaluated extremely critically by P. Häberle in: “Źródła prawa w nowych konstytucjach” [Sources of Law in New Constitutions], *Przegląd Sejmowy* 1996, no. 4, p. 58-74

¹³ Concerning the issue cf.: L. Antonowicz: “Projekt Konstytucji Rzeczypospolitej Polskiej ze stanowiska prawa międzynarodowego” [Draft of the Constitution of the Republic of Poland from the

10. The fact that a particular emphasis was put on the material aspect of the principle of rule of law does not mean that the Constitution creates no new procedural and organisational guarantees of this principle. In my opinion, the first important change in this sphere is “the new value” given to the judicial authority, which makes it equal to the other segments of the state authority.¹⁴

The basic framework of the constitutional institutions operating within this sphere influences directly the protection of citizens’ rights. The above-mentioned new value is comprised of the inclusion of “tribunals” into the judicial authority, namely the Constitutional Tribunal and the Tribunal of State (see Article 10). The change in the regulation of the third authority centre introduced by the new Constitution, however, consists not only in a mechanical “adherence” of the said tribunals to the system of courts (previously regulations concerning the two institutions were provided in separate chapters of the constitution), but first of all in the transformation of both the structure of the court system and the functions of the tribunals. In this contexts implications important for the new understanding principle of the rule of law originate from: the authorisation of “all courts” (and not as formerly only of the courts of appeal) to submit questions on points of law to the Constitutional Tribunal; proceedings of at least two instances in all types of courts - including administrative courts; the new powers of the Constitutional Tribunal to decide on the compatibility of international agreements with the Constitution and on the compliance of the Acts of Parliament with the international agreements (ratified on the basis of an earlier authorisation in the form of an act). Moreover, an equally significant impact is made by: the decisive character of all decrees of the Constitutional Tribunal; the authorisation of the Supreme Administrative Court to decide on the legality of the provisions of the local law; the fact that competency conflicts between the constitutional central organs of the state are solved by the Constitutional Tribunal, whereas similar conflicts between the self-government agencies and the local and central agencies of the government administration are judged by administrative courts.

Furthermore, certain significant reforms have been made outside the sphere of the judicial authority. One should mention here the introduction of the above-described principle of the two instances in all kinds of individual procedure (not only court procedure), the constitutionalisation of the obligation of the Ombudsman to submit to the houses of parliament the information about the observance of the individual’s rights,

Viewpoint of International Law], in: *Projekt konstytucji...*, p. 9-23; A. Wasilkowski: “Prawo międzynarodowe a prawo krajowe w przyszłej Konstytucji RP” [International Law vs. National Law in the Future Constitution of the Republic of Poland] in: *Prawo, źródła prawa i gwarancje jego zgodności z ustawą zasadniczą w projektach Konstytucji RP* [Law, Sources of Law and the Guarantee of Its Consistency with the Fundamental Law in the Drafts of the RP Constitution], edited by K. Działocha, A. Prebner, Wrocław 1995; R. Szafarz, “Międzynarodowy porządek prawny i jego odbicie w polskim prawie konstytucyjnym” [International Law Order and Its Reflection in the Polish Constitutional Law], in: *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and European Community Law in the Internal Law Order], edited by M. Kruck, Warszawa 1997, p. 19-43.

¹⁴ For more information see P. Sarnecki: “Władza sądownicza w Konstytucji RP z dnia 2 kwietnia 1997 r.” [Judicial Power in the RP Constitution of April 2, 1997], in: *Rejent* 1997, no. 5, p. 126-144.

and the creation of the institution of the Commissioner for Children's Rights. Additionally, the constitutional provisions prohibiting combining political party membership or trade union affiliation with any office or function as well as forbidding to conduct "any public activity that cannot be reconciled with the dignity" thereof, have increased the independence of the presidents of the Supreme Chamber of Control and the National Bank of Poland, the members of the National Council of Radio Broadcasting and Television, and the Ombudsman. One can regret that the Constitution does not mention certain other guarantees of the rule of law. What I particularly mean here is the lack of regulations concerning the public prosecutor's office that would provide it with a specific independence in investigation and in the submission of indictments. It seems also that, similarly to the Commissioner for Children's Rights, the institution of the Spokesman for the Insured is worth being included in the Constitution. Subject to discussion might also be the disregarding of the Bar - especially in the context of Article 42 Section 2 (the right to the defence in criminal cases).

To conclude without entering into a detailed analysis of either the guarantees of the rule of law - both new and those maintained in force - or the guarantees of the rights of citizens (practically indistinguishable from the former), one must acknowledge that the catalogue of rights present in the new Polish Constitution complies with the conditions, even higher than average, a modern constitution has to meet.

11. The third central constitutional idea influencing the general characteristics of the act of 2 April 1997 is the democratic character of its regulations - not only in formal terms, i.e. consisting of both the proclamation of the principle of nation's sovereignty (see Article 4) and the creation of mechanisms to realise this sovereignty, but also in material terms, i.e. reaching beyond the procedural regulations and including individual and collective political rights of citizens, as well as the constitutional regulation of both the status and the role of the main actors on the political scene (first of all, political parties, but also other entities). The principle of political pluralism, appearing among the provisions of the new Constitution, stands in a particularly clear opposition to the regulations formally in force until December 1989 and codified by the previous constitution of 1976. However, as Article 13 indicates, this pluralism is by no means unlimited - the political organisations that manifested in the past a particularly antidemocratic character are ruled out of the public life and Article 188 Point 4 plays the role of a sanction. On the other hand, the introduction to the Constitution demands from all the participants of the political life to enter "the social dialogue" that is regarded as one of the foundations of the Constitution itself.

The role of the subject of the supreme authority is played by "the Nation", in the political sense, undoubtedly, understood as the community comprising its statehood and entitled either to make direct decisions regarding its own matters or to authorise its representatives to do so (see Article 4 Section 2). To the fact that the "Nation" is understood in political terms testify also the provisions concerning the specific rights of the individuals who do not feel part of the Polish nation in the ethnical meaning of the term (see Articles 27 and 35). The above interpretation is also compatible with the constitutional provisions regulating the specific obligations of the state towards the

Polish nation in terms of ethnicity - namely Article 5: providing the obligation of the state to protect the national heritage, or Article 6: introducing the obligation to secure the availability of the cultural values of the Polish nation. The above assertion is justified because the Polish nation as an ethnic group constitutes the majority of "the Nation" in the political sense, whereas in the case of the residents of nationality other than Polish the role of the subjects acting towards their (ethnic) nations in the way described in Articles 5 and 6 is played by other states. The obligations of the Polish state towards the heritage of other nations exist to the extent interpreted from the awareness of "the need for co-operation with all countries for the good of the Human Family" that is declared in the introduction to the Constitution.

However, this considerably homogenous interpretation is unnecessarily undermined by another passage in the introduction which defines the "Polish Nation" as "all citizens of the Republic of Poland" and treats it as the subject establishing the Constitution of the Republic of Poland. "All citizens of the Republic of Poland" is a legal term - the individuals grouped under this term are defined both in the Constitution (see Article 34) and in Acts of Parliament. The author of these provisions while making decisions concerning citizenship would also decide on the existence of the sovereign. Therefore, the term "Nation" should not be defined in any legal regulations, as it is the basic principle (the foundation) of these regulations. To avoid exploring the issue still further one should only add that the above approach is not contradicted by the fact that in order to participate in the realisation of the supreme authority certain conditions must be met, e.g. the possession of citizenship or the attainment of a certain age. Another discord between the content of Article 4 and the above-mentioned term in the introduction is caused by the unnecessary use of the word "Polish" (the second described passage from the introduction), as it suggests ethnic meaning rather than political one (unless one interprets this word as genitive of the noun "Poland"¹⁵).

The notion of the nation's supremacy, similarly as the idea of a law-abiding state, reappeared in the constitutional text in December 1989. Like the latter, the former has also been reinforced in the new Constitution. Of highest significance is the very fact of accepting the Constitution in a referendum - to shape the structure of the state by means of a constitutional referendum, undoubtedly, might be regarded as the first and particularly important element of the sovereignty of the nation. From the formal perspective future constitutions do not necessarily have to be introduced in the same manner. However, the above assertion seems true only at first sight, since one should notice that the Constitution regulates exclusively the procedure of its changing and the adoption of future constitutions is not mentioned at all. Simultaneously, it is rather unlikely that its authors should expect it to last forever. If in the process of adoption of the next constitution - hopefully not too soon! - the procedure described in Article 235 of the Act of 2 April 1997 is employed, that is if the constitutional draft is treated as a suggested change of maximal character, then even this method

¹⁵ [Translator's footnote] In the original text of the Constitution "Polish Nation" reads "Naród Polski". The word "Polski" can be understood as either an adjective (Polish) or genitive of a noun (of Poland).

allows for calling a constitutional referendum, as such change would affect also those chapters of the Constitution whose amending might be conditioned by optional constitutional referendum. On the other hand, if one wants to create a separate procedure of adoption of future constitutions, it seems extremely unlikely that the constitutional precedence of 1997 will be disregarded.

The direct exercise of authority by the nation is provided in Article 4 that is why it might be regarded as a framework that characterizes the state defined in the Constitution. The close relationship between the institution of referendum and the legislation is indicated by the separate passage in Chapter Four (Article 125), devoted to the structure and competence of the Sejm and the Senate. In this passage the institution of referendum is treated identically as in the regulations existing so far (both constitutional and provided by Acts of Parliament), therefore it might be considered a typical example of the adoption of old provisions. The referendum described therein is a facultative one and its legal nature (either expression of opinion or provision of law) depends on the proportion of the votes cast to the total number individuals entitled to vote.

The previous experience concerning the functioning of the referendum suggests that no normative act can come into being through its application, in particular the possibility to introduce acts in the rank of an Act of Parliament is not provided. The nation may decide in referendum about certain substantial issues, but to transform them into specific legal acts is the task for the respective state agencies. The above concept, however, is not absolutely clear. Definitely, not all matters “of extraordinary significance for the state” can be subject to a referendum. To such issues belong for example questions within the scope of administration of justice and, in general, decisions concerning individual problems of citizens (or legal entities), disregarding how “extraordinarily” significant for the state they are.

In addition to Article 125 and Article 235 Section 6, considering the referendum (facultative as well) on the change of chapters I, II, and XII of the Constitution, also Article 90 provides the possibility of calling referendum on the authorisation to ratify any international agreement, in which Poland would delegate certain part of its competence of power to any organizations or international agencies. Finally, to make the picture of the analysed institution clear, one has to mention the possibility of calling a referendum on local matters.

Apart from referendum, the new Constitution introduces one more form of direct democracy. The institution of people’s initiative, so far unrecognised by constitutional regulations, endows a group of at least 100,000 enfranchised citizens with a right to submit a bill to the Parliament. What is astonishing in this context is the lack of people’s initiative in the issue of constitutional changes, as well as the lack of regulations providing special treatment for the *citizens’* bills, as the most common arrangement (in the countries where such institution is functioning) is that the rejection of the draft by the Parliament is necessarily followed by a referendum.

12. As it can be judged from the above, the forms in which the nation can directly exercise its authority are not particularly numerous in the new Constitution. Such re-

straint should be regarded as fully justified due to the quite low expectations concerning this issue on the part of our society. Therefore, the fundamental role in the process of exercising authority is played by representative bodies, to which belong the Sejm, the Senate, the President of the Republic of Poland, and - in the local administrative system - the decision-making organs of the local self-government. In respect to the list of state agencies elected by the nation to exercise on its behalf certain attributes of state supremacy, the Constitution introduces no changes in comparison with the so-far existing regulations. Simultaneously however, it does not exclude the possibility to establish executive agencies of the local self-government by means of public election.

The legal relations between the nation and the elected organs are based upon the notion of representative mandate considered traditional within the constitutional law. Applied most evidently with respect to the members of the houses of Parliament it pertains also to the President chosen in direct elections. Both the Members of Parliament and the Head of the State, bearing no legal obligations towards anybody, decide about the current meaning of such terms as “interests of the State”, “the prosperity of the Homeland”, and “citizens’ good” (phrases from the formula of the parliamentary oath), or “Nation’s dignity”, “the good of the Homeland”, and “the prosperity of citizens” (phrases from the formula of presidential oath), and then are supposed to act respectively. Nevertheless, if the President does not realise the aims enumerated in the oath, insofar as the “subjective expressions” can be objectively judged,¹⁶ the Head of the State might be subject to the indictment of the National Assembly and can be held responsible to the Tribunal of State. A new aspect of this issue is the responsibility the MPs to the same Tribunal - sanctioned with the withdrawal of their mandate - for conducting private business with the use of public property, which in their case is illegal (see Article 107). Obviously - due to the fact that the above-mentioned regulation cannot be interpreted *a contrario* as before any case of eligibility loss results in the withdrawal of the mandate.

The new Constitution does not introduce - in comparison with the provisions of the Act of 17 October 1992 on the Mutual Relations between the Legislative and Executive Authorities of the Republic of Poland and on Local Self-government (hereafter referred to as the “Little Constitution”) - almost any changes in the institution of parliamentary privilege. The only fact that seems worth-mentioning in this context is that an MP is entitled to accept being prosecuted in a criminal case, which makes the procedure of setting aside the privilege.

In accordance with the new Constitution the Polish Parliament is composed of two chambers and its bicameral composition is of “functional” character.¹⁷ The superiority of the Sejm over the Senate has been preserved. Similarly as the “Little Constitution”, the Act of 2 April 1997 provides neither the possibility of beginning the legislative

¹⁶ Concerning subjective expressions in constitutional provisions see L. Leszczyński: “Zwroty ocenne w projekcie Konstytucji RP - regulacja zasad ustroju i praw obywatelskich” [Evaluational Phrases in the Draft of the RP Constitution], in: *Ocena projektu...*, p. 57-73.

¹⁷ Antonym of the so-called structural bicameralism. Cf. J. Ciemiński: “Sejm i Senat w projekcie Konstytucji RP” [The Sejm and the Senate in the Draft of the RP Constitution], in: *Ocena projektu...*, p. 42.

procedure by the Senate nor any procedures for the two houses to co-ordinate their standpoints, and simultaneously allows the Sejm to reject quite easily (securing an absolute majority) both amendment suggestions and motions on rejection of bill submitted by the Senate.

The controlling functions and, even to a greater extent, the authorisation to employ procedures of political and constitutional responsibility is the prerogative of the Sejm alone. The only instance of the participation of the Senate - as a component of the National Assembly - is the procedure of the indictment of the President, nevertheless, even then the votes of senators constitute a clear minority.

Only the Sejm is authorised to announce referendum, pass decision on presidential veto, and to accept ordinances in the rank of an Act of Parliament that the Head of the State is empowered to introduce in the period of martial law. The Sejm is also the single house of Parliament that within the next two years is entitled to decide on the judgements of the Constitutional Tribunal concerning the unconstitutionality of the bills passed before 17 October 1997. In accordance with the Act of 2 April 1997 the so-far existing inequality of the houses of Parliament, regarding the right to establish other state agencies, remained unchanged. The Sejm preserved its exclusive right to grant investiture to the government and choose its members, to appoint members of the Constitutional Tribunal and the Tribunal of State, as well as the President of the National Bank of Poland. The Senate was furnished only with the right to accept the President of the Supreme Chamber of Control and the Ombudsman.

Additionally, the disparity of the representation of chambers in the National Judiciary Council has been maintained (it was "transferred" from an Act of Parliament of an ordinary rank). As far as the National Council of Radio Broad-casting and Television is concerned, the issue is not regulated in the new Constitution.

On the other hand, certain reinforcement of the position of the Senate took place, which consequently strengthened the principle of bicamerality. The chamber is no longer obliged to indicate the sources of financing in the case of the amendments that would have impact on the budget (see Article 17 Section 3 of the "Little Constitution"), which equalises it in this respect with other participants of the legislative process. A fundamental improvement in the standing of the Senate was caused by the new procedure of making changes in the Constitution - they require unanimous acceptance expressed by both houses in the form of an Act of Parliament, which demands the involvement of the Senate. Similarly, considerable amendments appeared in the passing of bills authorising the ratification of international agreements, on the basis of which a delegation of any competence possessed by state agencies would be delegated to an international organisation. In this respect, the improvement of the position of the Senate was the greatest, as the Constitution requires as much as 2/3 of all votes to pass the bill, which means the requirements are higher than in the case of changing the Constitution. Among the rights to establish various bodies, the Senate acquired the right to appoint members - what is more, the same number as Sejm - of the Monetary Policy Council.

13. The mutual relations between various centres of state authority continue (see Article 1 of the "Little Constitution") to be defined by the principle of separation of

powers provided in Article 10 as one of the main constitutional principles. The phrasing of the Article 1 of the “Little Constitution” was supplemented by the principle “of equilibrium of centres of authority”, which means that one of the possible versions of separation of powers was chosen. What is worth noticing in this context is the introduction to the Constitution mentioning “the co-operation of centres of authority” or the securing the “efficiency” of public institutions. The idea of separation of powers, which prevents the concentration of competence and is favourable to the precise specification thereof, is universally acknowledged as an important element of the principle of the state of law.¹⁸ The idea of “equilibrium of centres of authority”, meanwhile, (considering the metaphorical assumption that the competence of particular agencies concerning various matters are comparable) prevents the domination of one of the organs and, by means of the so-called checks, creates the mechanism for co-operation between the centres of authority, thus increasing their efficiency. The two ideas, naturally, find their actual regulation only when defined in competency clauses.

14. An important motif of the third central idea of the Constitution, regarding the structure of power, is the explicit declaration of the decentralisation of state authority. Although the controversies present within the Constitutional Committee and the National Assembly itself made it impossible to regulate the issue more concretely in the form of a clear indication to the three-level local division of local administration, the general character of the final text allows for no doubts. First of all, it is evident from the mere fact that the introduction to the Constitution mentions the principle of subsidiarity, and proclaims it to be one of the foundations of “the rights provided in the Constitution”, and stresses to its function of “reinforcing the rights of citizens and their communities”. The above principle, therefore, should be regarded as an extremely important clue in the interpretation of the analysed issue. Secondly, Article 15 Section 1 in Chapter One of the Constitution, describing the general character of the state, explicitly recognises the decentralisation as one of the basic principles of the organisation of public authority.

The decentralisation of authority is to be realised by the local self-government, however, the declaration that “the Republic of Poland shall be a unitary State” (Article 3) denotes that the self-government cannot evolve in the direction of political territorial autonomy - after all not new in the Polish history (e.g. Silesian autonomy in the interwar period) - not to mention the fédéralisation of the state. Nonetheless, the Constitution declares the delegation of a “substantial part of public duties” to the organs of the local self-government (Article 16 Section 2). The local self-government is supposed to consist of a natural local community, functioning in the areas characterised by the existence of “social economic, and cultural ties” (Article 15 Section 2) as well as by a potential sufficient to undertake public tasks. The role of basic cells of the local self-government is to be played by the units of the lowest level - countries - the third

¹⁸ Cf. *Komentarz, do Konstytucji Rzeczypospolitej Polskiej* [Comments on the Constitution of the Republic of Poland], edited by L. G a r l i c k i, set I, Warszawa 1995, comments on Article 1 of the “Little Constitution”.

element contributing to the decentralisation of authority. The establishing of self-governmental corporations of the higher level, which should be followed by the reduction of the competence of the central authority, is left by the Constitution to be decided by the legislator. To strengthen the position of the self-governmental corporations a separate chapter of the Constitution on the local self-government guarantees them the status of legal entity, the ownership right, the right to the court protection of independence, the statutory indication of income sources, the right to create local government associations and to enter international associations of this kind. The supervisory power of the central authority is limited to the criterion of legality and is subject to judicial control.

15. In so far as the judicial authority is concerned, among all three centres of authority this one was affected by the constitutional reforms probably to the greatest extent - the "Little Constitution" completely disregarded this issue. The principal constitutional change consisted in the inclusion of tribunals aside various types of courts as a part of the judicial authority - a straightforward conclusion based on the title and the initial article of Chapter Eight - which considerably increased both its importance and authority.

The above-mentioned inclusion results not only in the consolidation of the so-far existing competences of both types of organs, but also in a much more significant change, as it was accompanied by a considerable growth of the competence of both courts and tribunals. I researched this issue thoroughly by analysing the guarantees concerning citizens' rights and the guarantees of the idea of rule of law (see p. 12). Merely as a supplement to what has already been written one can add that from the point of view of courts, the increasing of competence consists, first of all, in the introduction of "the right to trial by court" in every individual case (see Article 45 Section 1), which makes the expected range of court activity, regulated by Acts of Parliament, extremely wide. Among other important aspects of this issue one should mention: the constitutionalisation of administrative courts and their organising into a separate section as well as the constitutionalisation of the right of the Supreme Court to decide on the validity of presidential elections and referendum (the right of the Supreme Court to decide on the validity of parliamentary elections was included already in the "Little Constitution"). The function of administrative courts, in compliance with the Act on the Supreme Administrative Court, is "to control the performance of public administration" (Article 184), which gives them a very wide range of possibilities. Additionally, courts of this type are responsible for "the administration of justice" (Article 175 Section 1). The Constitution declares also a judicial protection of the independence of local self-government (see Article 165 Section 2).

Preserving the reference to a specific act concerning the definition of "the competence of law courts" (Article 176 Section 2), apart from traditionally perceived administration of justice the Constitution maintains, *rebus sic stantibus*, the numerous court rights that have existed for a long time and enables their potential increase.

The changes concerning tribunals consist mostly in the expanded competence of the Constitutional Tribunal - its judgements acquired the status of decisiveness and their force is universally prevailing, it was authorised to control the accordance of the

national law with international agreements, and finally the provisional restrictions on its competence were abolished. A newly constitutionalised function of administrative courts (see Article 166 Section 3) and tribunals (in the case of the Constitutional Tribunal - see Article 189) is going to be to pass decisions concerning, as it seems, all possible situations leading to competence conflicts. The analysed changes increased also the competence of the Tribunal of State which was previously regulated (in an extremely general way) by the constitutional provisions of 1982. The new Constitution defines the group of entities subject to constitutional responsibility, however, the inclusion of the members of the Sejm and senators is a novelty.

The act of 2 April 1997 regulates guarantees of the independence of the judiciary in a much broader and more thorough way than the so-far existing provisions. The above refers to both courts and tribunals, but - surprisingly - not uniformly, as the Constitution provides separate regulations concerning judges of common courts of law and administrative courts, separate rules pertaining to the judges of the Constitutional tribunal, and still separate regarding the members of the Tribunal of State. Such a division is due to the organisational specificity of these bodies and, to a certain extent, due to the internal systematics of Chapter Eight, although the issue of independence could have been "thrown out" into the initial part of the chapter. Reiterating the principle of irremovability of judges, the legislator removed the constitutional provision on admissibility of its statutory suspension (cf. Article 60 Section 2 of the provisions remaining in force). Other changes concerning the official status of judges - their *ex officio* removal, suspension, moving to another seat or to another office or, retiring - became conditioned by the decision of court (its type is not specified in the Constitution).

Correspondingly, the Constitution regulated functions and the structure of the National Judiciary Council which plays the role of a statutory and institutional guarantee of the principles of independence of courts and the judiciary. Previously, while this organ was "rooted" in the constitutional provision (see Article 60 Section 3 of the provisions remaining in force), its role could be only deduced from the context - i.e. its placing within the article on irremovability (so independence) of judges. At this point, by the way, a comment can be made that it is apparently wrong that the National Judiciary Council is constructed to represent only a part of judicial authority, as neither the Constitutional Tribunal nor the Tribunal of State send their representatives to that body. It is probably wrong to assume that in the course of their operation neither tribunal will have any problems with its independence, nevertheless the National Judiciary Council will not be able to challenge the normative acts to the Constitutional Tribunal on the independence of tribunals and their members, although it is authorised to do so when those acts pertain to courts and judges (it is a new element of the competence of the National Judiciary Council).

The immunity of judges of common courts of law, administrative courts, and of the Constitutional Tribunal is regulated by the Act of 2 April 1997 identically, though in separate provisions (see Articles 181, 196, and 200).

Apart from the above-mentioned guarantees that are typical for judicial authority of democratic and liberal states, the new Constitution includes special guarantees, ap-

parently originating from recent negative experiences of our state, which are of great normative and educational significance. These regulations consist - on the one hand - of prohibition imposed on judges to be members of political parties or trade unions, and to conduct any public activity that is not compatible with the analysed principles of independence, and - on the other - of the obligation to secure such working conditions and salaries for judges that would correspond with their duties and the dignity of their office. Partly, this means constitutionalisation of statutory solutions that had existed before, to a considerable extent, however, these regulations are a complete novelty.

The agencies of “the third authority centre” did not keep all of the powers they enjoyed so far. Among the most significant “losses” one should mention depriving the Constitutional Tribunal of the right to announce a universally prevailing interpretation of legal acts, though it might be partially compensated by the powers of the Supreme Court - also an agency of the judicial authority (apart from that, it is meant to be solving competency conflicts - one of the new elements of the competence of the Constitutional Tribunal¹⁹). A certain diminution of the activity sphere of this tribunal is also - as one should conclude from the constitutionalisation of the right to submit motions to the Constitutional Tribunal (Article 191) - the cancellation of the right of the Constitutional Tribunal to institute legal proceedings on its own initiative. The Tribunal of State, on the other hand, will not be able to pass decisions in cases concerning constitutional responsibility of executives of central offices (cf. Article 198 Section 1 of the new Constitution and Article 1 Section 1 Point 5 of the Act on the Tribunal of State). From the above one can see that the losses are of not great importance, whereas some of them are conducive to the preserving of the judicial character of these organs.

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The analysis of the text of the Constitution of the Republic of Poland of 2 April 1997 allows for the assertion that the Act is based upon three central ideas subservience of the state, rule of law, and democracy. The three leading motifs are interwoven in the whole body of its provisions and in all chapters and passages, being expressed in numerous constitutional principles, of which only some could be examined in this essay (even more impossible was to analyse all constitutional institutions).

The new Constitution came into force on 2 April 1997, that is “on the expiration of the 3-month period following the day of its promulgation” (Article 243). The process of its application has just begun. In its course, various interpretations of constitutional provisions will appear in politics, judicial decisions, and doctrine, which will endow these provisions with a specific sense. Such interpretations, actually, have already started, if we take into consideration numerous conferences that are organised as well as the analysis of subsequent versions of both the constitutional draft and the final text that are published (insofar as it was possible in this article I tried to make use of most of them).

¹⁹ A. Zoll : “Trybunał Konstytucyjny w świetle projektów Konstytucji RP” [The Constitutional Tribunal in the View of Drafts of the RP Constitution], in: *Ocena projektu...*, p. 120.

Despite much criticism towards the new Constitution (*in statu nascendi* and after its adoption), summing up, one is probably allowed to accede to the thesis expressed about one of the last versions of the draft that it “undoubtedly complies with the standards of the modern European constitutionalism.”²⁰ The above evaluation is equally valid with respect to the final text of the Constitution.

²⁰ T. M o ł d a w a: “Konstytucja RP a standardy współczesnego konstytucjonalizmu” [The RP Constitution vs. Standards of Contemporary Constitutionalism], in: *Konstytucja RP. Oczekiwania...*, p. 42.

LE SYSTÈME DE GOUVERNEMENT DANS LA CONSTITUTION DE LA RÉPUBLIQUE DE POLOGNE DU 2 AVRIL 1997

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Un aperçu de la littérature scientifique, qui a accompagné les travaux sur la nouvelle constitution, révèle l'attention portée à la question du régime politique et-plus précisément - à celle de l'organisation des pouvoirs¹. Cet intérêt s'est manifesté aussi dans le grand nombre de projets de constitution proposés tant par les partis politiques, que par des milieux juridiques ou des groupes de citoyens. Diverses conceptions y ont été développées, concernant le système de gouvernement*^{1 2}. Aujourd'hui, tout cela-y compris les débats au sein de la Commission constitutionnelle et au Parlement - a, dans un certain sens, une valeur historique. La Constitution de la République de Pologne est entrée en vigueur³, et cela signifie, que le temps de la création du modèle constitutionnel est passé. Maintenant il reste à observer comment ce modèle va fonctionner en pratique. Un système constitutionnel ne révèle ses traits spécifiques et son caractère, parfois de façon imprévue ou même mal venue, qu'après de longues années de pratique. Quelques mois à peine après l'entrée en vigueur de la Constitution, on peut remarquer des éléments nouveaux dans le fonctionnement du mécanisme de pouvoir. Mais l'heure du bilan viendra plus tard. Pour l'instant, il s'agit d'essayer de caractériser ce système de pouvoir et le mécanisme de gouvernement, issus de la Constitution du 2 avril 1997.

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¹ Voir entre autres: *Jaka Konstytucja? Analiza projektów konstytucji zgłoszonych Komisji Konstytucyjnej Zgromadzenia Narodowego w 1993 roku* [Quelle constitution? Analyse des projets de constitution présentés à la Commission constitutionnelle du Parlement en 1993] (réd. M. Kruk), Ed. de Sejm 1994; *Model polskiego parlamentu* [Le modèle de parlement polonais] (réd. M. Grzybowski), Kraków 1996; *Demokratyczne modele ustrojowe w rozwiązaniach konstytucyjnych* [Les modèles de régime démocratique dans les solutions constitutionnelles] (réd. S. Gebethner et R. Chruściak), Warszawa 1997; *Konstytucyjne systemy rządów* [Les systèmes constitutionnels de gouvernement] (réd. M. Domagała), Ed. de Sejm, 1997; *Założenia ustrojowe, struktura i funkcjonowanie parlamentu* [Régime, structure et fonctionnement du parlement] (réd. A. Gwiżdż), Ed. de Sejm 1997.

² Voir: *Projekty konstytucyjne 1989-1991* [Projets de constitutions 1989-1991] (réd. M. Kallias), Ed. de la Diète 1992; *Projekty konstytucji 1993-1997* [Projets de constitution 1993-1997], part. I, II (réd. R. Chruściak), Ed. de la Diète 1997.

³ Voir: R. Chruściak, *Kalendarium* [Calendrier...], dans le présent numéro.

1. Les conditions

Dire que tous les Etats d'Europe centrale et orientale - Etats du socialisme réel sont partis du même point de départ pour les transformations de leur régime serait une simplification abusive. Cela n'a pas été possible, car ils étaient toujours, et surtout à la fin de l'époque du socialisme réel, malgré les ressemblances générales, fortement différents. Cela découlait de l'interaction de leurs propres traditions, qui n'étaient pas toujours aussi démocratiques qu'en Pologne ou en Tchécoslovaquie, et aussi de leur développement pendant l'époque socialiste, de leur flexibilité plus ou moins forte vis à vis du modèle soviétique, de leur autonomie plus ou moins grande dans la recherche de leur propre voie, des «expérimentations» en matière de régime, etc. Mais sans aucun doute, ils avaient pour base commune l'unification des règles principales et des mécanismes d'exercice du pouvoir et de leur justification idéologique. La règle principale était alors - en théorie - celle de l'uniformité (confusion) du pouvoir d'Etat, prévoyant la concentration du pouvoir entre les mains du Parlement (monocaméraliste, sauf pour les Etats fédéraux) et la subordination au Parlement de tous les autres organes de l'Etat, notamment des organes exécutifs. En pratique, la décision du parti communiste était transmise pour transposition au Parlement, conformément au principe du rôle dirigeant du parti, inscrit dans la Constitution en 1976. Le défaut de pluralisme politique et économique, le quasi-monopole de l'Etat sur les moyens de production, et d'autres caractéristiques connues du socialisme réel complétaient le tableau des conditions qui formaient le système de pouvoir dans tout le bloc de l'Est.

Rien d'étonnant alors qu'au début de la transformation du régime l'on ait en recours, avant tout, au principe de la séparation des pouvoirs et que sa constitutionnalisation ait souvent été réalisée de la façon la plus classique, conformément à l'analyse de Montesquieu. Dans de nombreux Etats démocratiques occidentaux l'organisation constitutionnelle des pouvoirs s'appuie sur ce principe, qui est considéré comme acquis, et les fonctions étatiques ne sont jamais concentrées entre les mains d'un seul organe (par ex. la Constitution de la Vème République Française). Dans les nouveaux régimes, qui aspirent maintenant au pluralisme et à la séparation des pouvoirs, la volonté de garantir le respect de ce principe a abouti à le mentionner *expressis verbis* dans les constitutions. Même les reproches selon lesquels il aurait fait son temps⁴ ne peuvent cacher le fait que dans le régime qui émerge après la transformation (lire: après le totalitarisme), une si claire définition des frontières séparant nettement les zones de pouvoir et empêchant leur confusion (donc l'abus), peut servir à une «extorsion de la démocratie» et à rendre impossibles les tentatives de «coup de force». Et même si ce principe n'a pas toujours aidé, les intentions de l'introduire dans les constitutions étaient compréhensibles; il est devenu la base de l'organisation du système de gouvernement dans la plupart des nou-

⁴ Voir: M. Kruk, «Zagadnienia jedności władzy i podziału kompetencji» [La question de l'unité du pouvoir et du partage des compétences], dans *Studia Konstytucyjne* [Etudes constitutionnelles], vol. 2, UW, Warszawa 1990; T. Borkowski, *System rządów w nowej Konstytucji* [Le système de gouvernement dans la nouvelle Constitution], *Państwo i Prawo* [L'Etat et le droit] 1997, n° 11-12.

veaux Etats démocratiques en Europe centrale et orientale⁵. Dans quelques constitutions à peine (Roumanie, Lituanie, Hongrie, Slovaquie) il n'a pas été introduit expressément mais même ce défaut ne signifie pas son rejet. Ce qui est caractéristique, c'est qu'il apparaît - bien exposé - dans des pays qui même avant la période communiste n'avaient pas de tradition démocratique (Albanie, Croatie, Slovénie). En Russie, ainsi que dans les Etats asiatiques créés après le démantèlement de l'Union Soviétique, il a été proclamé parmi les principales règles constitutionnelles. A cet égard, toutes proportions gardées, on peut remarquer une certaine ressemblance de la situation politique: Montesquieu a «découvert» la théorie de la séparation des pouvoirs en vue de limiter la monarchie absolue; les pays de l'ancien bloc communiste la redécouvrent en vue de sortir des systèmes non-démocratiques.

Dans la Constitution polonaise le principe de séparation des pouvoirs est entré sous cette forme très explicite, en éliminant de l'ordre constitutionnel les restes de l'uniformité du pouvoir⁶. De plus, à côté de la séparation des pouvoirs législatif, exécutif et judiciaire, on a accentué leur équilibre. La constitution dit alors (art. 10) que le régime politique de la République de Pologne a pour fondement la séparation et l'équilibre entre les pouvoirs législatif, exécutif et judiciaire, précisant ensuite de façon très classique que le législatif appartient à la Diète et au Sénat, l'exécutif au Président de la République et au Conseil des ministres, et le pouvoir judiciaire aux cours et tribunaux.

Comme on le sait, le fait même d'introduire le principe de séparation des pouvoirs dans le catalogue des fondements du régime ne préjuge pas du choix du système des pouvoirs sensu stricto. Sur le choix d'un modèle précis - et différent dans chacun des anciens Etats socialistes - ont influé des circonstances et conditionnements variés, partiellement semblables et partiellement différents, spécifiques dans chaque cas précis et n'ayant pas de dénominateur commun.

Le facteur prépondérant de ce choix était sans aucun doute le sentiment d'appartenance ou même d'identification à la tradition et à la culture juridiques de l'Europe auxquelles appartient la démocratie parlementaire. L'acceptation du système de pouvoir correspondant aux modèles élaborés par la démocratie parlementaire était alors facile à comprendre dans le cas des Etats, qui dans la période pré-communiste pratiquaient un système démocratique, notamment fondé justement sur les traditions européennes, tels que, par exemple, la Pologne (Constitution de 1921), la Tchéquie et la Slovaquie (Constitution de la Tchécoslovaquie de 1920), l'Estonie (Constitution de 1920), bien que ce soit la République Tchèque qui ait opté pour le système de gouvernement de cabinet de la façon la plus fidèle (1993). Certains Etats qui, dans leur tradition, n'ont pas connu de

⁵ De très intéressantes remarques relatives à l'application et à la signification de ce principe en Pologne par J. C i e m n i e w s k i: «Podział władzy w „małej konstytucji”» [Le partage du pouvoir dans la «petite constitution»], dans: «Mała konstytucja w procesie przemian ustrojowych w Polsce» [La «petite constitution» dans le processus de transformations en Pologne] (réd. M. K r u k), Ed. de Sejm 1993.

⁶ Le premier acte constitutionnel, qui a conduit en Pologne au rejet de l'uniformité (confusion) du pouvoir était la loi constitutionnelle du 17 octobre 1992 sur les relations mutuelles entre le pouvoir législatif et le pouvoir exécutif de la République de Pologne et sur les collectivités locales, jouant le rôle de constitution temporaire (nommée «petite constitution»), le texte en français se trouve dans: «Constitutions d'Europe centrale, orientale et balte» (M. L e s a g e), La documentation française, Paris 1995.

parlementarisme démocratique, aspiraient à ce modèle, comme par exemple la Bulgarie et l'Albanie, et ont proclamé *expressis verbis* le système parlementaire dans les articles ouvrant leurs constitutions (resp. art. 1 et 4). Il serait par contre plus difficile de faire le même constat pour les ex-républiques de l'Union Soviétique, à l'exception des Etats baltes. La Fédération de Russie a introduit un système de présidence forte, système difficile à qualifier de parlementaire. Là, l'équilibre entre le législatif et l'exécutif est ébranlé.

Sur un autre plan il faut, semble-t-il, situer les conceptions constitutionnelles liées aux conditions tant objectives que subjectives de la période de transformation du système de gouvernement en Europe centrale et orientale. Ces conditions étaient très variées. Toute généralisation comporte un risque de simplification, mais il s'agit ici seulement de les rappeler. Parmi ces conditions il faut avant tout évoquer le caractère pacifique du changement de pouvoir, c'est-à-dire de l'instauration d'un nouveau régime par des processus évolutifs d'application d'un nouvel ordre politique et économique. Le compromis consécutif à ce changement introduisait une co-participation au pouvoir de la nouvelle et de l'ancienne classes politiques. Cela signifiait que dans de nombreux Etats l'ancienne classe politique restait au pouvoir sur une nouvelle base de légitimation ou bien, qu'au sein de l'ancienne classe politique de nouvelles élites se créaient (souvent blâmées de post-communistes). Cela a influé sur la formation du système de gouvernement, tant au plan théorique que pratique, par la conservation des anciennes institutions, habitudes, procédures ou règles. Ceci est visible même en Pologne où la nouvelle classe politique - en dépit de la volonté de transformation du régime constitutionnel relativement grande - entraînait volontiers dans le corset des institutions anciennes et avait du mal à s'en débarasser⁷. Cela favorisait le processus de changement évolutif, mais avait ordinairement aussi des effets négatifs. Dans la plupart des Etats, les conflits entre les anciennes et les nouvelles élites politiques étaient et sont résolus de façon démocratique (élections parlementaires, etc.), mais il reste en mémoire la solution militaire, comme celle survenue en Russie en 1993.

Il faut enfin mentionner les difficultés de la transformation économique qui apparaissent dans les Etats démocratiques en cours de création et qui provoquent le mécontentement de la société, la baisse du niveau de vie, le chômage, des perturbations liées à la privatisation de l'économie nationale, etc. Ces difficultés sont facilement et volontiers mises sur le compte de l'inefficacité du système démocratique. Il n'y a alors qu'un pas à faire pour chercher des hommes «providentiels», disposant d'un pouvoir fort et autoritaire. Et ce pas, plus ou moins grand, a été franchi dans certains Etats, surtout sous la forme du renforcement de la position du président, élu au suffrage universel et direct, muni de très larges compétences aux dépens du parlement ou du gouvernement, ou des deux à la fois. Les régimes qui vont le plus loin dans ce sens sont ceux de la Russie, de la Biélorussie et de certaines anciennes républiques soviétiques.

⁷ L'exemple caractéristique est la lutte des députés pour de larges compétences de la Diète au moment de la transformation de sa position d'organe suprême de pouvoir au niveau qui lui est assigné par le principe de la séparation des pouvoirs. Voir M. Kruk: «Le Parlement en période de transformations», *Droit polonais contemporain* 1996, n° 1-4.

Signalons aussi le manque de savoir-être de la classe politique, le manque de savoir gouverner, de réserve dans les exposés publics, de respect à l'égard de l'adversaire politique, etc., ce qui entraînait parfois des baisses de popularité ou des échecs électoraux. Soulignons aussi le rôle important, en telles circonstances, de la personnalité des hommes politiques exerçant des fonctions - clefs dans l'Etat (p.ex. celle de président) ou des prétendants à de telles fonctions⁸.

Une signification encore plus importante avait de ce point de vue l'instabilité du système de partis politiques, qui avait tendance à «exploser» en un pluralisme spontané parfois à l'extrême, comme en Pologne, où le nombre de partis dépassait 250. Il en a résulté une atomisation politique du Parlement, qui s'est avéré incapable de nommer et de soutenir un gouvernement fort⁹. En réaction à ce phénomène l'on a eu souvent tendance à limiter le pouvoir du Parlement, par différents moyens, notamment par une rationalisation du parlementarisme et des modifications de la loi électorale. Ainsi, en Pologne, ce phénomène a abouti, après de nombreuses expériences négatives sur la base de la constitution temporaire (dénommée «petite constitution»), à un système de protection contre la déstabilisation et l'incapacité gouvernementale.

Enfin, un des derniers écueils^{10 11} était le défaut de culture juridique et politique développée et solide, le manque de coutumes constitutionnelles, de connaissance des «règles du jeu» et des procédures démocratiques, ainsi que l'incapacité à prévoir les conséquences de telles ou telles décisions. Bref, tous ces phénomènes qu'a entraînés, durant des décennies, l'interruption dans l'exercice de la démocratie parlementaire dans certains pays et dans d'autres cas - l'absence totale d'une telle pratique.

C'est sur cette base que devaient naître les mécanismes nouveaux d'exercice du pouvoir, en hypothèse démocratiques, mais aussi efficaces, stables et correspondant aux attentes sociales. Une tâche difficile.

2. Trois pouvoirs comme acteurs principaux

a) Le pouvoir législatif est confié par la Constitution de la République de Pologne à la Diète et au Sénat. Ces deux chambres traditionnelles en Pologne (depuis la période de l'entre-deux-guerres) composent un parlement bicaméral dans lequel la structure, la position et les compétences de chaque chambre, ainsi que leurs relations réciproques, sont assez schématiques et ne s'éloignent pas d'une façon importante de la conception adoptée dans la loi constitutionnelle de 1992¹¹. Les deux chambres participent au vote

⁸ Révélateur sur ce sujet, S. Gebethner, «Modele systemów rządów a ich regulacja konstytucyjna» [Les modèles de système de gouvernement et leur application constitutionnelle], dans: *Demokratyczne modele...*, op. cit.

⁹ Voir sur ce sujet, M. Kruk: «Le Parlement en période...», op. cit.

¹⁰ Voir M. Kruk: «Parlament - prezydent - rząd: wybór modelu rządów» [Parlement-Président-Gouvernement: choix du modèle de gouvernement], dans: *Prawo w okresie przemian ustrojowych w Polsce* [Le droit dans la période de transformation du régime en Pologne], Warszawa 1995.

¹¹ Voir M. Kruk: «Le Parlement...», op. cit.; Z. Jarosz: «Le problème du bicaméralisme dans la future constitution de la République de Pologne», *Droit polonais contemporain* 1995, n° 1-4.

des lois, mais c'est la Diète qui est la chambre principale. C'est à la Diète que l'on adresse les projets de lois, que se déroule pratiquement toute la procédure législative et qu'appartient le dernier mot en la matière. Le Sénat, construit sur la base de la formule très traditionnelle de la «chambre de réflexion», peut apporter des amendements à la loi votée par la Diète ou proposer de la rejeter dans son entier, mais ceci est soumis à l'acceptation de la Diète. Par contre, c'est à la Diète qu'appartient, exclusivement, le pouvoir de contrôle sur le Gouvernement, notamment au moyen du vote de confiance, du vote de défiance, d'interpellations, etc. De plus, la Diète, et dans certains cas aussi le Sénat, ont des compétences définies dans la Constitution en matière de nomination des autres organes et fonctions de l'Etat (comme président de la Banque nationale de Pologne, le Défenseur des Droits civiques, les juges du Tribunal constitutionnel, du Tribunal d'Etat, partiellement du Conseil national de la Radiophonie et de la Télévision).

Le changement de position du Parlement, du détenteur du plein pouvoir en organe du pouvoir législatif, a provoqué à son tour un changement dans la fixation de ses attributions, autrefois très étendues et englobant à côté du législatif et du pouvoir de contrôle, la fixation générale des orientations de la politique de l'Etat et la nomination des autres organes.

Ce qui est caractéristique pour la Constitution polonaise, récemment votée, c'est la non limitation du pouvoir législatif du Parlement au profit de l'exécutif, à l'exception d'un droit réduit d'édicter des règlements ayant force de loi, réservé au Président en cas d'état de siège, si le Parlement ne peut se réunir en séance (ces règlements sont soumis à l'approbation de la Diète à la séance la plus proche). L'initiative référendaire est une sorte de limitation du pouvoir législatif du Parlement mais déjà d'un autre genre, puisque, dans le système constitutionnel polonais, les lois ne peuvent pas être adoptées par voie de référendum. Il faut ajouter qu'une telle plénitude du pouvoir législatif¹² pour le Parlement n'existait pas en Pologne, où il était de règle (à l'exception des années 1989-1992) que le Chef de l'Etat ou le Gouvernement dispose de la faculté d'édicter des actes ayant force de loi (dans la période 1992-1997 il n'en faisait pas l'usage).

Dans les autres pays d'Europe centrale et orientale, les transformations dans le domaine du pouvoir législatif (bien que les Constitutions de la Hongrie et de la Roumanie n'aient pas introduit cette terminologie) ont un caractère semblable. Dans certains pays, on a donné au Parlement une structure bicamérale (Croatie, Roumanie, Slovaquie, République Tchèque). Ses compétences, en conséquence de la séparation des pouvoirs et à l'exemple du système parlementaire, ont été ramenées à la législation, au contrôle du gouvernement et à la participation aux nominations pour certains postes (on a supprimé la fonction déjà mentionnée de la direction générale de la politique de l'Etat, bien qu'elle persiste encore dans les constitutions des anciennes républiques asiatiques soviétiques comme le Tadjikistan). Dans la plupart des pays, on a conservé certaines formes de la législation déléguée. Dans plusieurs d'entre eux, le référendum est prévu.

¹² Renforcée en plus par le fait que les actes d'application édictés par l'exécutif sont définis d'une manière très restrictive, tant quant aux personnes autorisées, qu'aux conditions qu'ils doivent remplir, voir l'article de S. Wronkowska dans le présent numéro.

b) Le pouvoir exécutif est construit dans la Constitution polonaise d'une manière assez classique. Il est dualiste, composé du Président de la République et du Gouvernement, appelé Conseil des ministres. Le Gouvernement est un organe collégial et autonome. A sa tête, se trouve le Premier ministre (Président du Conseil des ministres), qui n'est plus *primus inter pares* comme c'était le cas dans la Constitution de 1921, mais qui a le caractère d'organe autonome.

Après les expériences de la «petite constitution», les auteurs de la nouvelle Constitution de la République de Pologne portaient une grande attention à la délimitation précise des compétences du Président de la République et celles du Gouvernement, conformément à l'idée que la direction de la politique de l'Etat, ainsi que la direction de l'administration doivent appartenir au Gouvernement. Le Président, quant à lui, se voyait attribuer des compétences typiques de Chef de l'Etat, étant perçu avant tout comme arbitre (mais cette fonction n'est pas mentionnée *expressis verbis* dans la Constitution) et garant de la continuité du pouvoir (et non de l'Etat, comme c'est le cas en France).

Mais le Président de la République, élu au suffrage universel direct, dispose de beaucoup de possibilités d'influer sur les décisions du Gouvernement et même, dans des situations exceptionnelles il pourrait entrer en concurrence avec ce dernier quant au pouvoir exécutif. Egalement dans ce domaine, on a tout fait pour minimaliser cette possibilité, qui existait avant le vote de la Constitution. Même si sous l'empire de la précédente loi constitutionnelle, le Président Wałęsa n'a pas effectivement créé un deuxième centre du pouvoir exécutif, il a profité des possibilités de déstabiliser le Gouvernement¹³.

On voit déjà par cette courte description que nous n'avons pas affaire au modèle classique de l'exécutif du système de cabinet, quoique bien de ses éléments aient été conservés. Certains pays post-socialistes, tels que la République Tchèque, la Slovaquie, la Hongrie, l'Estonie, l'Albanie, sont restés plus fidèles à ce système, en renonçant à l'élection du Président au suffrage universel direct mais en introduisant beaucoup de modifications (par exemple: la possibilité de révoquer le Président par le Parlement - en Slovaquie). Dans certains pays, les relations au sein du pouvoir exécutif s'articulent autrement. Il s'agit ici surtout de la double responsabilité du Gouvernement - devant le Parlement et le Président - ou bien des compétences plus vastes du Président à diriger le Gouvernement. Dans certains de ces pays, là où la règle de la séparation des pouvoirs n'a pas été nettement affirmée, on ne considère pas le Président et le Gouvernement en tant que deux segments du pouvoir exécutif (Hongrie, Roumanie). Ces remarques ne se rapportent pas aux pays issus de l'ancienne URSS, pour les raisons mentionnées ci-dessus.

c) Le troisième segment du pouvoir, c'est-à-dire le pouvoir judiciaire, se compose, selon la Constitution polonaise, des cours et tribunaux¹⁴, ce qui signifie qu'il englobe

¹³ Entre autres, une telle situation, liée aux agissements du Président au sein de l'armée (à l'insu du ministre de la Défense Nationale) a été condamnée dans l'Appel de la Diète du 12.10.1994, qui s'adresse au Président de la République pour qu'il cesse de déstabiliser l'ordre constitutionnel. Information sur l'activité de la Diète, II législature 14.10.1993-20.10.1997, Ed. de Sejm.

¹⁴ L'appellation «tribunal» est réservée pour les organes d'une juridiction spécifique: Tribunal Constitutionnel et Tribunal d'Etat c'est la distinction traditionnelle.

aussi la juridiction constitutionnelle (le Tribunal Constitutionnel) et le Tribunal d'Etat, organe compétent pour la responsabilité constitutionnelle des plus hautes fonctions de l'Etat. Notamment la présence au pouvoir judiciaire du Tribunal Constitutionnel fait que le pouvoir judiciaire n'est plus si «invisible et comme nul», comme l'a désigné Montesquieu. Certes, le Tribunal Constitutionnel a perdu le pouvoir d'interprétation généralement obligatoire des lois mais il a gagné le dernier mot en matière de conformité des lois à la Constitution, le pouvoir de régler les différends de compétence entre les organes constitutionnels de l'Etat et la compétence en matière de plainte constitutionnelle¹⁵. De plus, le Tribunal Constitutionnel peut, dans des cas exceptionnels, surtout quand la réalisation de la décision est liée aux finances, déterminer avec une grande tolérance quand la loi perd sa validité (même au cours de la période de 18 mois). Cela lui permet d'influer sur la politique financière du Gouvernement. Tout cela ne place pas le Tribunal Constitutionnel, pas plus que l'ensemble du pouvoir judiciaire, dans le mécanisme direct de gouvernement, mais cela lui assure une certaine influence sur chaque partie de ce mécanisme. Cela concerne aussi les autres pays post-socialistes parce que partout on a créé une juridiction constitutionnelle.

3. Etablissement du système de gouvernement

Les remarques précédentes indiquent déjà que le modèle dont se sont inspirés les auteurs des Constitutions dans tout le bloc des pays d'Europe centrale et orientale après la période communiste, a été celui du système parlementaire et que sa forme concrète dans chaque pays a été influencée par différentes conditions nationales. En Pologne, il existait tout un ensemble de ces conditions¹⁶.

Après «l'essai expérimental» qu'a été la période de validité de la loi constitutionnelle de 1992¹⁷, on a choisi consciemment certains éléments qui devaient composer la version finale du système de gouvernement admis dans la nouvelle Constitution. On peut les définir de la manière suivante.

1. Le rejet du système présidentiel. Aucun projet de Constitution présenté à la Commission Constitutionnelle du Parlement ne l'a proposé¹⁸. Bien qu'aujourd'hui, dans la presse ou à la télévision, Lech Wałęsa regrette que ce modèle-là n'ait pas été adopté en Pologne, le projet qu'il avait présenté lui-même pendant l'exercice de ses fonctions, ne comportait pas non plus une telle proposition. Il y a deux raisons principales pour lesquelles le système présidentiel n'était pas pris en considération. Premièrement, il était étranger à la tradition constitutionnelle polonaise, qui réside dans le parlementarisme et qui est très liée de ce point de vue à la tradition européenne. Deuxièmement, le système politique, et plus précisément le système des partis, établi en Pologne après 1989, ne favorisait pas

¹⁵ Voir l'article de M. W y r z y k o w s k i dans le présent numéro.

¹⁶ Voir M. K r u k : «Parlement - Président - Gouvernement...», op. cit.

¹⁷ Voir entre autres, M. K r u k : «Między konstytucją a konstytucją» [Entre la constitution et une autre], dans: *Mala Konstytucja w procesie przemian ustrojowych w Polsce* [La Petite constitution dans le processus de transformation du régime en Pologne], op. cit.

¹⁸ Voir «Jaka konstytucja...», op. cit.

l'imitation du modèle propre au système politique bipartite des Etats-Unis, puisqu'il était, comme on l'a déjà dit, multipartite et instable à l'extrême. Le caractère bipartite n'est peut-être pas la condition *sine qua non* du fonctionnement du système présidentiel mais la relation entre le Président et le parti politique qui assume la responsabilité pour sa politique, y est importante. Au début des années 1990, l'existence de ce genre de relations entre les personnalités politiques en Pologne n'était pas si évidente, surtout dans le cas de Lech Wałęsa, qui était soutenu généralement par «Solidarité» et non par un parti politique stable et important sur l'arène politique. La conviction que les processus de transformation exigent un pouvoir exécutif fort, concentré entre les mains du Chef de l'Etat, favorisait plutôt le modèle finlandais («finlandisation») ou français (Vème République). C'est justement ce modèle-là, de type gaulliste, qui était lancé par Lech Wałęsa. Mais la structure dispersée des partis politiques, qui ne garantissait pas au Président (à n'importe lequel) un soutien durable de la majorité parlementaire, y a aussi fait obstacle (rappelons que les élections parlementaires de 1993, sous la présidence de L. Wałęsa, ont été remportées par la gauche post-communiste et celles de 1997, sous la présidence de A. Kwaśniewski, par la droite de «Solidarité»). De plus, le fait que la période de transformation a été en Pologne assez longue et que les transformations y advenaient d'une manière évolutive, à commencer par les amendements successifs de la Constitution de 1952, incitait plutôt à opter pour des choix traditionnels que pour un «saut» vers une nouveauté totale.

2. Pourtant, la dispersion politique résultant du système multipartite et provoquant la peur de l'instabilité gouvernementale, a décidé de l'introduction dans le système de gouvernement des garanties de rationalisation du parlementarisme. Cette idée est apparue au moment du déclin de la Diète de la Xème législature (appelée «Diète contractuelle» 1989-1991), quand s'est manifestée la faiblesse du système de partis, confirmée ultérieurement par les élections et par la faiblesse des gouvernements successifs, surtout de celui de J. Olszewski, renversé facilement en 1991, puis de celui de H. Suchocka en 1993¹⁹.

3. La séparation conséquente des domaines d'activité du Président de la République et du Gouvernement et la séparation plus précise de leurs compétences. L'expérience précédente a décidé de la nécessité de cette opération, parce que la convergence des compétences de ces deux organes de l'exécutif provoquait de plus en plus de conflits. La conviction que ces deux organes doivent être comptés au rang de l'exécutif n'existait pas. Au début, on proposait que le Président soit exclu de la triade: législatif, exécutif, judiciaire, et qu'il occupe en tant qu'arbitre une position à part (plutôt neutre que supérieure)²⁰, quoique la «petite constitution» n'ait pas laissé de doutes quant à la qualification du Président en tant qu'élément de l'exécutif.

¹⁹ A comparer avec M. K r u k: «Le Parlement...», op. cit.

²⁰ Ce n'est qu'à la fin des travaux de la Commission constitutionnelle (automne 1996) qu'a été adopté dans le projet de Constitution une teneur claire de la formule de la séparation des pouvoirs, qui place le Président dans l'exécutif. A ce sujet voir aussi P. S a r n e c k i: «The Constitutional Role of the President of the Republic of Poland in the Light of the „Little Constitution”», *Droit polonais contemporain* 1995, n° 1-4.

L'attribution de la fonction de direction de la politique de l'Etat et de celle de l'administration courante au Gouvernement a été une conséquence de la séparation des compétences du Président et du Gouvernement.

4. Le maintien des élections présidentielles au suffrage universel et direct était un point acquis au cours de l'élaboration du système constitutionnel de gouvernement. Cela ne signifiait pas un manque de conscience quant à toutes les inconvénients résultant de ce fait, mais personne ne s'y opposait. Au contraire, tous les projets servant de base juridique aux travaux sur la Constitution prévoyaient l'élection du Président par la Nation. On a donc décidé de ne pas priver la nation de ce droit. Il paraît que ce fut la seule raison rationnelle de la conservation de ce type d'élection du Chef de l'Etat, surtout dans le contexte du système considéré dans son ensemble. Les tentatives de retour à l'élection du Président par l'Assemblée Nationale (chambres réunies), entreprises par la Commission constitutionnelle, n'ont pas réussi. Il convient de rappeler qu'en 1989 le premier amendement à l'ancienne constitution, après la «Table Ronde» ouvrant la voie aux transformations de régime, a introduit la fonction de Président (à la place du Conseil de l'Etat) élu justement par les chambres unies, conformément à la tradition polonaise de la période de l'entre-deux-guerres et de l'après-guerre jusqu'à 1952. Ce n'est que le changement accéléré au poste de Président en 1990 (après la démission de W. Jaruzelski), qui a provoqué la décision politique concernant l'élection au suffrage universel. Les raisons d'une telle option politique n'ont pas trouvé jusqu'à aujourd'hui une explication objective.

Les réserves envers les élections présidentielles au suffrage universel ont été diverses. Généralement, on indique leur inadaptation au système de cabinet. C'est très juste, surtout que le système des partis politiques en Pologne ne remplissait pas les conditions telles qu'on peut les trouver en France, par exemple, sous la Vème République²¹. Dans une autre variante, plus proche du système parlementaire traditionnel, la position du Président, qui présente son programme politique au cours d'une campagne électorale (ce qui paraît inéluctable) et gagne les élections grâce à ce programme, serait potentiellement concurrentielle par rapport au gouvernement. Dans ce cas, on aurait affaire soit à un conflit perpétuel, soit à l'impossibilité de tenir les promesses électorales, car le Président ne dispose pas de compétences et moyens suffisants pour mettre en oeuvre son programme. C'est ce qui a fait l'objet de maintes plaintes de la part de L. Wałęsa, accusé de ne pas avoir réalisé son programme (l'une des promesses électorales qu'il n'a pas tenues, a fait même l'objet d'une plainte judiciaire). Il n'est pas à exclure que de pareils reproches seront adressés au président actuel.

Cependant, la décision de maintenir les élections présidentielles au suffrage universel n'a pas été complètement «ignorée» lors de la construction du système de gouvernement et des rapports entre les organes centraux de l'Etat. C'est pourquoi, le Président jouit en Pologne d'une position plus forte, et son champ de compétence ne se

²¹ Ce n'est qu'à présent que se dessine le système de parti «bipolaire», qui ne garantit pas encore la stabilité. Qui plus est, plusieurs politiciens qui prétendaient au poste de Président, n'étaient pas membres de grands partis qui pourraient leur garantir un appui au Parlement.

limite pas à «inaugurer les chrysanthèmes», comme c'est le cas par exemple en Slovénie où le Président, élu au suffrage universel, est, en principe, dépourvu de tout pouvoir. Dans la nouvelle Constitution polonaise le statut du Président est un compromis entre la tendance à l'éloigner du processus de gouvernement et la tentative de lui assurer un pouvoir réel. Ainsi, à côté du rôle déjà mentionné, à propos de la caractéristique du pouvoir exécutif, le Président possède des instruments efficaces pour équilibrer les relations entre l'exécutif et le législatif, principalement dans le but de stabiliser la position du Gouvernement et d'éliminer «la diétocratie»²². Par contre, il n'exerce pas le rôle d'organe dirigeant, et n'est pas responsable de l'activité du Gouvernement, qu'il peut cependant inspirer ou orienter.

4. Un système parlementaire, mais lequel?

Les conditions présentées ci-dessus contribuent à un certain système global de gouvernement, dans lequel le rôle principal est joué, comme toujours, par le Président de la République, le Parlement et le Gouvernement. Mais c'est ce dernier qui est le centre de ce système. En effet, selon la Constitution, il lui appartient de «conduire la politique intérieure et étrangère» de l'Etat, de «diriger les affaires relatives à la politique de l'Etat qui ne sont pas réservées aux autres autorités de l'Etat et des collectivités territoriales», ainsi que «de diriger l'administration gouvernementale». Le Gouvernement est nommé par le Président de la République d'une façon classique pour les systèmes parlementaires, avec l'application supplémentaire de certaines mesures de protection contre les effets d'un éventuel démembrement politique du Parlement (et plus précisément de la Diète, car elle seule, participe à la formation du Gouvernement). Ainsi, le Président désigne le Premier ministre et, sur proposition de ce dernier, il nomme tous les membres du Conseil des ministres et reçoit serment de chacun d'eux. Une fois le Gouvernement formé, le Premier ministre présente son programme au Parlement en déposant une motion de confiance qui est votée à la majorité absolue (toute cette procédure est réalisée dans le délai précisé par la Constitution qui octroie 14 jours pour chaque étape). Pour écarter le risque du manque de soutien au Gouvernement de la part du Parlement, voire de l'impossibilité de nommer le Gouvernement par le Président (des cas de tentatives manquées de former le Gouvernement par le Premier ministre désigné ont eu lieu dans la pratique constitutionnelle²³), le constituant a prévu la possibilité d'une procédure nouvelle, qui donne l'initiative au Parlement. Dans ce cas, c'est le Parlement qui élit le Gouvernement. Cependant, le manque de prévoyance de la part des politiciens ne

²² Expression utilisée en Pologne, dans le passé, pour caractériser l'hypertrophie du pouvoir du Parlement.

²³ Pour la première fois en 1989, quand le gén. Kiszczak, membre de l'équipe de Jaruzelski, organisateur de la Table Ronde, désigné pour être Premier ministre après l'entrée de l'opposition au Parlement suite aux élections des 4-18 juin 1989, n'a pu accomplir cette mission. C'est T. Mazowiecki qui l'a ensuite remplacé au poste de Premier ministre. De même, en 1992, J. Olszewski avait du mal, pendant quelques semaines, à former le Gouvernement. La formation du Gouvernement par W. Pawlak a aussi échoué et le Premier ministre a démissionné en faveur de Mme Suchocka.

décourage pas trop facilement le constituant, car même si cette tentative échoue, l'initiative revient au Président, et la procédure se répète. La seule différence qui apparaît est que pour voter la motion de confiance, la majorité simple suffit. En cas d'échec de cette dernière solution, le Président dissout le Parlement et ordonne de nouvelles élections. Il faut rappeler que la «petite constitution» prévoyait, dans ce cas, d'autres possibilités de former le Gouvernement, jusqu'à la création d'un gouvernement présidentiel. Cependant, on a admis que le Gouvernement formé avec tant d'efforts n'aurait pas eu de chance de jouir d'un appui durable au Parlement et qu'il valait mieux abréger cette procédure lourde et fatigante, pour faciliter en pratique «l'arrangement» entre partis politiques dans le but de former une coalition au Parlement.

Ce mode de formation du Gouvernement nous dévoile les éléments suivants, qui caractérisent le système de gouvernement: premièrement, le Gouvernement doit jouir de l'appui de la majorité parlementaire, ce qui indiquerait la possibilité potentielle de pratiquer le parlementarisme majoritaire²⁴. Cependant, les mesures de protection signalées plus haut suggèrent que le constituant prévoit aussi que les circonstances politiques peuvent empêcher l'application d'une telle solution. Deuxièmement, le rôle du Président est réduit au seul aspect organisationnel, bien que, dans certaines situations précises, la formation du Gouvernement puisse dépendre de son habileté politique. Cependant, toutes les tentatives du Président de faire passer sa propre conception politique ou même personnelle lors de la formation du Gouvernement sont condamnées à l'échec. Il est essentiel - et c'est une remarque qui peut s'avérer difficile à comprendre pour les observateurs de la vie politique dans les pays de la démocratie occidentale - que les principaux acteurs de la scène politique, notamment le Président, comprennent et acceptent les règles du jeu parlementaire. Le Président doit se rendre compte que ce sont les résultats des élections et les coalitions formées par les partis politiques, et non pas ses préférences personnelles, qui décident de la nomination au poste de Premier ministre. En tout cas, la tentative du Président Wałęsa, qui exigeait à l'époque de la coalition formant le Gouvernement de présenter à son choix trois candidats au poste de Premier ministre, n'a pas réussi. De même que n'a pas été accepté le principe bien connu selon lequel c'est le chef du parti le plus fort qui prend ce poste. En Pologne, où depuis 1989 les gouvernements ont été formés par des coalitions (difficiles elles-mêmes à former), ce principe n'a jamais été appliqué, pour plusieurs raisons qui pourraient faire l'objet d'une analyse plutôt politologique que constitutionnelle.

Dès le début de la mise en oeuvre d'un nouveau système de gouvernement en Pologne (1989), il était évident que celui-ci serait tributaire, durant des années, d'un système multipartite instable. Afin de limiter son incidence négative sur le Parlement (entre autres, la facilité de formation des majorités dites «négatives»), l'on a introduit dans les dispositions de la «petite constitution», en 1992, l'institution du vote de défiance constructif, imitée sur le modèle allemand. Toutefois, l'existence de ce nouvel instrument - faute d'expérience ou de règles précises dans son application - n'a pas pu

²⁴ Voir: Le régime parlementaire (J.GI) dans: O.Duhamel, Y.Meny, *Dictionnaire Constitutionnel*, PUF, 1992.

sauver le Gouvernement de Mme Suchocka en 1993 et a conduit, en conséquence, à la dissolution du Parlement²⁵. A cette occasion, une fois de plus, la méconnaissance des règles du jeu de la part des politiciens s'est fait sentir de manière manifeste, car cette dissolution a stupéfait grand nombre de députés, alors que les commentateurs de presse ont fait observer que «la Diète s'était renversée elle-même». Dans la nouvelle Constitution, la clause de vote de défiance constructif est plus explicite, la procédure de dépôt de la demande est plus complexe (elle exige la signature de 46 députés, c'est-à-dire de 1/10 de la composition de la Diète; le vote ne peut avoir lieu qu'après 7 jours suivant le dépôt, la demande n'est pas renouvelable pendant trois mois, à moins qu'elle ne soit signée par 115 députés). Au cours de l'élaboration de la Constitution, est apparu un différend concernant le droit de révoquer les ministres par la voie du vote de défiance. Les partisans de la mise en oeuvre de tous les moyens possibles pour éviter la déstabilisation du Gouvernement étaient contre cette mesure. Cette mesure existe, mais son application est très difficile, car le dépôt de la motion exige la signature de 69 députés au moins. Il semble que la possibilité d'exprimer la défiance envers les ministres individuellement ne soit pas redoutable et qu'elle permette de résoudre la situation conflictuelle entre le Parlement et le Gouvernement par le biais du moindre mal. Il faut tenir compte du fait qu'en Pologne les coalitions ne sont pas monolithiques. Souvent elles sont formées par des partis dont les programmes ont peu en commun. Les «rébellions» parlementaires visant le Gouvernement arrivent assez souvent. D'autre part, il est vrai aussi que le ministre suscitant une opposition au sein de la coalition, peut être révoqué, sur proposition du Premier ministre, par le Président.

Cette prévoyance, si loin poussée, dont le but est d'empêcher la déstabilisation du Gouvernement par la majorité négative, est affaiblie par une autre clause qui, elle-aussi, avait à l'origine un caractère de parlementarisme rationalisé. Il s'agit d'une disposition constitutionnelle autorisant le Premier ministre à s'adresser à la Diète pour se faire accorder le vote de confiance. La Constitution ne prévoit pas de conséquences concrètes pour cet acte (telles que, par exemple, l'acceptation d'une demande du Gouvernement ou le vote de la loi, comme c'est le cas en France). En conséquence, le Premier ministre qui demande un vote de confiance, accomplit une manifestation strictement politique, en comptant sur une répercussion en fonction du contexte, mais aussi bien ce vote peut être défavorable pour lui et dans ce cas le Président est obligé de recevoir la démission du Gouvernement. Le risque est disproportionné par rapport aux avantages, et la clause elle-même peut servir, dans certains cas, à la manipulation constitutionnelle.

Comme cela a déjà été mentionné, la nouvelle Constitution polonaise «éloigne» le Président de la République du Gouvernement. Pour atteindre ce but, on a annulé la possibilité de convoquer des réunions gouvernementales sous la direction du Président, qui était prévue dans la «petite constitution» (cette possibilité est revenue sous une autre forme), ainsi qu'on a abandonné le principe selon lequel le chef du Conseil des Ministres informe le Président des problèmes principaux étant l'objet des travaux du Gouvernement. La Constitution ne laisse pas de doutes que la demande du Président du

²⁵ Le Président Lech Wałęsa a refusé la démission du Gouvernement et il a dissout le Parlement.

Conseil des Ministres de démissionner le ministre ne donne pas au Président de la République le droit de décider du sort du ministre, comme l'interprétait le Président L. Wałęsa, en se basant sur une clause imprécise de la «petite constitution» (qui prévoyait qu'à la demande du Premier ministre, le Président *pouvait* procéder à des changements dans la composition du Gouvernement, ce qui constituait l'inverse de la situation précédente). Dans le texte de la Constitution l'on a éliminé toute ambiguïté et imprécision résultant des formules qui prévoient le parallélisme des compétences du Président et du Gouvernement dans un domaine donné, disant que le Président «exerce la direction générale» dans le domaine de la sécurité intérieure et extérieure de l'Etat, ainsi que dans le domaine des relations internationales. Qui plus est, cette compétence de «direction générale» n'a pas disparu de la Constitution, mais elle a été additionnée aux compétences du Gouvernement, ce qui ne laisse plus aucun doute en la matière. Enfin, on a supprimé de la Constitution le principe qui était la manifestation de cette direction générale, mais qui était interprétée par l'ancien Président de manière à lui garantir la nomination des ministres des Affaires Etrangères, de l'Intérieur et de la Défense Nationale, issus de son propre camp politique, même s'ils n'appartenaient pas à la majorité gouvernementale. Ainsi, après le retrait de L. Wałęsa, ces trois ministres, malgré la proposition de rester dans le Gouvernement, ont démissionné, sans cacher leur loyauté vis-à-vis du Président et non pas du Premier ministre et du Gouvernement²⁶.

La pratique constitutionnelle a, en plus, «mis le point sur les i», car le Gouvernement du Premier ministre J. Buzek, formé par «Solidarité» (après les élections de 1997) s'est vivement opposé à la participation du représentant du Président Kwaśniewski aux réunions du Gouvernement, excepté les invitations spéciales, ce qui n'était pas conforme à la coutume de la participation permanente. Il est vrai que le Premier ministre et le Président de la République se sont rencontrés pour discuter sur ce sujet et que l'on a annoncé la continuation de telles rencontres, mais cette coutume ne s'est pas encore enracinée. Côté Président, on argumentait que la Constitution exige la coopération des pouvoirs (ce postulat est compris dans le préambule de la Constitution), qui peut être réalisée par une participation permanente du représentant du Président aux réunions du Gouvernement, permettant de connaître directement non seulement les travaux du Gouvernement, mais aussi les motifs de ses décisions. Cette argumentation a été étayée du refus du Président de la République de signer une loi à d'importantes conséquences financières²⁷, mais cette leçon n'a servi à rien.

Dans cette situation, le Président a décidé de profiter de ses autres compétences lui donnant la possibilité d'avoir une certaine influence sur la politique du Gouvernement, qui sont assez nombreuses. Commençons par l'institution, qui n'a pas encore fait ses preuves (bien qu'elle ne constitue pas un instrument nouveau), mais qui a été utilisée pour la première fois par le Président dans ce cas concret. Il s'agit du Conseil de Cabinet. Contrairement à la tradition française, le Conseil de Cabinet n'égale pas le

²⁶ La «petite constitution» elle-même prévoyait que la nomination de ces ministres exigeait un avis simple du Président, lequel a préféré une autre interprétation, ne suscitant - à vrai dire - qu'une faible résistance de la part des Premiers ministres.

²⁷ Cela concerne la suppression des retraites qui, grâce au veto présidentiel, ont été maintenues.

Conseil des Ministres sous la direction du Premier ministre, mais bien au contraire, le Conseil des Ministres sous la direction du Président de la République et convoqué par lui. Cette institution existait en Pologne dans les années 1947-1952, mais elle n'a jamais été mise en œuvre. Son idée a été reprise dans la loi constitutionnelle de 1992 sous forme d'un règlement autorisant le Président à convoquer, dans les cas d'importance cruciale, la réunion du Gouvernement et à la présider, mais sans utiliser le nom de «Conseil de Cabinet». De toute façon, de telles réunions n'ont pas été convoquées, bien que le Président de la République ait participé aux réunions du Conseil des ministres. La Constitution de la République de Pologne a repris cette idée sous le nom du Conseil de Cabinet, mais sans lui attribuer de compétences propres au Gouvernement.

La convocation du Conseil, à la suite du conflit évoqué ci-dessus, a ranimé cette institution, ainsi que le débat autour de la question de l'absence de toute compétence de pouvoir de sa part. C'est vrai qu'en formant ainsi le Conseil de Cabinet, la Constitution a bloqué le chemin que le Président aurait pu emprunter pour intercepter la gestion du Gouvernement, mais elle a laissé subsister un forum où le Président peut être entendu et obtenir des informations. A condition que le Gouvernement veuille bien les lui donner, car aucune disposition constitutionnelle ne l'y oblige. Toutefois, indépendamment de l'attitude émotionnelle du Gouvernement actuel à l'égard du Président de la République, le Conseil de Cabinet peut s'avérer (on en a déjà prévu une session suivante) un élément liant le Président et le Gouvernement. Il offre surtout, si les intéressés veulent bien en profiter, un moyen de coopération confortable, sans violer «l'autonomie» du Gouvernement dans le domaine de la politique d'Etat.

Cependant, la Constitution définit les domaines de la politique où les compétences du Président et celles du Gouvernement interviennent en même temps. Ce sont les domaines résultant de la position constitutionnelle du Président en tant que représentant supérieur de l'Etat ainsi que garant de la souveraineté et de la sécurité de l'Etat. La version antérieure de la Constitution, qui permettait du Président de la République de nommer les trois ministres dont il était question ci-dessus, a provoqué la prudence extrême du législateur à l'égard de ce problème. D'où, une détermination minutieuse des compétences du Président. De plus, lors de la définition des compétences du Gouvernement, la Constitution se sert du concept de, présuppositions de compétences en faveur du Gouvernement, dans les limites non réservées aux autres autorités. Ainsi toute compétence précise, qui est attribuée au Président de la République par la Constitution, ne devrait pas éveiller de doutes. C'est à ce groupe de dispositions qu'appartient l'article 133 de la Constitution, comportant des indications précises sur les compétences du Président dans le domaine des affaires étrangères et internationales (ratification, nomination et réception des représentants diplomatiques). Il faut y ajouter l'article 134 concernant les compétences du Président à l'égard de l'armée (commandement suprême, nomination des commandants) et le chapitre XI de la Constitution réglant les mesures d'exception (y compris les compétences des organes divers, relatives à leurs gestion, activité et contrôle). La pratique récente a remis à l'ordre du jour quelques questions, bien qu'il y ait un accord politique général sur les objectifs de la politique étrangère ainsi que sur ceux de la défense. On note un conflit entre le ministre des affaires étrangères

et le Président sur la procédure de révocation des ambassadeurs. La nomination et la révocation des ambassadeurs sont, de façon évidente, de compétence du Président, mais le ministre, après avoir déposé une proposition de révocation, affirmait que le rôle du Président ne ressemblait qu'à celui d'un notaire ou d'un chancelier n'accordant à la décision fondamentale du ministre qu'une forme officielle. Un autre différend qui s'est manifesté à l'occasion du vote d'une loi en février 1998, était dû à la nécessité de décider si les forces militaires peuvent être envoyées à l'étranger par le Gouvernement sur la base de l'avis du Président ou bien par le Président sur proposition du Premier ministre. Les deux conflits ont été résolus en faveur du Président, ce qui prouve que ses compétences limitées sont pourtant réelles (pour ce qui est de la première question, le Président a en effet donné suite à la proposition du ministre; le problème a été résolu grâce à un arrangement entre le Président et le ministre), mais cela n'a pourtant pas mis fin au problème en général. Juste après, a été publiée une interview avec le ministre de la défense, qui prévoit que des différences d'interprétation de la Constitution concernant le problème de la suprématie sur la défense nationale «peuvent resurgir»²⁸. La Constitution dispose que c'est le Président, par l'intermédiaire du ministre, qui exerce le commandement suprême, alors qu'à la question «qui commande l'armée?» le ministre répond: «moi», en s'appuyant sur l'exemple de la reine de Grande Bretagne, comme modèle de commandement à suivre (cette fois on ne cite pas la France). La solution de cette question exige donc l'élaboration d'une loi, afin d'éviter de pareils différends à l'avenir. Et on se référant à l'interview mentionnée ci-dessus, il reste à résoudre le problème de la nomination du Commandant en chef des Forces armées en cas de guerre²⁹.

Les autres formes d'influence du Président sur la politique peuvent être réalisées par le biais de ses compétences en matière législative³⁰. Il s'agit ici du droit d'initiative législative que la Constitution polonaise a déjà accordé au Président antérieurement (en 1989, le Président l'a hérité du Conseil d'Etat), du droit de refus de signer une loi et de son renvoi à la Diète, avec l'avis motivé, pour réexamen ou de la soumettre au Tribunal Constitutionnel pour avis sur sa conformité à la Constitution (en vertu de la Constitution actuelle, ce n'est que cette dernière procédure qui peut être appliquée à la loi budgétaire). Les compétences citées ci-dessus peuvent servir au Président à la réalisation des autres objectifs, et notamment à l'arbitrage (y compris l'arbitrage politique, par exemple entre la majorité et l'opposition), au maintien de la continuité du pouvoir ou enfin pour veiller au respect de la Constitution. Ce qui suscite les discussions les plus vives c'est l'attribution au Président de l'initiative législative, et surtout sans contreseing, car elle peut devenir ainsi un instrument de concurrence face au Gouvernement - l'autre segment du pouvoir exécutif. C'est pour cette raison que ce «dualisme» apparaît rare-

²⁸ P. W r o ń s k i, «Komu wojsko?» [Pour qui l'armée?], *Gazeta Wyborcza* du 17 mars 1998.

²⁹ Selon la Constitution, le Commandant en chef des Forces armées est nommé par le Président sur proposition du Premier ministre; le ministre affirme «qu'il faudrait que ça soit le Premier ministre», comme en Allemagne.

³⁰ Une analyse détaillée de ce phénomène dans la réalité polonaise antérieure, a été effectuée par J. W a - w r z y n i a k: «Udział prezydenta w ustawodawstwie» [La participation du Président...], dans: «*Mala Konstytucja*» na tie..., op. cit.

ment (même dans les pays de l'Europe post-socialiste, il n'existe qu'en Albanie, Lituanie, Hongrie, Ukraine et Russie). Il se peut qu'en réalité cette solution ne manifeste guère de caractère destructif. Dans certaines conditions, elle peut même avoir des effets positifs, mais ceci constitue une question à part. Il est toutefois intéressant que la société semble s'attendre aux initiatives présidentielles, comme le laissent deviner, par exemple, les articles de presse reprochant au Président de ne pas proposer de lois afin d'initier une nouvelle politique culturelle³¹.

La dissolution du Parlement, admise dans l'amendement de la Constitution en avril 1989, constitue un des instruments typique des checks and balances. A l'époque le contrôle du Président de la République sur le Parlement, où l'opposition aurait dû siéger, était garantie par la disposition admettant la dissolution de la Diète, si celle-ci «prend une résolution qui ne permet pas au Président d'effectuer ses devoirs constitutionnels...» concernant, entre autres, la surveillance de la réalisation des alliances internationales politiques et militaires (la Pologne était alors membre du Pacte de Varsovie et du Comecon). Depuis lors, les compétences du Président relatives à la dissolution du Parlement ont été considérablement limitées et précisées. La nouvelle Constitution prévoit deux cas justifiant la dissolution de la Diète et du Sénat, lequel est obligé de démissionner en même temps. L'un exige la dissolution obligatoire - au cas où le Parlement ne se voit pas accorder un vote de confiance dans la situation mentionnée ci-dessus; l'autre prévoit la dissolution - si, dans le délai de quatre mois après la présentation du projet gouvernemental, le Parlement n'arrive pas à voter le budget (ne le dépose pas à la signature du Président de la République).

On peut facilement constater, que ces deux cas de dissolution conviennent au Gouvernement et appartiennent à l'arsenal présidentiel permettant de diminuer la domination du Parlement sur le pouvoir exécutif. Cela peut avoir de l'importance notamment en cas de rupture du pouvoir législatif, ce qui impliquerait son impuissance à agir et bloquerait le Gouvernement. L'autre situation, grâce au caractère facultatif des décisions présidentielles, devient un moyen d'arbitrage classique entre le Gouvernement et le Parlement. Aucun des cas admettant la dissolution du Parlement n'exige de motion de la part du Premier ministre. Ces décisions ne sont pas non plus contresignées.

C'est en effet le contreseing des actes officiels du Président de la République qui constitue un des éléments du fonctionnement des mécanismes de pouvoir et qui, dans la pratique constitutionnelle, n'est pas suffisamment précis³². Le problème vient du fait que, dans la conscience des hommes politiques, le contreseing constitue davantage un instrument de dépendance du Président de la République à l'égard du Gouvernement qu'une responsabilité à assumer. La très large étendue des actes présidentiels exemptes de l'obligation de contreseing, donne la preuve des inquiétudes face au contreseing, quoique la Constitution précise que c'est le Premier ministre contresignant «qui engage ainsi sa responsabilité devant la Diète». Même si les différents aspects et l'application

³¹ En reprochant au Président que la Carte de la Culture polonaise n'est qu'un geste vide, P. S a r z y ń - s k i: «Pusty gest» [Un geste vide]. *Polityka*, n° 11, 14 mars 1998.

³² Déjà sous l'empire de la «petite constitution», la procédure du contreseing était, indirectement, objet d'un arrêt du Tribunal Constitutionnel (W 1/ 95 et W 6/ 95).

de cette procédure ont déjà été largement discutés lors d'un forum de sciences politiques, ainsi que lors des arrêts prononcés par le Tribunal Constitutionnel, aucun différend direct relatif à cette problématique, issu par exemple d'un rejet démonstratif d'application du contreseing, ne s'est encore manifesté. D'où la difficulté de prévoir l'interprétation qui l'emporte aujourd'hui: qui doit céder: le Président de la République ou le Premier ministre? Toutefois, il ne semble pas que la démission du Premier ministre soit prise en considération, vu les relations tendues entre les organes intéressés.

Le large catalogue d'exceptions à l'obligation du contreseing prouve l'existence de prérogatives, pour lesquelles le Président de la République n'assume qu'une responsabilité constitutionnelle. Ceci fait partie de la logique de l'institution du Président élu directement par la Nation, politiquement responsable de ses actes devant la Nation et disposant ainsi d'un pouvoir réel. Ces prérogatives constituent donc une sorte de concession en faveur de ce mode d'élection du Président³³. Cela permet en même temps de préserver une certaine zone décisionnelle de conflits politiques, de la «dépolitiser» d'une certaine façon. Du fait du maintien d'une distance institutionnelle par rapport aux décisions politiques courantes, le Président de la République apparaît plutôt apolitique. Le législateur constituant polonais en a profité pour accorder au Président la compétence de nomination des juges et des présidents de la Cour Suprême, du Tribunal Constitutionnel et de la Haute Cour Administrative, ainsi que celle de proposition de nomination du Président de la Banque nationale de Pologne (la banque centrale). Néanmoins, la nomination d'une partie des membres du Conseil de la Politique monétaire ou du Conseil national de la Radiophonie et de la Télévision, constituent un élément du mécanisme de partage et d'équilibre de compétences entre les organes qui devraient sauvegarder leur l'indépendance et leur impartialité.

Le troisième participant à ce mécanisme de gouvernement, le Parlement, a dans ce contexte deux visages. Le premier - comme corps législatif, considéré comme un tout. L'autre comme organe permettant la coexistence d'une majorité et d'une opposition. Pour une grande part, le rôle du Parlement a déjà été présenté. Ce qui est important pour la séparation des pouvoirs, c'est avant tout son droit exclusif de voter les lois. Afin de compléter cette image, il faut ajouter que la loi occupe, dans le système des sources du droit polonais, un rôle particulier. Non seulement elle est, après la Constitution, le premier acte normatif de la hiérarchie (sauf le statut des traités internationaux), mais encore elle n'a pas de «concurrent». Dans cette catégorie des normes générales en vigueur, la Constitution n'admet que les règlements édictés par un nombre restreint de sujets (principalement le Gouvernement et les ministres), et toujours précisément prévus par la loi respective, laquelle contient même des indications concernant le contenu du règlement. Le Parlement effectue ainsi un certain contrôle préliminaire du pouvoir réglementaire³⁴.

³³ Comme a remarqué J. Cie m n i e w s k i dans son article précité «l'introduction en 1989 des leçons directes du Président dans le système constitutionnel n'a impliqué aucun changement dans ses compétences; cela avait donc une valeur autonome». Toutefois, ce fût par la suite un argument pris en compte lors des discussions.

³⁴ Le règlement de la Diète prévoit cependant que doivent être annexés, au projet de loi, les projets de règlements prévus dans cette loi.

la Constitution accorde aux traités internationaux ratifiés un rang supérieur aux lois, en cas de leur incompatibilité réciproque c'est le Parlement qui doit prononcer, par voie législative, l'autorisation de ratifier les traités concernant les domaines prévus dans la Constitution. Ainsi, aussi bien du point de vue formel que sur le fond, le pouvoir législatif du Parlement est maximalelement protégé.

En ce qui concerne la procédure législative, le Gouvernement n'a pas beaucoup de prérogatives. Dans ce domaine, la recherche des instruments de rationalisation n'a pas donné de résultats comparables aux modèles français ou allemand (en réalité, on ne les recherchait pas trop). Parmi les plus importants, il faut citer la procédure d'urgence, qui signifie qu'un projet de loi défini comme urgent (sauf exceptions), a la priorité devant les autres et est examiné plus vite. Le Gouvernement n'est pas le seul à déposer les projets de loi. C'est aussi l'attribution des députés, qui déposent beaucoup plus de projets que le Gouvernement, et même plus que les autres sujets dans leur ensemble (en plus, le droit d'initiative appartient non seulement au Président de la République, au Sénat et aux commissions parlementaires, mais aussi à 100 000 citoyens; pour l'instant, il manque une loi définissant les conditions de réalisation de l'initiative des citoyens). Comme la Constitution ne prévoit, en principe, aucune procédure susceptible de restreindre les projets parlementaires (ils sont égaux aux projets gouvernementaux), le nombre de lois issues des députés et du gouvernement est presque le même. Souvent, l'on présente aussi des propositions parlementaires concurrentes.

En outre, en dehors des points déjà décrits (dissolution des chambres parlementaires, veto législatif ou saisine du Tribunal Constitutionnel), le Parlement n'est plus exposé à d'autres ingérences de la part de l'exécutif. Le Président proclame les élections, convoque la première séance plénière de la Diète et du Sénat, signe les lois dans les délais prévus par la Constitution. Le Président a aussi le droit d'adresser un message à la Diète, au Sénat, à l'Assemblée Nationale, de même que de participer aux sessions des chambres et de proposer des amendements, s'il est l'auteur du projet débattu. Le Gouvernement jouit des compétences plus importantes dans la procédure législative.

Les relations avec le Gouvernement divisent les députés en majorité et opposition. Mais de nombreuses coalitions, souvent incohérentes, multilatérales, intérieurement brouillées, s'astreignant difficilement à la discipline, font parfois disparaître cette frontière³⁵. Il n'y a que la séparation claire entre les «post-communistes» et les parties issues de «Solidarité» qui persiste toujours et «met de l'ordre» sur la scène parlementaire polonaise. L'opposition a plus souvent recours aux institutions de contrôle (notamment aux interpellations, questions, motions de procédure, dernièrement un peu restreinte dans le règlement de la Diète). De même, elle se plaint plus volontairement du non-respect de ses droits, pas nécessairement sans raison, surtout à l'occasion de la répartition des postes parlementaires (la conviction que le vainqueur prend tout, s'est déjà manifestée plus d'une fois au sein du Parlement, mais dans son effet final, elle a toujours été un peu bridée). Mais ni la domination de la majorité, ni la discrimination de

³⁵ Au printemps 1998, pendant de longues semaines, la Diète n'a pas pu élire l'inspecteur des données personnelles, en raison des divisions internes tant au sein de la majorité que de l'opposition.

l'opposition n'ont de caractère absolu. Pour toutes les décisions du Parlement, qui exigent une majorité qualifiée, les voix de l'opposition sont nécessaires. Parfois, il arrive que la coalition gouvernementale perde un vote à cause des absences dans l'hémicycle. A titre d'exemple, on peut rappeler le renversement du Gouvernement de Hanna Suchocka (il a manqué des voix de députés de la coalition au pouvoir, ci-inclus le vote d'un ministre qui est venu en retard). C'était aussi le cas du vote concernant un ordre du jour important pour le Gouvernement (mars 1998) où des l'absences, a côté de l'opinion contraire d'une partie de la majorité, ont été à l'origine du vote perdu.

En somme, la Constitution a créé un Parlement fort, qui peut poser des problèmes au Gouvernement en cas de manque de discipline de vote de la majorité ou quand il y a une différence essentielle d'opinion entre la majorité et l'opposition, si la décision exige une majorité qualifiée (rejet d'un veto présidentiel ou modification de la Constitution³⁶). Et aussi, bien entendu, s'il perd l'appui de la coalition majoritaire.

Pourtant, la fonction de contrôle qui appartient à la Diète, quoique non trop «corseée» par les procédures excessives, favorables au Gouvernement, est nettement limitée aux régies du système parlementaire, où elle doit servir à la mise enjeu de la responsabilité politique du Gouvernement. La Constitution esquisse les limites de ce contrôle en constatant que «La Diète, l'exécute dans le cadre prévu par la Constitution et par la loi», ce qui rend impossible l'élargissement de ce cadre (par exemple par règlement intérieur de la Diète qui n'a pas de forme de la loi) jusqu'à l'acquisition des compétences gouvernementales exécutives. De telles inquiétudes résultaient justement du phénomène de conservation des habitudes acquises pendant la période de plein pouvoir parlementaire. A cette époque, le contrôle - très large quant aux principes - était toutefois, quant aux effets, assez illusoire, et il ne constituait aucun danger pour la séparation des pouvoirs, parce que cette séparation n'existait pas. Une des premières questions pratiques à résoudre dans ce domaine était la suppression en 1997 - très contestée par l'opposition - de l'usage d'auditionner en commissions parlementaires les candidats aux postes de ministre, ce qui n'est quère justifié dans la situation où le Gouvernement est nommé en bloc.

Quoique, avec le rejet du principe d'homogénéité du pouvoir (suprématie du parlement), la fonction parlementaire de définir les politiques d'Etat ait disparue, a été conservée la possibilité, utilisée par le Parlement (et aussi par la Diète et le Sénat indépendamment), d'adopter des résolutions d'une importance politique plus large, qui ne répondent que partiellement aux exigences des procédures de contrôle. Elles résultent de certains débats politico-économiques, par exemple sur la politique étrangère de l'Etat, sur l'état de préparation de la Pologne à l'intégration européenne, sur l'état de l'ordre et de la sécurité publiques. Ces résolutions contiennent des propositions adressées au Gouvernement et censurent les politiques gouvernementales. Le Parlement profite ici de sa position en tant que représentant du souverain. A part cela, la Diète exerce toutes les autres formes de contrôle, comme par exemple l'examen des rapports du Défenseur des Droits Civiques (ombudsman) et de la Chambre Suprême de Contrôle.

³⁶ Ainsi, dernièrement, a été gelée l'initiative de modification de la Constitution en matière de limitation de l'immunité parlementaire, car l'opposition et le Président ne cachent pas leur réticence aux changements de la Constitution.

L'analyse, même si générale qu'elle est présentée ici, montre un mécanisme assez clair, bien qu'il ne soit pas toujours conséquent. On voit que le système de gouvernement créé par la Constitution se caractérise: premièrement, par la volonté de non rétrécissement des compétences de la Diète (et du Parlement en général) en tant qu'organe représentatif, ainsi que par des efforts en vue de minimaliser les effets pervers de l'atomisation des partis politiques; deuxièmement, par une séparation assez nette des compétences du Gouvernement et du Président de la République; troisièmement, par la création des possibilités de coopération entre les trois partenaires, à savoir, le Parlement, le Président et le Gouvernement, sans pour autant éliminer le risque d'un éventuel conflit (dans ce domaine la pratique peut être décisive pour la fixation du système de gouvernement, même si la Constitution ne laisse pas trop de place pour un conflit grave); quatrièmement, par l'entrée en vigueur des mécanismes d'interdépendance réciproque et de modération, c'est-à-dire du système traditionnel d'«équilibres et de freins». On peut dire que, avec tous les éléments étrangers à un système parlementaire classique tels que les élections présidentielles au suffrage universel direct, le système constitutionnel de gouvernement, en Pologne contemporaine, tire son origine de la démocratie parlementaire et du système parlementaire (en Pologne, on emploie plus souvent le terme de «système de cabinet»), avec les éléments de rationalisation et de renforcement de la position du Président. Ce n'est pas un modèle qui réponde au système parlementaire - présidentiel, proposé ces derniers temps en doctrine (non développée ici), parce que ce sont avant tout le Parlement et le Gouvernement qui prennent part au processus de gouvernement.

Pourtant, dans le monde contemporain, le Parlement, le Gouvernement et le Chef de l'Etat, ne sont ni les seuls à exercer le pouvoir public, ni entièrement indépendants dans cette tâche. C'est pourquoi, en analysant un système de gouvernement, on ne peut omettre le contexte dans lequel ce système est inséré. Il y a plusieurs éléments, pas seulement institutionnels, qui font partie de ce milieu. Ceux qui appartiennent au domaine institutionnel, ce sont surtout la juridiction constitutionnelle incluant la plainte constitutionnelle, susceptible de mettre fin aux actes normatifs contraires à la Constitution et de résoudre les conflits relatifs aux compétences, et ensuite la juridiction administrative, qui statue sur la légalité des décisions administratives. Enfin, ce sont les organes de protection du droit, tels que le Défenseur des Droits Civiques, le Conseil national de la Radiophonie et de la Télévision (organe indépendant qui veille au respect de la liberté des médias et qui accorde les concessions) et l'organe spécialisé de contrôle, indépendant de l'administration, à savoir la Chambre Supême de Contrôle. Il y a enfin une banque centrale, autonome. Tout cela constitue un réseau d'institutions qui renforce ou rétrécit les éléments particuliers composant le système de gouvernement *sensu stricto*.

A cela s'ajoutent des éléments d'un autre caractère: la décentralisation du pouvoir qui prend la forme d'autogestion des collectivités locales, un catalogue très large des droits des citoyens et des droits de l'homme, les rapports avec les structures européennes d'intégration, et enfin «le quatrième pouvoir», fort et pluraliste, à savoir, la presse, la radio, la télévision qui rendent publics non seulement la scène, mais aussi les coulisses du pouvoir. Ce dernier élément ne peut être oublié, car toute analyse du mécanisme de l'exercice du pouvoir en Pologne serait alors incomplète.

LA PROTECTION DES CITOYENS - LA CONSTITUTION DE LA POTENTIALISATION DE L'ACTIVITÉ

Ewa Łętowska*

1. Caractériser la nouvelle Constitution polonaise de 1997 serait chose facile, si l'on voulait se limiter à une simple analyse de son texte. Une telle approche serait d'ailleurs justifiée par la tradition «textocentrique» de pratiquer la science du droit, caractéristique pour la science continentale en général et pour la pratique héritée des pays socialistes. Pourtant une simple description ou analyse du texte appauvrissent considérablement l'évaluation de la loi fondamentale, dont le rôle et la mission sont de «refléter», d'influer sur tout le système du droit positif, en tant que son clef de voûte axiologique. Et puisqu'il doit en être ainsi, nous sommes intéressés plutôt par le mécanisme d'impact de la constitution, par sa dynamique, que par son texte apprécié d'une façon statique.

Toutefois, l'évaluation de l'efficacité du fonctionnement de ce mécanisme (question de savoir s'il était construit «avec succès», si les usagers potentiels le connaissent, s'ils savent et veulent l'utiliser) peut être effectuée si l'on dispose de l'expérience pratique en matière de son application. Dans mes réflexions, je voudrais donc indiquer ces traits particuliers de la nouvelle constitution auxquels sont liés les espoirs, ainsi que certains problèmes de fonctionnement du mécanisme d'influence de la constitution sur le système de droit et les relations citoyens-pouvoir.

2. Les travaux préparatoires de la constitution polonaise ont duré longtemps¹, se sont déroulés dans une mauvaise ambiance sur laquelle nous reviendrons encore, et les controverses se sont concentrées plutôt autour des questions idéologiques (voire symboliques), qu'autour de celle de savoir comment élaborer une constitution ayant la qualité d'un instrument efficace, c'est-à-dire utile pour les juges, qui pourraient s'en servir en accomplissant réellement leurs fonctions de «troisième pouvoir» et propice au citoyen, tel un bouclier le protégeant réellement (non seulement d'une manière déclaratoire) contre les excès du pouvoir.

Souvent, quand il m'arrivait de caractériser (devant les étudiants ou un auditoire étranger) les différences entre les constitutions occidentales et celles des Etats du bloc de l'Est, je me référais à une anecdote (authentique) en provenance de Moscou. Un

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¹Le changement du régime en Pologne fut accompli en 1989. Pendant environ deux années qui ont suivi, il existait un consensus qui rendait possible l'adoption rapide de la constitution; hélas, il n'y avait pas, à l'époque, de projet prêt à soumettre au vote. Plus tard, l'éparpillement et les disputes sur la scène politique ont rendu difficile l'adoption de la constitution.

client entre dans un restaurant de catégorie moyenne. Il s'assoit et étudie le menu. «Un filet de porc, s'il-vous-plaît». «Il n'y en a pas». «Alors des boulettes». «Il n'y en a plus» - répond le garçon. «Donc, peut être du foie?». «Hélas». «Qu'est-ce qui se passe? - s'irrite le client. Vous m'avez donné le menu ou notre constitution à lire?!». Je répétais cette blague quand je devait distinguer, d'une manière plus imagée, entre le droit dans le socialisme réel et celui des démocraties contemporaines, c'est-à-dire propre à l'Etat où justement le droit constitue le bouclier qui protège réellement les citoyens menacés par l'absolutisme du pouvoir. Cette anecdote soviétique démasque l'essentiel du problème. En théorie, la constitution est la pierre d'achoppement de l'Etat de droit. Le système de droit commence par elle et en tire sa force; c'est avec la constitution qu'il devrait être véritablement, c'est-à-dire réellement et non seulement formellement, conforme. Par contre, dans notre anecdote la constitution est un «acte du dimanche», lointain, irréel. C'est une façade, une sorte de belle promesse, existant plutôt pour sauver les apparences, que pour refléter la réalité. Elle n'influe sur rien, elle ne défend personne, elle ne donne rien. Comme un menu fictif dans un restaurant médiocre. Ce n'est pas étonnant qu'une telle constitution semble aux gens - les hommes de la rue - inutile. Puisqu'elle ne sert à rien et que l'on peut gouverner l'Etat sans prendre en compte ses dispositions et les conséquences de sa violation. Mais en même temps la constitution (ou plutôt la Constitution - il s'agit de celle par la majuscule) éveille - selon les sondages d'opinion en Pologne² - l'espoir de quelque chose de solide, de constant, qui permettra aux gens d'échapper au manège des changements du droit «ordinaire» et de construire sur un fondement plus solide de principes ou règles libres des conjonctures politiques et du «bon plaisir» d'un politicien ou d'un administrateur. «Inscrire dans la constitution» veut dire obtenir quelque chose sur quoi l'on puisse compter. Et c'est, pour cela d'ailleurs que les nostalgies de nos citoyens pas très riches envers la sécurité sociale, se traduisent par le postulat d'«inscrire» dans la constitution le salaire minimum ou le droit de «chacun» à un appartement. Car c'est bien le paradoxe: l'expérience constitutionnelle polonaise a abouti à une double attitude envers la constitution. D'une part, la société s'est habituée à ce que la constitution soit un recueil de déclarations solennelles des bonnes intentions de l'establishment, et non pas un outil à la disposition du citoyen, lorsque ses droits constitutionnels étaient violés. Ceci influait sur la consolidation d'une attitude un peu négligeante par rapport à la constitution elle-même (celle qu'incarnait la constitution de 1952), que l'on ne prenait pas très au sérieux. En même temps, pour cette même raison augmentait la nostalgie pour une constitution qui fonctionne «véritablement». Cependant, d'autre part, des années de

² Ces sondages ont été réalisés par le Centrum Badania Opinii Społecznej [Centre d'étude de l'opinion publique] à l'automne 1993 et leurs résultats ont été publiés en janvier 1994, intitulés «La Constitution dans la conscience des Polonais». Les trois-quart des personnes interrogées trouvaient à l'époque que la constitution était importante (41%) ou même très importante (33%) pour un citoyen ordinaire. Il est caractéristique que dans la période séparant ces recherches du moment du vote de la constitution (avril-mai 1997), l'intérêt de la société pour la problématique constitutionnelle a baissé; ceci a été confirmé par les sondages réalisés par ce même Centre en avril 1997: le manque d'intérêt pour la loi constitutionnelle a été déclaré par 46% des personnes interrogées et ce chiffre avait tendance à augmenter. Cela signifie que l'on a gaspillé la chance de voter la constitution au moment où il y avait la possibilité d'avoir l'appui social le plus fort.

fonctionnement de la «constitution-déclaration» ont créé l'illusion qu'il suffit d'écrire «n'importe quoi», pour que ce «n'importe quoi», par le seul fait d'être inscrit dans la constitution, devienne un droit ou une liberté existant réellement. Il y a eu alors une sorte de falsification de la conscience de la société, qui a commencé à croire sérieusement qu'il suffit de déclarer quelque chose dans la constitution pour que cela devienne réalité. Et c'est pour cela que la discussion constitutionnelle au sein de la société a essentiellement tourné autour de la question de savoir qui et quelles déclarations inscrirait dans la constitution - sans trop se soucier de la création (dans la mesure du possible) d'un mécanisme constitutionnel garantissant la réalisation de ces déclarations.

3. La forme définitive de la constitution polonaise, votée en avril 1997 et soumise à référendum national en mai 1997, est le résultat d'un compromis entre deux conceptions. La première, esquissée de manière plus précise au cours des premiers travaux préparatoires, prévoyait que la constitution serait davantage «juridique» qu'«idéologique», que les droits et libertés deviendraient l'objet de prétentions des citoyens, réalisables par voie juridictionnelle, au cas où le «pouvoir» ne voudrait pas les réaliser. On admettait ainsi que la constitution précise avant tout les droits et libertés personnels et politiques. Par contre, les droits économiques, comme impossibles à revendiquer par la voie de la justice, par exemple la prétention de la réalisation du droit au travail, au logement, la protection médicale, etc., devaient tenir moins de place dans la constitution.

Une deuxième conception a pris de l'importance surtout à la dernière étape des travaux, poursuivis déjà sous la pression du temps et des élections parlementaires qui approchaient. Il s'agissait de l'introduction dans la constitution des affirmations d'ordre axiologique, idéologique ou même symbolique. Sans cela, le compromis politique, indispensable pour le vote de la constitution, aurait été impossible. Il ne s'agissait pas seulement du compromis avec les cercles politiques étant sous l'influence de l'Eglise catholique³, ce qu'on a pu observer, par exemple, lors de la discussion sur la présence et le contenu du Préambule, évoquant l'existence de Dieu et sur la façon de régler dans la constitution les relations, entre l'Etat et l'Eglise catholique, sur les postulats (finale-ment non acceptés, mais formulés sous forme d'ultimatum) d'énoncer dans la constitution la priorité du droit naturel sur le droit positif ou de garantir, par la loi fondamentale, la protection de la vie dès la conception (l'interdiction constitutionnelle de l'avortement). Les aspects symboliques et déclaratoires de la constitution ont été renforcés par l'inscription dans son texte de nombreux droits sociaux et d'assurances verbales de leur respect en tant que «acquisitions du peuple»⁴. Il faut pourtant avouer que cette axiologisation du texte de la constitution, accomplie au dernier moment des travaux préparatoires (printemps 1997), n'a pas touché à la principale et décisive inno-

³ Voir W. Osiatyński: An Interview with Hanna Suchocka on Church-State Relation, *East European Constitutional Review* vol. 5, no 2-3, Spring-Summer 1996, p. 48-50.

⁴ Par ex. Part. 6 «La République de la Pologne assure les conditions de la propagation et de l'accès égal aux biens culturels étant la source de l'identité de la nation polonaise, de sa durabilité et de son développement», ou l'art. 74 al. 3 «Chacun a droit à l'information sur la qualité et la protection de l'environnement».

vation de la constitution polonaise de 1997 (celle qui la différencie des constitutions des autres Etats de l'Europe centrale et orientale, votées plus tôt et trop liées à la tradition des constitutions communistes⁵). La constitution polonaise de 1997 est - malgré tout et à la différence de la constitution de 1952 - **une constitution de mécanismes et non une constitution de déclarations**, bien qu'à l'étape finale des travaux préparatoires on se soit concentré justement sur des questions idéologiques ou même symboliques. Ceci est visible quant à la situation des citoyens, leurs libertés et droits car:

* La constitution prévoit la **plainte constitutionnelle**, inconnue jusqu'à présent en Pologne. Toute personne peut déposer une plainte devant le Tribunal Constitutionnel «en matière de conformité à la Constitution de la loi ou d'un autre acte normatif en vertu duquel l'autorité judiciaire ou l'autorité de l'administration publique se sont définitivement prononcées sur les libertés ou les droits de cette personne ou sur ses devoirs définis par la Constitution» (art. 79). La plainte constitutionnelle n'est pourtant pas ouverte en cas de violation des droits économiques, même ceux inscrits dans la Constitution (art. 81). Il faut souligner que le catalogue des droits et libertés politiques et individuels est large et défini concrètement, ce qui donne matière à un éventuel grand nombre de plaintes constitutionnelles. La construction de ce catalogue démontre des liens de parenté avec la façon dont on a formulé le catalogue des droits et libertés fondamentales de l'homme dans la Convention européenne des Droits de l'Homme et des Libertés fondamentales. C'est une conception confirmée entre autre par la pratique des organes juridictionnels de Strasbourg.

* La constitution **introduit des restrictions pour le législateur ordinaire lorsqu'il tente de régler les questions concernant les libertés et droits constitutionnels**: «l'exercice des libertés et des droits constitutionnels ne peut faire l'objet que des seules restrictions prévues par la loi lorsqu'elles sont nécessaires, dans un Etat démocratique, à la sécurité ou au maintien de l'ordre public, à la protection de l'environnement, de la santé et de la moralité publiques ou des libertés et droits d'autrui. Ces restrictions ne peuvent porter atteinte à l'essence des libertés et droits» (art. 31 al. 3). Cette disposition (contrairement à la plainte constitutionnelle) concerne aussi les droits économiques. Cela signifie l'introduction d'une large restriction pour le législateur et la soumission de celui-ci à un contrôle⁵. Ajoutons aussi que dans les dispositions consacrées aux mesures d'exception (état de siège, d'urgence, cataclysme), la Constitution limite la liberté du législateur ordinaire par rapport à son pouvoir de restriction des libertés et des droits des citoyens, indiquant d'une façon claire ce qu'il ne peut limiter, ni exclure en cas d'état d'urgence (art. 233).

* La Constitution introduit le principe de la **«réparation des dommages causés par l'action illégale des personnes publiques»**. Le droit polonais connaissait aupa-

⁵ La formule d'un test à trois degrés pour l'admissibilité des restrictions (la loi - **indispensable** dans une **société démocratique** pour une **énumération exhaustive** des *buts* de la restriction] est empruntée à la Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales. Cette dernière ne concerne pourtant que les droits politiques et individuels et non pas les droits sociaux. Les restrictions prévues à l'art. 31 al. 1 de la Constitution polonaise limitent le législateur de façon plus large que la Convention Européenne.

vant (depuis 40 ans) un système assez développé de responsabilité pour dommages causés par l'administration; ceci est devenu maintenant un principe constitutionnel. Par cela même le législateur ordinaire a les mains liées à l'avenir, s'il voulait diminuer le degré de protection des citoyens, en supprimant les cas existant dans la législation ordinaire pour lesquels le dédommagement a été prévu.

* **La Constitution doit être appliquée directement.** Ce principe est particulièrement important lorsqu'il s'agit des juridictions. Une application directe de la constitution ne mène nullement (quoiqu'elle ne l'exclue pas) à faire des dispositions constitutionnelles la base unique de la résolution d'une affaire concrète. Elle rend par contre possible l'utilisation de ces dispositions (celles d'ordre général et celles plus concrètes) par le juge qui, non seulement à partir d'une loi ordinaire mais de tout le système de droit couronné par la constitution, doit interpréter la norme qui va lui servir de base pour la prise de décision. L'application directe de la constitution change alors la matière qui sert de base à l'interprétation du système. Elle l'étend à ce qui a été écrit dans la loi constitutionnelle. La résolution de chaque litige devant la cour oblige le juge à poser une série de questions: «quelles dispositions doivent être appliquées dans l'affaire?» ou bien (en cas d'appel) «est-ce que les dispositions pertinentes ont été appliquées correctement?». En adoptant comme fondement de ces questions un acte juridique de législation ordinaire servant de base à la résolution, le juge (soumis lui-même à la loi) leur donnera une portée très étroite. Lorsque l'on accepte l'idée de l'admissibilité de la vérification par le juge de la régularité de l'action du législateur (par l'évaluation du produit de son travail que l'on a l'intention d'appliquer *in concreto*, sous le jour de la constitution ou du droit international), la liste des questions que le juge doit se poser s'allonge. Car il faut bien se demander aussi - au moment où l'on constate que «telle et telle disposition, ainsi comprise, doit servir de base à la décision» - si le législateur, qui a édicté cette disposition, avait le droit de le faire, compte tenu des exigences constitutionnelles et des restrictions qui lui étaient imposées par le droit international? Et encore: est-ce qu'il l'a fait correctement, par exemple du point de vue de la cohérence axiologique du système des sources de droit (et surtout des sources «plus récentes» et comprenant des règlements plus représentatifs pour l'axiologie d'aujourd'hui, notamment contenus dans les actes de rang supérieur dans la hiérarchie des sources de droit)? Les juridictions (conformément à la Constitution) sont tenues (art. 8 et 178) d'appliquer aussi la Constitution (à côté des lois réglant directement le sujet du litige), ainsi que le droit international obligatoire en Pologne. Il faut se réjouir que la Constitution s'indique elle-même comme base de travail quotidien du juge et en même temps comme limite de sa soumission. Une telle approche permet d'espérer faire comprendre aux juges que ce qui «compte» ce n'est pas seulement la «disposition» étant la base directe de la décision dans un litige concret, mais aussi la Constitution comme clef de voûte de construction et axiologique du système de droit. Enfin, il ne s'agit pas tellement du problème de l'application directe de la Constitution comme base de la résolution d'un litige concret (les circonstances de fait le permettront rarement), mais plutôt de la certitude de rechercher justement dans la Constitution l'inspiration interprétative, le «code de lecture» de la législation ordinaire. Il s'agit de l'élargissement de la notion de «loi». Jusqu'à

maintenant, dans la conscience des juges, la loi était interprétée comme «la base concrète de la solution, au-delà de laquelle le pouvoir du juge ne va pas» devrait être interprétée comme «la loi un élément indéfectible du système de droit conforme à la Constitution, interprétée en accord avec cette dernière». Et c'est pourquoi la référence à l'article 178 du projet, à la soumission des cours aux lois et à la **Constitution**, ordonnant aux cours de «ne pas oublier» l'existence de la loi constitutionnelle, constitue pour les juges l'indication des sources d'inspiration en matière d'interprétation du droit. L'auteur de ces remarques considère qu'il n'y a pas d'obstacles à ce que l'on utilise la Constitution soit comme facteur décisif pour l'interprétation d'une loi (comme critère de définition de la façon d'interpréter ou comme élément décisif pour le choix d'une des possibilités d'interprétation), soit même comme facteur qui permette de décider de la non-application d'une loi et de l'application directe, à la place de celle-ci, des dispositions constitutionnelles. Une alternative à cette solution serait la règle selon laquelle, en cas de doute, les cours de droit commun seraient obligées de soumettre leurs problèmes au Tribunal Constitutionnel, sous forme de question⁶. En conséquence de cette nouvelle position des obligations constitutionnelles reposant sur les cours, une vision étroite du droit positif de la recherche du «fondement» de la décision à prendre n'est plus actuelle, et les méthodes de lecture du texte ne peuvent pas négliger les questions concernant le système et l'axiologie liés à la constitution.

* **Ainsi (justement grâce à la force obligatoire directe de la loi constitutionnelle) les cours deviennent le gardien de la hiérarchie des sources de droit et du contrôle exercé sur le législateur ordinaire en matière de respect de la constitution.** L'article 178 de la Constitution doit d'ailleurs être considéré comme décisif dans la lecture de la relation «législatif» - «judiciaire», dans le cadre de la séparation des pouvoirs. Car il signifie, **pour le troisième pouvoir, l'obligation de se soumettre au droit comme système couronné par la Constitution, et non pas la réduction de cette obéissance à une disposition concrète.** Ceci admet et légitime pour les cours l'obligation d'effectuer une évaluation critique de chaque élément particulier de ce système (donc du produit du législatif), justement du point de vue de la Constitution. Malgré les apparences, l'affaire présente une importance pratique quant aux méthodes d'interprétation et aux préférences dans le cas de résultats divergents d'interprétation. Et c'est justement ici que s'ouvrent les possibilités, pour les cours, de donner un contenu concret à la notion constitutionnelle d'«équilibre» des pouvoirs. Les cours, non seulement le Tribunal Constitutionnel, mais aussi les cours de droit commun, en conséquence de l'accent mis sur les besoins et possibilités d'application directe de la Constitution et du droit international, obtiennent la position de gardien de l'ordre juridique constitutionnel. Elles peuvent évaluer cet ordre du point de vue des principes constitutionnels et du droit international (bien sûr la nature des choses, quant aux cours de droit commun, c'est un contrôle indirect, non abstrait, exercé ad casum).

⁶ Voir A. Z o l l: «Comment le juge est lié par la loi» dans «La Constitution et les garanties de son respect». Mélanges J. Z a k r z e w s k a, Ed. TK, Varsovie 1996, p. 247 et s.

Par conséquent, **les cours (tribunaux) renforcent de façon remarquable leur position par rapport au législatif** (dans le cadre de l'évaluation du droit établi par ce dernier), **ainsi qu'envers l'exécutif** - lorsqu'il agit (le cas échéant) au moyen d'actes généraux. La décision définitive, relative à la légitimité ainsi qu'à la force obligatoire (in abstracto dans le cas du Tribunal Constitutionnel) et à l'application in casu (par les cours de droit commun et la NSA⁷) de l'ordre juridique, appartient aux cours et au Tribunal constitutionnel. L'«équilibre» entre le législatif et le judiciaire, de la façon dont elle se dessine dans la Constitution (en comparaison avec l'état précédant), est instaurée à un niveau différent.

* Il faut ajouter que **la Constitution introduit aussi l'obligation de soumission directe du juge au droit international**. C'est ce droit justement qu'elle considère comme critère d'évaluation, par le Tribunal Constitutionnel, de la conformité du droit interne (article 188).

La liste sus-mentionnée des mécanismes de contrôle limitant le législatif (et l'exécutif) n'est pas du tout complète; on y a indiqué seulement les plus importants d'entre eux, qui décident de la «nouveau» de la Constitution de 1997 et concernent la situation des citoyens ainsi que l'utilisation du judiciaire comme «gardien de la Constitution».

4. Pour créer obstacle aux éventuelles futures actions du législateur ordinaire, le principe de la réglementation constitutionnelle permet de «bloquer la matière» au niveau constitutionnel. Il est aussi possible - techniquement - d'aborder la question autrement. Notamment il est possible de laisser pro futuro, dans une matière donnée, la liberté d'action au législateur ordinaire, en instaurant, tout au plus, un contrôle de l'utilisation de sa possibilité de réglementation dans une sphère donnée, en créant des mécanismes de contrôle pour le cas où il voudrait utiliser in concreto une possibilité précise. Cependant il est impossible de juger si le mécanisme de contrôle est bien ou mal construit dans le texte même de la constitution tant que l'on ne connaît pas encore l'efficacité de son fonctionnement. La situation est bien pire lorsque la constitution est en général un acte uniquement déclaratoire, faiblement équipé en mécanismes de contrôle susceptibles d'être appliqués par les citoyens eux-mêmes et contrôlant mal les actions du législatif et de l'exécutif. Cette situation était typique sous l'empire de la constitution de 1952. La Constitution de 1997 rompt radicalement avec cette conception. Elle est donc - contrairement à la «constitution de déclarations» de 1952 - une «constitution de mécanismes». Le but de ces mécanismes est d'empêcher, à l'avenir, le dépouillement de la constitution de son contenu, à la suite de l'action ordinaire du législatif. Le progrès constitutionnel est donc remarquable car on passe de la simple déclaration de principes à la création de mécanismes et de garanties.

L'évaluation de la «constitution de mécanismes» n'est pourtant pas facile. Car il ne s'agit pas tellement d'évaluer ce qui est «dit» dans la constitution, mais plutôt d'imaginer

⁷ Le Tribunal Constitutionnel en Pologne vérifie la conformité à la Constitution des lois et autres dispositions de droit. La NSA (Haute Cour Administrative) se prononce sur la légalité (conformité à la loi) des décisions individuelles rendues par les corps administratifs. Le troisième élément juridictionnel se compose des cours de droit commun qui s'occupent des affaires pénales, civiles et de droit de la famille.

comment un mécanisme donné va fonctionner à l'avenir. Ce qui exige une évaluation c'est non seulement ce que l'on peut lire directement dans le texte de la constitution, mais aussi le caractère «opérateur» du mécanisme (arrivera-t-il à démarrer, a-t-il des chances de fonctionner?). Voilà pourquoi la «constitution de mécanismes» ne donne pas de possibilités d'évaluation immédiate: elle n'est pour l'instant qu'une possibilité créée par un projet et non pas la solution définitive apportée par le texte lui-même. Elle donne plutôt l'espoir pour l'avenir et elle est - à peine ou prou - la «constitution de possibilités».

L'évaluation - si et dans quelle mesure cette conception se confirmera en pratique - est alors douteuse; elle dépend de nombreuses inconnues et plus encore du «facteur humain». Il faut prêter attention à quelques circonstances accompagnant le vote de la nouvelle constitution polonaise, qui peuvent être importantes en ce qui concerne l'utilisation des possibilités créées par celle-ci. Les citoyens sont-ils prêts à profiter des mécanismes mis à leur disposition? Cela suscite quelques doutes.

5. La nouvelle Constitution a été adoptée par référendum, avec un taux de participation assez faible d'environ 43%⁸. La plupart des Polonais ont négligé le référendum. Tout de suite après le vote, les politiciens ont essayé - en principe d'une façon superficielle et propagandiste - de récupérer politiquement cette circonstance. Certains disaient que le faible taux de participation signifiait tout simplement le manque de soutien dû au manque d'approbation au contenu de la Constitution. D'autres - que c'était un signe d'aversion et de protestation contre les méthodes utilisées lors batailles politiques avant le référendum, contre les mensonges et les insultes. D'autres encore ont supposé que les Polonais étaient fatigués de la politique en général et que la Constitution était victime de cette lassitude. Aucune des ces opinions n'est complètement convaincante. Personnellement, je trouve qu'une des raisons du manque d'enthousiasme électoral était la faible conviction du citoyen ordinaire que sa participation au référendum (et le résultat de celui-ci) puisse influencer rapidement et efficacement sur sa condition et son niveau de vie. Une telle conviction, présente encore en 1994, selon les résultats des sondages, disparaît aujourd'hui. Ceci est d'ailleurs lié (et c'est un paradoxe) à la stabilisation progressive de la situation sociale et économique. Car nous voyons que l'on peut vivre en sécurité relative sans une nouvelle constitution. Cette conviction se consolide avec le temps, depuis le changement du régime. La conviction que la constitution est «pour les politiciens» et non «pour les gens» a été renforcée par une campagne référendaire vilaine, où la question de la constitution a été complètement instrumentalisée, exploitée comme élément de pré-campagne électorale (les élections législatives étaient prévues pour l'automne 1997)⁹. Le système politique polonais n'a pas créé jusqu'à

⁸ Le quorum n'était pas exigé dans ce cas-là. Pour l'adoption de la constitution il suffisait la majorité absolue des votants.

⁹ Comme très manquée, il faut considérer la décision de la Commission Nationale des élections, donc d'un corps, par nature de chose, neutre et apolitique, qui, en disposant d'un temps d'antenne important à la télévision publique pour l'information sur le référendum constitutionnel, a tout simplement distribué ce temps en égales parties entre les partisans et les adversaires de la constitution, en renonçant même au contrôle sur la façon d'utiliser ce temps. A la place d'une éducation, on a offert aux téléspectateurs un spectacle politique, parfois même hystérique.

présent une stable possibilité d'articuler efficacement les intérêts sociaux. Aujourd'hui il existe en Pologne plus de 200 partis politiques, dont les programmes ne sont souvent pas très différents les uns des autres et dont le nombre d'adhérents ne dépasse pas quelques centaines de personnes. Continuellement apparaissent des tentatives de rassembler ces petits partis, de façon plus ou moins formelle, dans le cadre de programmes politiques plus importants. Ceci ne se fait pourtant ni rapidement ni efficacement. De plus, quant aux partis de droite, la défaite aux élections parlementaires en 1993, puis la défaite aux élections présidentielles, y ont créé un esprit de frustration et d'agressivité: «nous avons libéré la Pologne et les Polonais de l'esclavage communiste et maintenant l'on ne veut plus s'en souvenir...». Cela a influé aussi sur le caractère et l'ambiance des discussions avant le référendum. Nous pouvons même parler d'invectives, d'insultes et de mensonges. Un de plus âgés et sérieux hommes politiques polonais, venant de l'ancienne opposition anticommuniste, Aleksander Małachowski, dira plus tard: «les gens qui, il n'y pas longtemps, étaient prêts à lutter pour la vérité et la justice, se servaient quotidiennement d'un mensonge primitif (...). Les politiciens avaient une facilité à insulter les gens qui pensaient autrement (...) Je suis stupéfait par la facilité avec laquelle les personnes, qui ne partageaient pas mes opinions mais qui passaient, il n'y a pas longtemps, pour gens honnêtes, avaient recours au mensonge pour gagner quelque chose pour soi». En même temps, il s'est avéré que l'engagement contre le vote de la constitution de la part de nombreux prêtres et même évêques de l'Eglise catholique (l'appel à participer au référendum et à voter contre la constitution^{10 11}), n'a pas donné de résultats escomptés - comme l'a prouvé le faible taux de participation. Le résultat obtenu a démenti les arguments sur «le complot massono-homosexuel», sur la supposition que l'acceptation de la constitution entraînerait pour la Pologne «la perte de sa souveraineté», que «l'on introduirait un athéisme obligatoire», que «l'Etat reprendrait les enfants aux parents», que «l'économie dépendrait des banques commerciales étrangères», que «Гон ne respecterait pas les droits de l'Homme (comme sous Hitler et Staline)», que «le droit de propriété serait limité (notamment le droit de propriété foncière)», que «le Président aurait un pouvoir illimité (tyrannie)», que «le projet de Constitution avait été préparé par les organisations qui ont légalisé l'avortement¹, la démora-

¹⁰ L'avis officiel de l'Episcopat de Pologne, formulé en mai 1997, donc immédiatement avant le référendum disait que le texte de la constitution «soulève d'importantes réserves de nature morale». Sous cette formule était caché le mécontentement provoqué par l'absence dans la constitution de dispositions sur la protection de la vie dès la conception et sur la primauté du droit naturel sur le droit positif. (Au fond, dans ce dernier cas, derrière la question philosophique se cachait un problème pratique: qui va établir le contenu du droit naturel dans chaque cas litigieux et comment seront résolus les cas de collision avec le droit positif?). Un autre sujet de mécontentement de l'Eglise catholique étant les dispositions concernant l'obligation de la prise en compte de la volonté de l'enfant dans les décisions concernant son éducation, et aussi l'invocation au Dieu dans le Préambule («Dieu des philosophes et, peut-être des maçons, mais non pas des catholiques») et la façon d'arranger les relations Etat-Eglise.

¹¹ En 1996 le Parlement a déposé un amendement à la loi très rigoriste de 1993, interdisant l'avortement et le permettant seulement en cas de menace pour la vie ou la santé de la mère, de soupçon que la grossesse est le résultat d'un délit, ainsi que de grave et irréparable lésion du fœtus. L'amendement admet la possibilité de l'avortement lorsque la femme se trouve dans des conditions de vie ou une situation personnelle difficiles. Le tract fait allusion justement à cet amendement. Ce qui est intéressant c'est que deux jours après le

lisation des enfants et des jeunes, la pornographie et la vente de la terre polonaise aux étrangers; que ce projet rend possible le maintien des dispositions immorales, antichrétiennes et antipolonaises». Tout cela ce sont des citation authentiques provenant de documents qui étaient remis aux fidèles dans les églises. Cette campagne, fatigante et peu raisonnable, n'a eu qu'une faible influence sur le résultat du référendum et n'a pas abouti à une désorientation politique de la société. Cependant, il est caractéristique qu'une semaine après le référendum, toute cette argumentation ait disparu des journaux, de la radio et de la télévision. Personne ne s'y est plus référé, tout comme si elle n'avait jamais existé. La constitution votée par référendum a été acceptée comme une réalité avec laquelle il faudra vivre. On peut tout de même s'interroger: la tactique de «dégoûter la société de la constitution» va-t-elle avoir un effet durable? Les mécanismes prévus dans la constitution - dont la mise en oeuvre exige l'action collective, l'internalisation de la constitution par la société qui devrait la considérer comme «la sienne» - ne vont-ils pas rester lettre morte? En tel cas, les effets de l'hystérie politique déclenchée autour du référendum constitutionnel s'avèreraient dangereux. Et cette «aversion pour la constitution créée par les politiciens» est le premier facteur avec lequel il faut compter en évaluant la chance d'un fonctionnement réel dans la société de la «constitution de possibilités» ou de la «constitution de mécanismes», c'est-à-dire de la loi constitutionnelle polonaise de 1997. Le problème est d'autant plus brûlant que les élections parlementaires de septembre 1997 ont été gagnées par le parti qui du changement de la constitution a fait une de ces devises. L'introduction de ce changement semble peu réel, vu la composition des forces au Parlement (une forte opposition qui ne donne aucune chance d'obtenir la majorité qualifiée). De plus, les formations «vainqueurs» ont commencé à parler du caractère non-prioritaire du changement de la constitution. Indépendamment de ce que cela peut signifier, au moment de l'entrée en vigueur de la constitution (17 octobre 1997) il ne faut pas s'attendre à une forte implication de la part de l'establishment au pouvoir¹².

6. Comme danger suivant, apparaît la question de la plainte constitutionnelle. Elle est conçue assez étroitement, non comme une plainte contre une décision (de justice ou administrative) qui viole les droits et libertés constitutionnels de l'individu, mais comme une plainte contre l'inconstitutionnalité du fondement juridique de cette décision. C'est une conception qui - comprise à la lettre - élimine la possibilité de contrôle par le Tribunal Constitutionnel des cas où la cause de l'infraction aux droits constitutionnels de l'individu n'est pas «le fondement juridique» lui-même (donc la loi), mais une fausse interprétation, appliquée dans l'affaire, par la cour ou l'organe administratif. Je suis

référendum, le Tribunal Constitutionnel a prononcé l'inconstitutionnalité de cet amendement, comme contraire à la notion d'Etat de droit. La base de la décision n'était pas nouvelle. Ce n'était pas la nouvelle Constitution (le passage sur la protection du droit à la vie), mais la Constitution de 1952, dans laquelle, en 1989, l'on avait introduit la disposition selon laquelle la Pologne respecte les principes de l'Etat de droit. La justification du Tribunal peut susciter des doutes.

¹² Il faut ajouter que les nouveaux membres du corps représentatif viennent de milieux n'ayant pas d'expériences parlementaires et il paraît difficile de se prononcer sur leur capacité de donner un appui purement tactique à la loi constitutionnelle qu'ils n'acceptent pas comme la leur («nôtre»).

convaincue qu'une telle limitation de la compréhension de la plainte constitutionnelle n'est pas acceptable. Pourtant une telle interprétation est proposée même par certains juges du Tribunal Constitutionnel. Or, si cette interprétation devait être maintenue, les espérances attachées à l'introduction et à la signification réelle de la plainte constitutionnelle seraient déçues. Car la plainte constitutionnelle sert autant à obtenir la justice pour l'individu dont les droits (libertés) ont été violés, qu'à démocratiser le processus de contrôle de la constitutionnalité du système juridique lui-même. Une éventuelle crise de confiance des citoyens par rapport à la plainte constitutionnelle, considérée alors comme une institution de façade, priverait de «moteur» l'un des plus importants mécanismes de la nouvelle Constitution. La possibilité de réaction contre un tel phénomène dépendrait alors de l'«image» de la plainte qui va se former dans la société. Et celle-ci dépendra beaucoup des premiers pas faits par le Tribunal lui-même¹³.

7. Le dernier danger est causé par la crise de la magistrature polonaise¹⁴. Pour que l'affaire soumise à la justice soit examinée, il faut attendre très longtemps, parfois quelques années. La confiance en la justice étatique a abouti, en Pologne, à l'accroissement des compétences des cours et à leur surcharge. La Constitution attend des cours la réalisation de leur fonction de gardien de la constitutionnalité. Les cours sont-elles à la hauteur de cette attente? L'avenir le dira.

Cette circonstance contribue au fait que, pour le moment, la Constitution de 1997 est une Constitution des possibilités. Seront-elles réalisées?

¹³ D'autant plus qu'au début (cette question relevait de la compétence de la Haute Cour Administrative et de l'Ombudsman) il faut s'attendre à une affluence des plaintes et à une aversion des citoyens envers les délais d'attente pour obtenir une réponse à une plainte déposée, ainsi qu'à une aversion ou même une hostilité en réaction contre le refus du Tribunal de connaître de l'affaire (par exemple en cas d'absence d'élément de violation du droit constitutionnel).

¹⁴ Une image intéressante (mais très pessimiste) de cette crise, est présentée dans la publication *Quo Vadis Iustitia. L'état et les perspectives de la justice en Pologne*, réd. A. Siemaszko, Institut de la Justice, Warszawa.

THE SOURCES OF LAW IN THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2 APRIL 1997

Slawomira Wronkowska*

I. Some Historical Remarks

One of the key notions used in this paper is that of the normative concept of the sources of law within some system. I shall take such a concept to mean by normative concept of the sources of law of any system the set of rules specifying which bodies are empowered to make law, what is the scope of their law-making, and what form of law-making these bodies can assume. Such rules may be formulated by legislators in normative acts (constitution), or may take shape in legal writing and judicial decisions, which supplement the legislation. In recent decades the rules constituting the normative concept of the sources of law in Poland were rather few and far from precise. In criticising that state of affairs, lawyers and legal scholars would often describe the official concept of the sources of law as “open-ended” and “confusing”.

The “open-endedness” of the system of the sources of law suggested that the Constitution then in force was not considered to provide an exhaustive list of either the forms of law-making, or of the bodies vested with law-making powers. The actual practice was that both the range of bodies empowered to make law and the forms of normative acts provided for by the Constitution would be extended beyond the constitutional provisions by means of ordinary statutes.

The “confusion” of the system of the sources of law had to do with the fact that the relationships between normative acts were not clear. It was frequently impossible to predict which area would be regulated by which kind of normative acts, there was no clarity as to the scope of exclusive statutory regulation (regulation by statute), and, finally, that there was no clear relationship between of international agreements and national law.

A state of considerable uncertainty with regard to the rules of law-making is characteristic of authoritarian states. The vagueness of the conception of the system of law causes the rules of responsibility for law-making to become obscure, and thus favours an instrumental attitude towards the law and facilitates engaging the law in ad hoc political games. This in turn contributes to keeping citizens subordinate to political authorities, instead of making them subject to clear rules of the law.*¹

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¹ For more on arbitrary law-making see E. Kuśtra: *Polityczne problemy tworzenia prawa* [Political problems in law-making], Toruń 1994, p. 27-53.

The political authorities in authoritarian state are not interested in ordering the system of the sources of law. In particular, such authorities are not interested in specifying clear-cut limits that law-making bodies may not transgress. Finally, such authorities are not interested in the functioning of bodies whose task would be to review the constitutionality of the law-making process.²

The Constitution of 22 July 1952, which had been in force in Poland for nearly forty years, regulated matters concerned with the sources of law in a very laconic way, and it was not until the year 1982 that any idea of constitutional judiciary was introduced into it. That situation was conducive to arbitrariness in law-making and it contributed to delaying the process whereby legal science and judicial decisions could help to introduce order into the system of sources of law.³

According to the provisions of the 1952 Constitution, the sources of law comprised of the Constitution (and constitutional acts), statutes, decrees with the force of statute (issued by the Council of State [the collective presidency] in between the Sejm sessions), as well as executive acts for the implementation of statutes and decrees with the force of statute: regulations, orders, and executive resolutions [decisions] (the latter, alongside the regulations, issued by the Council of Ministers [the Government]). It was also recognized that sources of law were found among at least some of the “spontaneous” normative acts, i.e. acts issued directly on the basis of provisions specifying the tasks of certain bodies, such as resolutions of the Council of Ministers, issued on the basis of the Constitution, and orders (as well as various instructions and circulars) issued by the Prime Minister, by ministers and other central authorities of the state on the basis of statutes specifying the tasks of these bodies. It is especially important to note the diversity of forms of the normative acts, and the multiplicity of bodies engaged in law-making, especially administrative authorities.

As time went on, a number of changes were introduced into the above-mentioned system of sources of law, based on the 1952 Constitution. First, decrees with the force of statute were eliminated from the catalogue of the sources of law,⁴ and then, in the “Little Constitution”, i.e. the 1992 constitutional act on mutual relations between the legislative and executive authorities, the list of executive acts was limited to regulations and orders, with the Council of Ministers being vested only with the right to issue regulations. Thus, the list of normative acts was restricted, but no such restrictions were applied to the range of bodies authorized to make law.

Independently of the slight modifications in the system of sources of law made by the legislators, significant changes had begun to appear in the process of law-making as early as in the beginning of the 1980s. Such changes had to do with three facts: the establishment of the Chief Administrative Court and the subjecting of ad-

² S. Wronkowska: *Gesetzgebung und Gesetzgebungslehre in den osteuropäischen Ländern*, ASRP Beiheft 52, Praktische Vernunft, Gesetzgebung und Rechtswissenschaft, Stuttgart 1993, p. 70-76.

³ For more on the subject see A. Gwiżdż, S. Wronkowska: “Current Problems of Legislation in Poland” in: *Legislation in European Countries* (ed.) U. Karpén, Baden-Baden 1996, p. 330-346.

⁴ This was connected with the abolishment in 1989 of the Council of State [collective presidency] and the establishment of the office of President of the Republic of Poland.

ministrative decisions to review by an independent court,⁵ the introduction of constitutional judiciary,⁶ and the establishment of the office of the Commissioner for Citizens' Rights [ombudsman].⁷ The activities of those institutions contributed, be it in various degree, to raising and promoting the standards of legal culture, to the formation of ways of protecting the individual against the unconstitutional actions of law-making bodies, and, finally, to the partial ordering of the system of the sources of law. It was thanks to the activities of these institutions that the effects of a "confusion" conception of the sources of law became less painful for the citizens. Thus legal practice began to precede the normative change of out-dated and undemocratic constitutional rules of law-making.

In particular, judicial decisions and legal science helped to work out the relationships between statutes and executive acts, and specify in detail the range of matters that were subject to exclusive statutory regulation, thus making a contribution to the implementation of the principle of the primacy of statutes in the system of sources of law. Another advance in ordering the rules of law-making was made after the principle of a state based on the rule of law [Rechtsstaat] was introduced into the 1952 Constitution.⁸

Yet the changes that could be observed in the practice of law-making were not reflected in the provisions of the Constitution. After the political transformations of the year 1989, Poland implemented a radical reform of whole branches of the law. However, a major reform of the system of sources of law had to wait until the adoption of a new Constitution.

II. The Basic Objectives and Dilemmas of the Constitutional Reform of the Sources of Law

In spite of the advances in the practice of law-making in Poland, the makers of the new Constitution had little doubt that the system of sources of law should be ordered, and adapted to the demands of a modern, democratic state and to the principle of the separation of powers, and that this ordering should find its place in the Constitution. This conviction was voiced in all the drafts of the constitution, and the weight of the issue was testified to by the fact that the National Assembly's Constitutional Committee set up a special sub-committee on the sources of law.

Such a standpoint had been largely due to the historical experience of the "confusing" system of the sources of law, an abiding fear of the arbitrary law-making interference by administrative authorities and of the role of acts known as instructions,

⁵ This was provided for by the Act on the Chief Administrative Court and on amending the Code of Administrative Procedure Act, adopted on 31 January 1980.

⁶ Poland's Constitutional Tribunal was established in 1982, but the Constitutional Tribunal Act was not adopted until 1985, which was when the Tribunal embarked on its activities.

⁷ The office of the Commissioner for Citizens' Rights started activities on the basis of the Act on the National Ombudsman, of 15 July 1987.

⁸ The principle of a state based on the rule of law was introduced in the Act on amending the Constitution of the Polish People's Republic, of 29 December 1989.

which frequently had been more effective in shaping the actual activities of state authorities than statutes themselves.

The ordering of the system of the sources of law was guided by two objectives:

(a) to guarantee that citizens would have a secure position in the state, for any arbitrariness in law-making may pose a threat to the citizens' situation;

(b) to ensure the "transparent" and efficient functioning of the legislature, and thus also of the other powers, for a "confusing" system of the sources of law had turned out to be a major obstacle in the efficient functioning of the state.

The tasks formulated above were to be implemented by means of the two complementary courses of action: by the constitutional "closure" of the system of sources of law, and by the introduction of fairly rigorous forms of review of the constitutionality of the enacted law.

One of the first dilemmas that the Constitutional Committee had to solve was whether the constitutional regulation of the sources of law was to be contained in a separate chapter or whether provisions regulating the sources of law should accompany those which regulated the structure and powers of the state authorities (or any other bodies vested with law-making powers). In the history of Polish constitutionalism both solutions had been adopted: the former in the Constitution of 1935, and the latter in the Constitutions of 1921 and 1952.

The Constitutional Committee decided that it would be better for the purpose of ordering the process of law-making if those matters were to be regulated in a separate chapter. Thus, the Constitution contains Chapter Three, entitled "Sources of Law", which - alongside with naming the sources of law (non-exhaustively) by the constitutional provisions (see point III) includes also several fundamental principles of law-making (cf. article 88, para. 1, article 92, para. 2). It may be assumed that introducing such systematics of the constitutional provisions will have a profound impact on the interpretation of those provisions which relate to the sources of law.

Another dilemma faced by the Constitutional Committee was the question of how to understand the law. After much heated debate, it decided not to include in the Constitution provisions expressing the idea that, apart from the law as a system of norms which are the product of human activity, there is some other kind of law - a system of norms of behaviour which are addressed to human beings, but which are independent of human will in their content and binding force (natural law). It was concluded that the Constitution was not the place to solve disputes of the philosophy of law, and it was decided not to settle the question whether natural law was to be the only a model for norms enacted by public authority, or whether the latter norms were to lose their force in the event where they were in conflict with natural law, and finally who would be entitled to make authoritative adjudications on such contradictions and their consequences.

The rules formulated in the Constitution thus relate to law understood as a system of norms which are the product of human activity. However, law made by public authorities may not be made in an arbitrary way. The Constitution points to the values which the legislative authorities are obliged to protect and is quite emphatic in stating

that any law-making authorities, including the legislature, must operate within clear limits which they may not transgress.

Finally, the Constitutional Committee had to make a decision on what sense was to be given to the expression “source of law”, and in particular, whether a “source of law” was to be understood as any fact that made law (the enactment of norms, agreement, the development of norms of common law and law-making precedent) or whether it was to refer only to the so-called written sources of law, i.e. enactment and agreement. There is no unequivocal stance on this matter in the Constitution; it does not exclude any of the forms of law-making, but makes only the written sources of law subject to regulation.

The Constitutional Committee also discussed the matter of what position was to be given in the system of sources of law in Poland to the so-called negotiation-based sources of law, i.e. all kind of agreements and understandings of domestic law. The Constitution gives clear priority to law enacted by a unilateral decision of the empowered state authority. Collective labour agreements and other agreements are recognized as source of labour law (article 59, para. 2). On the other hand, the Constitution introduces agreements between the Council of Ministers [the Government] and the representatives of churches and religious organizations other than the Roman Catholic Church, which are to form the basis for statutes regulating the relationships between the Republic of Poland and those churches and religious organizations (article 25, para. 5).

III. The System of Sources of Law in the Constitution; The Kinds of Sources of Law and Their Hierarchy, Bodies Vested with Law-making Powers

1. As it has been pointed out above, the new Constitution of the Republic of Poland regulates the written sources of law: normative acts and agreements. According to a view widely held in Polish legal science only those agreements and normative acts are considered to be sources of law which contain norms that are in principle general (indicating the addressees by naming their features) and abstract in nature (defining repeated behaviour).

2. The Constitution systematizes the sources of law basing on a distinction, well-grounded in Polish jurisprudence, between “sources of universally binding law” and “internal acts”. This distinction, although controversial in many of its facets, played an important role in attempts of ordering the law-making process in the 1970s and 1980s. It was decided then that only acts with a universally binding force may contain norms addressed to any subject (including citizens, their organizations, economic units, state authorities) and may encroach upon the sphere of individual rights, freedoms and obligations (or, more widely, shape the legal situation of individuals). Because of the fact that what counted as acts with a universally binding force there were only statutes and executive (implementing) acts issued on the basis of those statutes, or in other words, acts that were issued according to a relatively precise procedure and which had to be promulgated, the conception of acts with a universally binding force protected the

citizens against arbitrary, spontaneous and frequently unpublished law-making by administrative bodies. As for normative acts of an internal character, it was decided that they could be issued on the basis of a statute specifying the structure and tasks of a given body (and not on the basis of special authorization granted by statute), but that their binding force was to be restricted only to the organizational units subordinate to the authority which was issuing the acts.

2.1. In the light of the Constitution, sources of law with a universally binding force in the Republic of Poland comprise of: the Constitution, statutes, ratified international agreements, and regulations (article 87, para. 1). Among normative acts with a universally binding force there are also regulations with the force of a statute issued by the President of the Republic (article 234, para. 2) on a motion of the Council of Ministers [the Government] during a period of martial law, in the event when the Sejm cannot convene in session and exclusively within the limits defined in article 228, paras. 3-5 of the Constitution. The regulations in question need to be approved by the Sejm at its next session (article 234, para. 1). The constitution-makers have not taken an unequivocal stand on what is the legal character of collective labour agreements. The Constitution guarantees the right of trade unions and of employers and their organizations to make collective labour agreements and “other agreements” (article 59, para. 2), but it does not expressly count collective labour agreements among the sources of law. In Polish labour law literature, however, it has been decided, after many years of disputes, to treat collective agreements as a source of universally binding law of a special kind. Thus, it may be expected that interpretations of the rather imprecise constitutional provisions will follow that approach.

The Constitution also provides for sources of universally binding law of territorially restricted scope, i.e. normative acts with force binding only in the area of activity of the bodies that enacted them (e.g. in a province or commune). These are acts adopted by local government authorities (e.g. the Commune Council) and by local organs of government administration (e.g. by voivodes [governors of provinces]), on the basis and within the limits of delegation contained in statutes - such acts are described by the Constitution as constituting “local law”.

2.2. The matter of internal acts is less clear in the Constitution. The constitution-makers have included among such acts resolutions and orders (article 93, para 1), with the qualification - notwithstanding the unequivocal stand on that matter taken in legal science and judicial decision-making - that they are binding only for the organizational units subordinate to the body issuing a given kind of act (article 93, para. 1) and that they are subject to scrutiny for their conformity with the universally binding law (article 93, para 3).

Whereas orders may be issued only on the basis of statute and may not constitute the basis for decisions concerning the citizens, there are no such conditions with regard to resolutions. Hence, it must be assumed that the Constitution provides for two, fundamentally distinct types of internal acts.

2.3. The rules of procedure for the two chambers of the Parliament (the Sejm - article 112, and the Senate - article 124) are also a specific kind of normative acts.

Such rules are issued directly on the basis of the Constitution, and it is also the Constitution that determines the scope of matters that such rules may and should regulate. Among them are such matters as the internal organization of the Chamber and the agenda of its work, the procedures for appointing and for the functioning of the authorities of the Chamber, and the manner in which state authorities discharge their constitutional and statutory duties with regard to the authorities of the legislature. An overview of the matters which are to be dealt with by the rules of procedure for the two chambers suggests that they will contain - apart from internal provisions - also provisions of a universally binding force.

3. Article 8, para. 1 of the Constitution states as follows: “The Constitution is the supreme law of the Republic of Poland”; all other legal norms binding in the state must be in compliance with the Constitution (article 188) and the Constitution’s provisions may be amended only according to a special, relatively complicated procedure (article 235). It is interesting to note that the Constitution does not mention, as a source of law, any constitutional acts, in spite of the fact that in Poland there has been a tendency to enact such laws.

In the hierarchically ordered system of sources of law, the place immediately following that of the Constitution is taken by statutes and ratified international agreements.

The Constitution does not differentiate between statutes, although in the course of its drafting there appeared suggestions to distinguish special kind of so-called “organic” (cardinal, systemic) statutes. The Constitution does, however, make some changes to legislative procedure, and perhaps the most significant of such changes concerns the legislative initiative whereby a group of 100,000 citizens eligible to vote has the right to introduce a bill in the Sejm (article 118, para. 2)

The constitution-makers have not tried to provide a definition of a statute, on the correct assumption that there is a generally accepted notion of statute in Polish legal culture. The features of a statute undisputably include the fact that it is a normative act which complies with the Constitution, an act adopted by the parliament in a special procedure whose main features are regulated by the Constitution and moreover it is an act whose scope of regulation is in principle unlimited.

The Constitution does not define the scope of matters which can be regulated exclusively by means of a statute (i.e. areas of exclusive statutory regulation). Defining the scope of matters subject to statutory regulation has an enormous public and political role when the executive can make universally binding law “spontaneously”, as it was the case in Poland when the 1952 Constitution was in force. Such a definition is not, however, necessary when constitution provide for the executive to issue universally binding normative acts only on the basis of authorization by statute (as is the case in the present Constitution). It is another matter, however, that regulation of many areas is delegated by the present Constitution to statutes. This is especially the case where the Constitution provides for mandative statutory regulation of specific matters (e.g. article 88, para. 2) or where it empowers the statute to modify a constitutional norm (e.g. article 57).

Thus, in saying that the scope of matters to be regulated by statute is unlimited, note must be taken of two essential although quite evident things. Firstly, statutory regulation

does not cover those matters which the Constitution delegated to other bodies, especially executive and judicial authorities. Secondly, a statute must comply with the Constitution, which defines the clear and unbreachable limits of the legislative power.

Polish constitution-makers have quite resolutely opted for the consolidation of the opposition of the parliament and of the statute. That is why regulations with the force of a statute, which are provided for by the Constitution, are acts of an exceptional character, issued (as mentioned above) only under extraordinary circumstances and regulated in a separate chapter (Chapter 11, "Extraordinary measures").

The current Constitution devotes a great deal of attention to international agreements. After years of silence on that matter, the constitution-makers have decided to resolve many controversial issues related to the binding force of those agreements in domestic law and their place in the hierarchy of the sources of law.

The Constitution expressly distinguishes three types of international agreements: (a) agreements ratified on the basis of prior consent granted by statute (article 88, para. 3 and article 89, para 1); (b) agreements according to which the Republic of Poland may delegate competences of public authorities on certain matters to international organizations and international institutions (article 90); with regard to those agreements the Constitution provides that granting consent for their ratification requires the form of a statute, and even provides for the possibility of holding a national referendum on that matter (article 90, paras. 2 and 3), (c) agreements ratified without the requirement to obtain consent granted by statute (article 89, para. 2).

Ratified international agreements, once they are promulgated in the Journal of Laws of the Republic of Poland, become an integral part of the domestic legal order and are applied directly (article 91, para. 1).

The place of an international agreement in the hierarchy of the sources of law depends on the procedure according to which it was ratified. Agreements ratified on the basis of consent granted by statute have priority over statutes if the agreement cannot be reconciled with the provisions of such statutes (article 91, para. 2, and also article 188 para. 2). The Constitution also defines the position of law enacted by an international organization - if an agreement establishing an international organization provides so, the law enacted by such an agreement is applied directly and has precedence in the event of conflict with statutes (article 91, para. 3). The interpretation of that provision is likely to cause a lot of problems. As it stands, the provision would suggest that if there is a conflict between statutes, on the one hand, and law enacted by international organizations, on the other, priority is to be given to the latter, irrespective of whether it is a law with a universally binding force or not. No such doubts emerge in case where a statute is in conflict with an agreement ratified with prior consent granted by statute, for agreements which ratification requires such consent contain universally binding norms (article 89, para. 1).⁹ Doubts may arise, however, regarding the position within the system of sources of law of agreements whose ratifi-

⁹ Thus, a universally binding norm contained in an agreement has precedence over a universally binding norm contained in a statute.

cation does not require statutory consent, as the constitution-makers have not taken a stand on that matter.

The constitution makes no mention of international agreements (to which the Republic of Poland is a party) other than those ratified, which may lead to the conclusion that such agreements are not universally binding law in Poland. The Constitution also lacks any explicit standpoint on sources of international law other than agreements, being restricted to the general provision that "The Republic of Poland shall respect international law binding upon it" (article 9), which leads one to assume that the Republic of Poland also complies with international customs and principles of international law.

The least important position among sources of law with a universally force binding in the whole of the state is occupied by regulations. According to the Constitution, they are the only kind of executive (implementing) acts, and as executive acts they are linked with statutes in two ways: by relating to competences and by relating to functions.

The Constitution defines regulations in a very restrictive way, as acts issued on the basis of a specific authorization formulated in a statute, for the purpose of implementing the statutes, and the powers to issue such acts are vested exclusively with bodies specified in the Constitution (article 92, para. 1, sentence 1). The Constitution vests the right to issue regulations with the President of the Republic (article 142, para. 1), the Council of Ministers [the Government] (article 148, point 3), the Prime Minister, ministers in charge of a government department (article 149, para.2), and also the National Council of Radio Broadcasting and Television (article 213, para. 2). The Constitution also requires the statutory provisions on the basis of which regulations are issued to indicate the scope of matters to be delegated to regulations and to contain guidelines concerning the content of future regulations (article 92, para 1, sentence 2). The Constitution also precludes the possibility of delegating law-making powers by means of regulations (ban on sub-delegation, article 92, para.2), thus settling a long-lasting dispute on this point.

A final source of universally binding law is constituted by acts of local law. The right to issue such acts is vested with the authorities of local government, which are guaranteed autonomy by the Constitution (article 16, para. 2, article 165), and by local bodies of government administration (e.g. voivodes [provincial governors] as representatives of the government in the provinces, article 152, para. 1). The Constitution does not provide an exhaustive list of bodies which have powers to issue acts of local law, nor does it define the form of such acts. The only requirement that Constitution makes with regard to such acts is that they should be issued on the basis of and within the limits of delegation contained in statutes; however, unlike in the case of regulations, it does not require such acts to be issued with purpose of implementing a statute. All other matters concerning local law are delegated by the Constitution to statutes.

In ordering the system of universally binding law, the constitution-makers have also resolved one highly embarrassing matter. It occurred that both the 1952 Constitution, as well as the "Little Constitution", allowed unpromulgated normative acts, including those with a universality binding force, to figure in the system of law in Po-

land. The new Constitution dispenses with that practice, making the promulgation of statutes, regulations, and acts of local law, a necessary condition for such acts to come into force (article 88, para. 1), and requiring that the mode of promulgation should be regulated by statute. The same requirement could apply, in spite of there being no unequivocal provisions on the matter in the Constitution, to international agreements ratified with prior consent granted by statute.

The second group of normative acts in a dualistic system of sources of law in Poland is comprised of internal acts. Their constitutional regulation gives rise to number of doubts. As it has been mentioned above, there are only two kinds of such acts mentioned in the chapter "Sources of Law" in the Constitution: resolutions, which can be issued by the Council of Ministers [the Government], and orders. The right to issue orders is formulated explicitly in article 93, para.1, of the Constitution, where it is vested with the Prime Minister and ministers, as well as by article 142, para. 1, which vests the right also with the President of the Republic.

The Constitution also makes a distinction between the legal bases for issuing, respectively, orders and resolutions. Orders may be issued only on the basis of a statute. The issuing of orders, however, does not require statutory authorization, for they are not executive (implementing) acts and as such, according to the Constitution, they may not serve as a basis for decisions relating to citizens, legal persons, and other legal subjects.

In relation to resolutions, the Constitution does not formulate any such requirements. It seems reasonable to assume that the Government may issue them both on the basis of the Constitution (e.g. by repealing a regulation or order issued by a minister, article 149, para.2) and on the basis of statutes.

IV. Areas of Controversy

One of the main ideas of the new Constitution was that the system of sources of law should be "closed", both with respect to what form normative acts could take, and with respect to which bodies should be vested with law-making powers. The constitution-makers have been quite successful in achieving that goal, although there are already many matters that give rise to doubts and even serious differences of opinion. This section will look at some of those matters.

Firstly, the Constitution provides for a rather limited list of sources of law. What is especially disquieting is the lack among the normative acts of all kinds of charters, and this in spite of the fact that Constitution provides for a much wider scope and role of self-governmental institutions, which are to enjoy substantial autonomy, also with respect to regulating their structure and functioning.

The radical narrowing down of the range of bodies authorized to issue regulations also may give rise to organizational and legislative problems. The change introduced by the new Constitution is troublesome; many bodies which previously had the right to issue regulations now have to approach the Council of Ministers [Government], the Prime Minister or the respective minister, with requests for such regulations to be issued.

Many difficulties are also involved in interpreting the provisions on formulating authorization to issue regulations. The authorization provisions are to give a detailed description of the scope of matters to be regulated and are to contain guidelines on the content of the future regulations. There is now debate on how very detailed such guidelines are to be and on whether they have to be explicitly formulated in the authorizing provisions or whether it would be sufficient if they were expressed in various fragments of the enabling statute.

The area where there is the greatest number of doubts and controversies relates to the constitutional provisions on internal acts, and more precisely to the limited range of bodies authorized to issue them. The view that is now starting to prevail among legal scholars is that the Constitution has not closed the catalogue of public authorities entitled to issue provisions of internal law and that such provisions may be issued, apart from the bodies expressly mentioned in the Constitution, by at least the central organs of state authority. This is a view which has a praxiological justification. It would be difficult, however, to accept that the argument in favour of such a view is provided by article 188, para. 3, which empowers the Constitutional Tribunal to investigate the conformity of legal provisions issued by the **central organs of the state** (underlined by S.W.) with the Constitution, international agreements, and statutes.

V. Recapitulation

The new Constitution of the Republic of Poland has made a profound and wide-ranging reform of the system of sources of law, and, looking from a broad perspective, of the whole process of law-making. The inspiration for the reform was provided by the negative experience of the "open-ended" system of the sources of law, which led to a situation where law-making powers were all too readily transferred by statute to an ever increasing number of bodies, thus undermining the hierarchical structure of the system of law.

It is the first time that Polish constitution-makers have devoted so much attention to the process of law-making, forms of law and review of its constitutionality, and have given so much prominence to the problems of law-making in relation to the totality of constitutional principles. They have thus expressed their conviction that the rules of law-making and the quality of law are a foundation of a democratic state. The role that they have given to the Constitution in the system of sources of law has been changed considerably as well: the Constitution now forms the basis for the law-making process. It defines the system of law-making in the state and also provides the basic frame of reference for the content of the law. The constitution-makers have also strengthened the position of statutes, these being laws adopted by a democratically elected parliament. By contrast, the law-making role of the executive has been considerably restricted - regulations, which are now the only kind of executive act, have been linked to statutes; also the role of internal law-making has been significantly reduced. The con-

stitution-makers have also failed to take advantage of unconventional forms of law-making, especially those that relate to negotiation.

It is still too early to give a well-grounded evaluation of the changes that have been introduced. There are welcome changes relating to the democratization and the ordering of the process of law-making process, but the radical reduction in the range of forms of law-making by administrative bodies gives rise to some skepticism, and the lack of unequivocality of the provisions on the sources of law must be viewed with some concern, as these have already been the source of disputes. Resolving such disputes is bound to take some time, and will require contribution from both legal science and judicial decision-making.

LA NOUVELLE CONSTITUTION POLONAISE: LES ASPECTS INTERNATIONAUX

Andrzej Wasilkowski*

Je voudrais présenter ici trois séries de problèmes:

- premièrement, les dispositions de la nouvelle Constitution concernant la gestion des relations avec l'étranger, notamment la répartition des compétences entre les organes de l'Etat dans ce domaine.
- deuxièmement, les dispositions concernant la place des normes internationales en droit interne, notamment celles sur l'introduction des traités ratifiés dans le catalogue des sources du droit de la République de Pologne.
- troisièmement, les dispositions de la Constitution anticipant la future qualité de membre de l'Union Européenne, notamment les autorisations d'entrée dans l'Union et d'application du droit communautaire.

I.

1. Dans le domaine de la gestion des relations avec l'étranger, il faut prêter attention aux compétences du Président, du Gouvernement et du Parlement.

2. Les compétences du Président dans le domaine qui nous intéresse ici, découlent de certaines dispositions générales de la Constitution (et aussi du droit international coutumier, ce qui n'est pas l'objet de notre étude), ainsi que de certaines dispositions détaillées. De cette première catégorie relève l'article 126 de la Constitution, qui dispose (al. 1) que «Le Président de la République de Pologne est le représentant suprême de la République de Pologne et le garant de la continuité du pouvoir d'Etat». Cette règle générale est développée à l'alinéa 2 dudit article: «Le Président de la République veille au respect de la Constitution, il est le garant de la souveraineté et de la sécurité de l'Etat, de l'inviolabilité et de l'intégrité de son territoire». On peut admettre que ces dispositions forment un certain cadre général pour la position constitutionnelle du Président et peuvent être importantes pour l'interprétation des dispositions particulières. Elles ne constituent pourtant pas un fondement autonome pour les compétences du Président dans

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ses relations avec l'étranger. En effet, l'alinéa 3 de l'article précité dispose que «le Président de la République exerce ses fonctions dans les limites et selon les principes prévus par la Constitution et les lois».

Les compétences du Président en matière de relations extérieures, font l'objet, notamment, de l'article 133 de la Constitution, qu'il faut citer en entier:

«1. En tant que représentant de l'Etat dans le domaine des relations étrangères, le Président de la République:

- 1) ratifie et dénonce les traités, et en informe la Diète et le Sénat,
- 2) nomme et révoque les représentants plénipotentiaires de la République Polonaise dans les pays étrangers et auprès des organisations internationales,
- 3) reçoit les lettres de créance et de rappel des représentants diplomatiques étrangers et des organisations internationales accrédités auprès de lui.

2. Le Président de la République peut demander au Tribunal Constitutionnel de se prononcer sur la conformité à la Constitution du traité préalablement à sa ratification.

3. Le Président de la République coopère dans le domaine de la politique étrangère avec le Président du Conseil des Ministres et le ministre compétent».

La compétence propre du Président en matière de ratification des traités internationaux est limitée de façon importante par les compétences développées du Parlement, ce dont il sera question ci-dessous. Par contre, l'alinéa 3 de la disposition citée, limite l'indépendance du Président dans le domaine de la politique étrangère, ce qui devient particulièrement visible après la confrontation de cette formule générale aux dispositions concernant la compétence du Gouvernement dans le domaine en question.

Ajoutons enfin que la Constitution confie au Président la publication des traités par ordonnance (art. 144, al. 7). En la matière, le Président agit indépendamment; le contre-seing du Premier Ministre n'étant pas requis.

En général, la nouvelle Constitution a réduit les compétences du Président dans le domaine des relations étrangères - en comparaison avec la Loi Constitutionnelle du 17 octobre 1992 sur les relations réciproques entre le pouvoir législatif et le pouvoir exécutif de la République de Pologne ainsi que les collectivités locales, dite «Petite Constitution». En particulier, a disparu de la nouvelle Constitution la disposition prévoyant que le Président exerce la gestion générale dans le domaine des relations étrangères (art. 32, al.1 de la «Petite Constitution»).

Les compétences propres du Président en matière de ratification des traités internationaux étaient plus développées car les compétences du Parlement en la matière n'étaient pas aussi largement entendues (art. 33, al. 2, «Petite Constitution»).

Enfin, le Président a perdu son influence particulière en matière de nomination du ministre des Affaires Etrangères (ainsi que des ministres de l'Intérieur et de la Défense) qui découlait de l'article 61 de la «Petite Constitution». Cette disposition obligeait le Président du Conseil des Ministres à solliciter l'avis du Président avant la présentation des demandes de nomination pour ces trois ministères.

Tout cela ne signifie pas la limitation de l'activité du Président en matière de relations étrangères, mais la création d'une obligation de consultation et de coopération étroite avec le Gouvernement, qui est le propre maître de la politique étrangère de l'Etat.

3. Les compétences du Gouvernement dans le domaine qui nous intéresse sont définies à l'article 146 de la Constitution, qui dans son alinéa 1 définit le principe général selon lequel le Conseil des Ministres conduit la politique intérieure et étrangère de la République de Pologne. Les bases de ce principe général sont renforcées par la clause de compétence formulée à l'alinéa 2, selon lequel: « Le Conseil des Ministres dirige les affaires relatives à la politique de l'Etat qui ne sont pas réservées aux autres autorités de l'Etat et des collectivités territoriales ». A mon avis, il est possible d'interpréter cette disposition comme la présomption de compétence du Gouvernement pour toutes les affaires de politique de l'Etat. Cette compétence n'exige donc pas de justification. Par contre, une justification est nécessaire dans chaque cas de limitation des compétences du Gouvernement au profit des autres organes de l'Etat (en particulier du Président et du Parlement) ou des collectivités territoriales.

Une telle construction n'exige pas de définition rigoureuse de la compétence du Gouvernement dans le domaine des relations étrangères. Néanmoins, l'article 146 alinéa 4, énumérant les différentes fonctions du Conseil des ministres, se réfère, entre autres, au domaine en question. Selon le point 8 de cette disposition, le Conseil des Ministres « assure la sécurité extérieure de l'Etat ». Selon le point 9, il « exerce la direction générale dans le domaine des relations avec les pays étrangers et les organisations internationales ». Et enfin, selon le point 10, il « conclut les traités demandant la ratification, approuve et dénonce les autres traités ».

Il faut y relever notamment la disposition relative à l'exercice de la « direction générale » dans le domaine des relations étrangères. A la lumière de l'art. 146 al. 1, précité (le Conseil des Ministres conduit la politique étrangère de l'Etat), cette disposition paraît inutile. Pour garantir la position dominante du Gouvernement dans le domaine en question, il suffisait d'éliminer la formule « la direction générale » du catalogue des compétences du Président (comme le faisait la « Petite Constitution » de 1992, soulevant de nombreuses controverses). Le constituant a sans doute considéré qu'il fallait mettre « le point (juridiquement inutile) sur i », donc non seulement priver le Président de ce droit, mais encore reprendre la formule dans les dispositions relatives aux compétences du Gouvernement.

4. Les compétences du Parlement dans le domaine des relations étrangères ont, de même que dans d'autres domaines, un caractère législatif et un caractère de contrôle. Les lois prévoyant le consentement présidentiel à la ratification des traités internationaux tiennent ici une place particulière. Comme on l'a déjà rappelé, les compétences du Parlement dans ce domaine sont très développées. La question est réglée par l'article 89 de la Constitution, qu'il faut reproduire ici dans son intégralité.

« 1. La ratification par la République Polonaise d'un traité et sa dénonciation exigent l'autorisation exprimée par une loi, si le traité concerne:

- 1) la paix, les alliances, les accords politiques ou militaires,
- 2) les libertés, les droits ou les devoirs des citoyens, prévus par la Constitution,
- 3) la participation de la République de Pologne à une organisation internationale,

- 4) des charges engageant considérablement les finances de l'Etat,
 - 5) les questions réglées par une loi ou pour lesquelles la Constitution exige une loi.
2. Le Président du Conseil des Ministres informe la Diète de son intention de soumettre à la ratification du Président de la République les traités dont la ratification ne demande pas l'autorisation exprimée par une loi.
3. Les principes et la procédure de conclusion, de ratification et de dénonciation des traités sont prévus par la loi.»

A la lumière de ce catalogue, le nombre de traités ratifiés par le Président sans la participation du Parlement sera certainement minime. Ces traités ne concerneront pas en tout cas la matière législative. L'article 89 alinéa 2 comporte sur ce point une garantie essentielle de la position du Parlement, en protégeant de l'éventuel arbitraire du Gouvernement pour le choix de la procédure de ratification.

De plus, la Constitution renvoie à la loi (ou aux traités internationaux ratifiés) la question de l'utilisation de la force armée hors des frontières de la République de Pologne, ainsi que celle des règles de passage et de séjour des armées étrangères sur le territoire polonais.

Les compétences législatives du Parlement concernent enfin le statut des différents organes de l'Etat participant aux relations internationales.

S'il s'agit des fonctions de contrôle, elles sont assumées avant tout lors des séances plénières sur la politique étrangère, sous forme d'interpellations et de questions des députés, ainsi que dans le cadre de l'activité des commissions permanentes aux affaires étrangères de la Diète (celle-ci, entre autres, auditionne les candidats aux postes d'ambassadeurs) et du Sénat. Enfin, le Parlement à lui seul apparaît comme sujet actif des relations internationales dans le cadre de différentes formes de coopération interparlementaire.

II.

1. Définissant la place des traités internationaux et leur effectivité en droit interne, la Constitution du 2 avril 1997 ne pouvait pas baser sur l'ordre établi, car la Loi Fondamentale de 1952 gardait le silence complet sur ces questions. Après 1989, la situation n'a guère changé. Dans le domaine qui nous intéresse, on s'est limité à adopter une nouvelle législation, importante mais fragmentaire, sur la compétence de la Diète dans le processus de ratification des traités internationaux (art. 33 al. 2 de la «Petite Constitution»).

Cette dernière solution se référait à la tradition de la Constitution de mars 1921. Pour de nombreuses autres questions, il était difficile de remonter aux anciens modèles. Après la deuxième guerre mondiale, on est arrivé à un tel élargissement du champ d'interaction du droit international et du droit national, qu'on peut parler de l'émergence d'une situation complètement nouvelle. Il s'agit, entre autres, des questions relatives au domaine constitutionnel, lesquelles, encore récemment, étaient considérées comme relevant de la compétence exclusive du législateur national. A l'échelle universelle, cela est particulièrement visible en matière de droits de l'Homme, et en Europe également en matière constitutionnelle (développement des institutions démocratiques, Etat de droit, respect des minorités, etc.)

Cette nouvelle situation a créé un sérieux défi pour les législateurs constitutionnels, et apporté - surtout en Europe - de nombreuses solutions précédemment inconnues¹. A cet égard, il faut encore ajouter qu'indépendamment des changements dans la sphère classique des relations droit national - droit international, sont aussi apparus des problèmes constitutionnels complètement nouveaux, résultant de la participation d'un nombre accru d'Etats dans les structures d'intégration européenne. Face à ces circonstances, à peine esquissées ici, le constituant polonais était obligé à adopter des solutions novatrices par rapport aux réalités polonaises.

2. Il faut toutefois dire que dans la recherche de ces solutions, le législateur a eu la possibilité de se fonder sur une solide base-arrière intellectuelle, car l'omission, dans la Loi Fondamentale de 1952, de la problématique du droit international et de ses effets sur l'ordre juridique interne avait été pendant des dizaines d'années, un sujet permanent de critiques et de demandes de *lege ferenda*. On a élaboré aussi une conception de la force obligatoire directe du droit international dans l'ordre juridique polonais, intéressante du point de vue théorique. Des propositions développées de *lege ferenda* ont été formulées en 1971, au cours d'une conférence consacrée à la réforme du système juridique. Par la suite, cette question a été soulevée, à plusieurs reprises, par le Conseil Législatif auprès du Président du Conseil des Ministres, dans ses rapports successifs sur l'état du système juridique.

Il faut avouer qu'il a fallu attendre longtemps la réalisation de ces postulats. Cependant, au cours des travaux sur la Constitution du 2 avril 1997, on a consacré beaucoup d'attention à cette question, plus qu'on aurait pu espérer. En effet, la place que la Constitution réserve au problème qui nous intéresse ici, dépasse, semble-t-il, la «moyenne européenne».

La Constitution du 2 avril 1997 est sans doute ouverte sur le droit international et lui est favorable. Cette constatation générale ne saurait s'incliner devant la critique de telle ou telle autre solution particulière. De ce point de vue, la nouvelle Constitution polonaise se situe parmi celles qui, courageusement, prennent en compte les tendances contemporaines des relations droit interne - droit international, et qui définissent la place des traités dans l'ordre juridique interne.

3. Maintenant, je voudrais caractériser de façon générale le contenu des dispositions constitutionnelles en question, dans le contexte des différentes méthodes garantissant l'efficacité des traités en droit interne. Je voudrais aussi indiquer certains problèmes d'interprétation, puis réfléchir sur le statut (en droit interne) de ces catégories de traités sur lesquelles la Constitution est muette.

4. Pour la totalité des questions abordées ici, l'article 9 du chapitre I de la Constitution, intitulé «La République», revêt une importance centrale. Cet article dispose que la République de Pologne respecte le droit international par lequel elle est liée. Cette disposition ne différencie pas les sources du droit international. A la différence des autres

¹ Voir par ex. A. C a s s e s e, «Modern Constitutions and International Law», *RCADI* 1985, III, vol.

dispositions, consacrées exclusivement aux traités internationaux, elle se réfère à la totalité du droit international (liant la Pologne). Elle englobe donc les traités internationaux et le droit coutumier, ainsi que - même si on y porte rarement attention - les résolutions normatives des organisations internationales (et plus précisément des organisations internationales qui ont une compétence normative liant les Etats et dont la Pologne est ou sera membre à l'avenir).

Au cours des travaux sur le projet l'on a formulé des remarques critiques, fondées sur la juste considération que le caractère obligatoire du droit international ne dépend pas de dispositions constitutionnelles; la disposition en cause est donc inutile.

Toutefois, le constituant n'a pas partagé ces objections.

Il ne fait aucun doute que, dans la sphère du droit international, ladite disposition a un caractère exclusivement déclaratif. Cependant, dans la sphère du droit national, elle a une fonction constitutive, en ce sens qu'elle est le fondement général de l'ouverture sur le droit international.

Le caractère déclaratoire d'un acte juridique (et donc pas seulement d'une disposition constitutionnelle, mais aussi d'une disposition d'un traité international, par exemple) n'est pas d'ailleurs une preuve suffisante que cet acte soit inutile. La pratique internationale en donne un riche témoignage, de même que les Constitutions de nombreux Etats. Dans le monde où les violations du droit international ne sont pas, pour ainsi dire, chose rare, une déclaration constitutionnelle dudit contenu a donc bien une signification.

Qui plus est, l'article 9 de la Constitution pose cependant une règle de conduite obligatoire pour les organes de l'Etat et autres sujets, les orientant vers le droit international, indiquant la nécessité de son respect soit dans le processus normatif, soit décisionnel. L'obligation de respect du droit international est indépendante de la tournure des dispositions constitutionnelles, c'est vrai, mais en pratique elle subit un véritable renforcement dans l'Etat, lorsqu'elle devient une obligation constitutionnelle.

Cependant, ce qui est certainement le plus important, c'est que l'article 9 de la Constitution peut être le fondement de l'utilisation par les tribunaux et autres organes publics de ces normes de droit international qui n'ont pas été incorporées au catalogue des sources de droit ayant force obligatoire en Pologne. Ceci concerne, dans la plus large mesure, les traités internationaux n'exigeant pas de ratification, ainsi que le droit coutumier, et enfin - dans leur champ d'application non-couvert par la disposition particulière de l'article 90 - des résolutions normatives des organisations internationales.

Cette solution est sûrement insuffisante pour ceux qui, dans les débats sur les projets de Constitution, se prononçaient nettement pour l'insertion large du droit international coutumier, justement par avoir mentionné ce droit (à côté des traités internationaux) dans le catalogue des sources du droit ayant force obligatoire en Pologne. A cet égard la pression de l'argumentation a été assez forte². Le constituant ne s'est cepen-

² Cette argumentation est développée par A. Wyrozumska: «Zapewnienie skuteczności prawa międzynarodowemu w prawie krajowym w projekcie Konstytucji RP» [La garantie de l'effectivité du droit international en droit interne dans le projet de Constitution de la République de Pologne], *Państwo i Prawo* 1996, nr 11, surtout p. 18-21.

dant pas soumis à ces arguments, étant probablement convaincu qu'il ne faut pas, voire que l'on ne peut pas accepter comme source constitutionnelle du droit des normes dont le champ et la portée sont difficiles à définir précisément et que l'on ne saurait pas publier en due forme.

L'article 9 de la Constitution crée toutefois la possibilité d'appliquer le droit coutumier dans les situations où existent déjà des précédents ou lorsque la juridiction décide qu'il s'agit d'une norme généralement acceptée et dont le contenu est suffisamment clair.

Ceci conduit à une remarque d'ordre plus général: l'insertion de l'une ou l'autre catégorie de normes internationales dans le catalogue des sources du droit en vigueur, n'est nullement la condition de leur efficacité et de leur application. Ces normes peuvent être efficaces et appliquées sur la base de principes fort différents, et leur choix appartient à l'Etat. Par contre, dans le catalogue des sources de droit en vigueur dans l'Etat, on peut insérer, de façon rationnelle, avant tout les normes qui remplissent des conditions formelles précises. Il s'agit des normes qui forment, par leur structure et leur articulation, des actes comparables aux lois et qui se laissent publier selon le mode prévu pour les lois. Les traités internationaux sont justement de tels actes.

2. Sans aucun doute, la plus grande innovation du système qu'a apportée la Constitution du 2 avril 1997, est l'introduction des traités internationaux ratifiés au catalogue des sources du droit ayant force obligatoire (art. 87), et aussi le positionnement dans la hiérarchie de ces sources du droit des traités ratifiés avec le consentement de la Diète, exprimée sous forme d'une loi (art. 91, al. 2).

D'un point de vue théorique, on pourrait apprécier cela comme un pas vers la conception moniste, mais nous n'allons pas nous occuper ici de cet aspect³. Il se pose cependant une question d'une plus grande importance pratique: comment faut-il qualifier cette solution dans le contexte des méthodes classiques d'assurance de l'effectivité du droit international dans l'ordre juridique interne? Rappelons ici que l'on peut généralement diviser ces méthodes en fondées et non fondées sur la réception, bien que des doutes puissent quelque fois apparaître sur le mode de qualification d'une méthode.

La réception repose, comme on le sait, soit sur la répétition d'une norme (ou groupe de normes) de droit international dans la loi nationale, ou bien sur la transformation, donc la transposition de cette norme (ou groupe de normes) dans la sphère du droit national, la délivrance de sa force obligatoire dans cette sphère. Dans ces deux situations, les normes de droit international fonctionnent dans l'Etat comme normes de droit national.

La méthode la plus fréquente d'insertion des normes juridiques internationales dans le droit interne sans réception (et donc sans création parallèle de normes de droit interne) est le renvoi. La loi indique alors la norme juridique internationale (conventionnelle ou coutumière), qui dans un cas donné peut ou doit être appliquée. Elle est donc appliquée comme

³ Voir sur ce thème A. Wasilkowski: «Monism and Dualism at Present», dans: *Theory of International Law at the Threshold of the 21st Century. Essays in honour of Krzysztof Skubiszewski*, ed. J. Makarczyk, Kluwer Law International, The Hague-London-Boston 1996, p. 323 et s.

norme de droit international. Ceci concerne également la conception de la force obligatoire du droit international *proprio vigore* (j'utilise dans ce cas le terme de conception, et non celui de méthode, car il s'agit plutôt d'une certaine idée théorique).

Beaucoup plus compliqué est le problème de l'introduction dans le droit interne des normes juridiques internationales par la méthode d'adoption et d'incorporation. Or, en fonction de l'appréciation de la pratique, mais aussi de l'approche théorique, l'utilisation de ces méthodes peut être appréciée différemment. On peut donc admettre que dans ces mêmes cas il n'y a pas de réception et que les normes adoptées ou incorporées fonctionnent dans le droit interne comme normes de droit international. Ces méthodes peuvent toutefois conduire aussi à la réception, si par exemple la pratique démontre que ces normes sont appliquées comme nationales. Cette question ne se laisse donc pas résoudre *in abstracto*.

3. Apparaît donc la question: comment évaluer du point de vue adopté ici, la solution admise à l'article 87 de la Constitution de la République de Pologne? Avant tout, il faudrait nous demander si nous avons ici à faire avec une transformation ou une incorporation.

La méthode de transformation s'applique sous deux formes: comme transformation spéciale et comme transformation générale. La première de ces formes, la plus courante, connue en Pologne sous la Constitution de mars 1921, se rapporte à des actes concrets de droit international, en général des traités internationaux. Cette solution, traditionnelle et sans nul doute efficace, n'éveille pas, en général, de grands doutes. La situation est quelque peu différente dans le cas de la transformation générale, quand le constituant insère automatiquement dans l'ordre juridique interne toute une catégorie, définie d'une manière générale, de normes juridiques internationales, ce qui nous rapproche déjà de la méthode d'incorporation. Et c'est, justement ainsi qu'a procédé le constituant polonais pour l'ensemble des traités internationaux ratifiés.

Ici, il faut rappeler que seul l'acte de ratification ne préjuge pas du choix de telle ou telle méthode d'incorporation des traités internationaux à l'ordre juridique interne. Il est de ce point de vue-là neutre, sauf si le droit d'un pays donné lie cet acte aux effets de la transformation. Cependant, tel n'est pas le cas du droit polonais. Du simple fait donc que l'article 87 de la Constitution intègre les traités ratifiés, au catalogue des sources du droit ayant force obligatoire en Pologne, on ne saurait déduire si nous avons affaire ici à la transformation générale ou à l'incorporation.

Comme on l'a dit, les traités ratifiés se divisent en deux groupes: les traités ratifiés par le Président de façon autonome, c'est-à-dire sans participation du Parlement (art. 133 pt 1 de la Constitution) et les traités ratifiés après autorisation législative préalable (ait.89 de la Constitution). Le premier groupe devient la source de la force obligatoire du droit sur la seule base de l'acte de ratification qui - comme nous l'avons rappelé - n'a pas d'effets de transformation. Le deuxième groupe devient source du droit en conséquence de la loi autorisant la ratification et de l'acte de ratification.

Or, c'est justement à la loi d'autorisation - à la différence de l'acte de ratification - qu'on peut attribuer un effet transformateur. Toutefois, dans tous les cas il s'agit

d'une transformation particulière. Cette solution est rationnelle dans un système qui ne range généralement pas les traités ratifiés dans le catalogue des sources du droit interne. On pourrait donc la justifier sur la base de la «Petite Constitution» de 1992. En revanche, à la lumière de l'article 87 de la nouvelle Constitution, il est difficile d'appliquer la construction de la transformation particulière aux traités ratifiés, dès lors que la Constitution elle-même la compte parmi les sources du droit ayant force obligatoire dans la République de Pologne. C'est pourquoi même les conséquences de la division des traités en deux groupes présentés supra ne nous laissent pas conclure sur la question de savoir si l'article 87 de la Constitution se fonde sur la méthode de transformation générale ou plutôt sur celle d'incorporation.

Certains indices peuvent par contre découler de l'article 91, alinéa 1 de la Constitution, qui est cependant difficile à interpréter de manière univoque. C'est pourquoi, il faut citer intégralement cette disposition: «Le traité international ratifié, après sa publication au Journal des lois de la République de Pologne, constitue une partie intégrante de l'ordre juridique national et il est directement applicable, sauf si son application relève de la promulgation d'une loi.»

Tout d'abord déblayons le terrain. La constatation que le traité ratifié devient une partie de l'ordre juridique interne est inutile, car ceci découle à l'évidence de l'article 87. Mais ce n'est pas cela qui est intéressant. Du point de vue adopté ici, la chose fondamentale est d'établir ce que signifie la règle selon laquelle le traité est «directement applicable», bien qu'il fasse partie de l'ordre juridique interne.

C'est là justement, que sont possibles diverses interprétations. La première d'entre elles, reproche à la disposition un manque de logique: si le traité, au terme de l'article 87 de la Constitution, est devenu une partie du droit polonais, il ne peut être en même temps directement applicable (c'est-à-dire en qualité de droit international). Or cette critique n'est fondée que si l'on admet que l'article 87 de la Constitution agit sur la base de la méthode de la transformation générale, c'est-à-dire qu'il crée par analogie (aux normes juridiques internationales créées par traités) la norme parallèle de droit polonais. Alors, en effet, la formule de l'applicabilité directe des traités internationaux apparaît comme un malentendu⁴.

On peut toutefois considérer la question autrement. La formulation «directement applicable» ne doit pas être forcément traitée comme une erreur du législateur. On peut y voir l'indice essentiel selon lequel l'article 87 de la Constitution n'a pas été pensé comme transformation générale, mais justement comme incorporation de la partie du droit international qu'il définit - sans réception, ni effets transformateurs. Cela signifierait par conséquent que les traités ratifiés doivent être appliqués en Pologne comme droit international, et donc justement directement - à moins que l'on ne puisse pas les appliquer de cette manière-là, puisqu'ils exigent l'engagement d'un processus législatif.

⁴ Voir W. Czaplinski: «Prawo międzynarodowe a prawo wewnętrzne w projekcie Konstytucji RP (Uwagi na tle artykułu Anny Wyrozumskiej)» [Droit international et droit interne dans le projet de Constitution de la République de Pologne (Remarques sur la base de l'article d'Anna Wyrozumska)], *Państwo i Prawo* 1997, nr 2, p. 100.

Evidemment, il est trop tôt pour prendre clairement position sur cette question. On ne peut exclure qu'en utilisant la formule de l'applicabilité directe, le constituant desirait simplement évacuer le passé, car sous le régime d'avant 1989, les tribunaux dans leur ensemble, à des moments politiques mouvementés, renonçaient à l'application des traités internationaux. Il faut attendre que se développe la pratique constitutionnelle, et surtout la jurisprudence. Pourtant, une loi une fois votée vit sa propre vie et indépendamment de l'intention du législateur. Le libellé de l'article 91, alinéa 1 de la Constitution (conjointement avec l'article 87) peut justifier l'opinion que l'introduction des traités ratifiés au droit polonais est basée sur la méthode de l'incorporation.

4. Il a été question précédemment de la division des traités internationaux ratifiés en deux groupes - selon la participation ou le manque de participation du Parlement au processus de ratification. Or, dans la nouvelle Constitution, cette division est décidément plus marquée que dans les dispositions précédentes. En effet, la Constitution différencie la place de chacun de ces groupes dans la hiérarchie des sources du droit. L'article 91 alinéa 2 prévoit que le traité ratifié par suite de l'autorisation législative jouit de la primauté sur la loi, si cette dernière n'est pas compatible avec le traité. Cependant, le statut des traités ratifiés sans autorisation législative n'a pas été défini de façon directe,

La reconnaissance de la primauté des traités ratifiés avec le consentement du Parlement sur les lois (en cas d'incompatibilité) constitue la réalisation de postulats avancés depuis longtemps et l'acquis certain de la nouvelle Constitution. Elle la situe parmi les lois organiques, toujours peu nombreuses, lesquelles, à cet égard, vont dans le sens de l'époque. C'est ajuste titre, également, que cette primauté concerne seulement les traités ratifiés par suite de l'autorisation législative. En effet, en votant une telle loi, le Parlement limite sa propre marge de manœuvre pour les questions réglées par le traité. L'élargissement de ce privilège aux autres traités ratifiés pourrait menacer l'équilibre nécessaire des relations entre le pouvoir législatif et le pouvoir exécutif.

5. Tout cela ne change rien au fait qu'un des effets secondaires de cette solution est l'incorporation au catalogue des sources du droit à force obligatoire d'une certaine catégorie d'actes d'un rang imprécis dans la hiérarchie des sources, c'est-à-dire justement des traités ratifiés de façon autonome par le chef de l'Etat. C'est pourquoi l'auteur de ces lignes a soutenu (au cours des travaux sur le projet de Constitution) l'idée qu'il serait bien plus logique d'incorporer aux sources du droit seulement les traités ratifiés avec le consentement du Parlement. Ceci serait justifié non seulement par les difficultés de définition de la place des traités ratifiés sans participation du Parlement dans le système des sources du droit, mais aussi pour certaines raisons essentielles. Une lecture attentive de l'article 89 alinéa 1 de la Constitution peut nous amener à la conclusion que tous les traités internationaux qui ont une signification dans l'ordre juridique interne (compris ici comme le droit ayant force obligatoire), ne peuvent entrer en vigueur autrement qu'avec le consentement du Parlement exprimé par une loi. Les autres traités soit ne concernent pas, en général, les relations infra-étatiques, soit ils les concernent dans un cadre particulier, au niveau ministériel et technique.

Cependant, puisque les traités ratifiés sans la participation du Parlement sont incorporés au catalogue des sources de droit, il faut rechercher la possibilité de définition de leur place dans la hiérarchie des sources du droit soit par voie d'interprétation, soit au moyen d'une loi sur la conclusion ou la dénonciation des traités internationaux, afin de régler cette question.

Les possibilités d'interprétation ne sont pas nombreuses. On peut se fonder sur l'ordre d'énumération des sources particulières de droit à l'article 87 alinéa 1 de la Constitution et en tirer la conclusion que, tous les traités ratifiés, qui y sont mentionnés avant les règlements, sont égaux aux lois, sous réserve qu'une disposition particulière reconnaît aux traités ratifiés avec le consentement du Parlement la primauté sur la loi. Sur le fond, cette conclusion pourrait se défendre. La critique pourrait toutefois objecter que du point de vue formel, un tel exemple d'interprétation est discutable.

S'il s'agit du statut des traités ne nécessitant pas de ratification, la question reste totalement ouverte. Le constituant n'a pas suivi les projets qui prévoyaient la primauté de ces traités sur les actes d'un rang inférieur à la loi. Il semble qu'il ait agi avec clairvoyance. Les accords intergouvernementaux et interministériels sont tellement différents d'u point de vue de leurs contenu et signification, que le traitement général de leur statut dans la Constitution serait une opération purement formelle et entravant inutilement la pratique constitutionnelle.

6. Et c'est là justement qu'apparaît la question du mode de résolution de ces problèmes, liés aux dispositions de la nouvelle Constitution, qui n'ont pas été réglés dans la Loi Fondamentale. Les opinions peuvent ici diverger, surtout entre les partisans de l'intervention législative et ceux de l'application pratique et évolutive de la Constitution par les juridictions et le Tribunal Constitutionnel. La première de ces voies donne, en théorie au moins, une chance de résolution rapide et univoque des problèmes signalés. Mais la seconde peut autoriser des réponses différentes et souples, donc moins schématiques à la question..

7. Pour compléter le tableau, il faut encore ajouter que la nouvelle Constitution se réfère à plusieurs reprises au droit international, en réglant certaines situations particulières.

L'article 42, alinéa 1, en constitutionnalisant le principe *nullum crimen sine lege*, ajoute: «ce principe n'est pas un empêchement à la punition d'un acte qui, au moment où il a été commis, constituait une infraction selon le droit international».

L'article 56, alinéa 2 parle de la possibilité d'accorder le statut de réfugié, «conformément aux traités liant la République de Pologne».

L'article 116 prévoit que la Diète décide de la proclamation de l'état de guerre uniquement en cas d'agression armée sur le territoire de la République «ou lorsque les traités engageant à la défense commune contre l'agression». On pourrait donc dire que cette disposition anticipe sur l'adhésion de la Pologne à l'OTAN. Il en est de même pour l'article 117, qui précise que les principes d'utilisation des Forces armées hors des frontières, ainsi que les principes de stationnement et de déplacement des forces armées étrangères sur le territoire polonais sont définis par des traités internationaux ratifiés ou des lois.

8. Dans le domaine qui nous intéresse la loi fondamentale accorde certaines compétences au Tribunal Constitutionnel. Selon l'article 188, le Tribunal statue entre autres, dans les affaires «relatives à la conformité à la Constitution des lois et traités internationaux» (pt 1), ainsi que dans les affaires «relatives à la conformité des lois aux traités internationaux ratifiés, dont la ratification exigeait l'autorisation préalable d'une loi» (pt 2), et enfin dans les affaires «relatives à la conformité à la Constitution, aux traités internationaux ratifiés et aux lois, des dispositions juridiques émanant des autorités centrales de l'Etat» (al. 3).

III.

1. La Constitution du 2 avril 1997 a abordé des problèmes essentiels constitutionnels, en tenant compte de la future adhésion de la Pologne à l'Union Européenne. Cette perspective a été traitée au cours des travaux préparatoires avec une grande attention. En dépit de certains doutes (concernant, par exemple, la question de savoir s'il ne vaudrait pas mieux laisser certaines affaires à négocier d'abord avec l'Union), il a été décidé d'adopter des solutions d'anticipation.

Comme on peut s'en douter, l'on a poursuivi ainsi deux objectifs prioritaires. Le premier consistait à définir d'avance un certain nombre d'obligations à assumer au moment où la qualité de membre sera acquise. Il s'agissait donc de ne pas compliquer la situation au moment de l'adhésion, par des débats au sujet des changements constitutionnels nécessaires.

Le deuxième objectif, orienté aussi vers l'extérieur, l'Union Européenne et ses organes, était de confirmer clairement la volonté d'entrer dans les structures intégrées européennes. L'ouverture de la Constitution sur cette perspective est sans doute un signal important.

2. L'autorisation d'entrer dans les structures européennes a été formulée à l'article 90 de la Constitution. La signification de cette disposition invite à la citer dans son intégralité.

«1. La République de Pologne peut céder, en vertu d'un traité, à une organisation internationale soit à un organisme international, les compétences des autorités du pouvoir d'Etat en matière de questions concrètes.

2. La loi autorisant la ratification du traité visé au premier alinéa est adoptée par la Diète à la majorité des deux tiers des voix, la moitié au moins du nombre constitutionnel des députés étant présents, et par le Sénat, à la majorité des deux tiers des voix, la moitié au moins du nombre constitutionnel des sénateurs étant présents.

3. L'autorisation à la ratification d'un tel traité peut être approuvée par référendum national, conformément aux dispositions de l'article 125.

4. La Diète adopte une résolution relative au choix de la procédure d'autorisation de la ratification, à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents.»

Le référendum sur l'adhésion à l'Union Européenne peut donc être décidé, mais ce n'est pas une nécessité. La particularité de ce référendum réside dans le fait qu'il rem-

placerait la loi (en ce cas, une loi autorisant la ratification), alors que, par exemple, lors du référendum de mai 1997 l'on n'a pas voté la Constitution, ni remplacé le vote de l'Assemblée Nationale - il a servi à approuver la Constitution votée par le Parlement.

3. Un deuxième élément d'ouverture de la Constitution aux futures obligations de membre de l'Union Européenne, se trouve dans l'autorisation d'application du droit communautaire, en vertu de l'article 91, alinéa 3, qui dispose: «Si cela résulte du traité ratifié par la République de Pologne, instituant une organisation internationale, le droit qu'elle crée est directement applicable et a une qu'elle primauté en cas d'incompatibilité avec les lois.»

Tout compte fait, on peut donc affirmer que les bases constitutionnelles de l'adhésion de la Pologne à l'Union Européenne, ainsi que celles de l'acceptation de *communautaire* ont été établies.

LÀ RÉFORME DU TRIBUNAL CONSTITUTIONNEL POLONAIS

Mirosław Wyrzykowski*

Introduction

1. En Pologne, l'idée de la création d'un Tribunal Constitutionnel a été plusieurs fois suggérée par la doctrine juridique et par un des partis politiques de l'époque, le Parti Démocrate, à l'occasion des multiples crises politiques sous le régime communiste. Elle s'incarna paradoxalement puisque la révision de la Constitution de 1952, instituant le Tribunal Constitutionnel s'est faite au printemps 1982, pendant l'état de siège dirigé contre les tendances libératrices et démocratiques, incarnées dans le mouvement social sous l'égide du syndicat «Solidarité». L'introduction de deux nouvelles institutions dans l'ordre constitutionnel, à savoir le Tribunal d'Etat, statuant sur la responsabilité constitutionnelle des représentants des pouvoirs publics, et le Tribunal Constitutionnel, statuant sur le contrôle de constitutionnalité, apparaissait comme une concession politique du parti communiste. Cette concession n'a pas eu lieu sans adaptation du mécanisme de justice constitutionnel aux impératifs de l'Etat socialiste. Le caractère suspect de son origine fut reproché au système institué dans les années 1980.

Le modèle de contrôle de constitutionnalité adopté par un amendement de 1982¹ à la Constitution, ainsi que par la loi sur le Tribunal Constitutionnel de 1985^{* 1 2}, reflétait les principes fondamentaux du régime communiste, en particulier le principe de l'homogénéité du pouvoir d'Etat et son aspect principal, la suprématie du Parlement dans l'organisation des pouvoirs publics³. La solution adoptée dans l'alinéa 2 de l'article 33 de la précédente Constitution, selon lequel les décisions du Tribunal constatant la non conformité d'une loi à la Constitution sont soumises à l'examen de la Diète, était la conséquence directe du principe d'homogénéité du pouvoir d'Etat. Cela signifiait que la décision du Tribunal prononçant l'inconstitutionnalité d'une loi n'était pas définitive, mais était soumise à l'examen du rédacteur de cette loi, c'est-à-dire de la Diète. La Diète avait le droit de rejeter la solution du Tribunal, à la majorité qualifiée des deux-tiers des

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¹ Dz. U. (Dziennik Ustaw - Journal des Lois) 1982, nr 11, poz. 83.

² Dz. U. 1985, nr 22, poz. 98 et pour les modifications, Dz. U. 1991, nr 109, poz. 470; 1993, nr 47, poz. 213; 1994, nr 122, poz. 593; 1995, nr 13, poz. 59; 1996, nr 77, poz. 367.

³ Massias Jean-Pierre, *Socialisme et contrôle de constitutionnalité*, thèse Clermont-Ferrand, 1991.

voix, en présence d'au moins la moitié des députés. Ce défaut d'autorité de la chose jugée des décisions du Tribunal Constitutionnel en matière de constitutionnalité de la loi était considéré comme la faiblesse la plus grave du contrôle de constitutionnalité.

Bien que la Petite Constitution de 1992⁴ ait introduit le principe de séparation et d'équilibre des pouvoirs, jusqu'au 17 octobre 1997, date d'entrée en vigueur de la nouvelle Constitution du 2 avril 1997⁵, ainsi que de la nouvelle loi sur le Tribunal Constitutionnel du 1er août 1997⁶, cet examen par la Diète des décisions du Tribunal prononçant l'inconstitutionnalité d'une loi n'a pas été aboli. De plus, il va demeurer partiellement en vigueur encore deux ans à compter de l'entrée en vigueur de la nouvelle Constitution, c'est-à-dire jusqu'au 17 octobre 1999. En effet, en vertu des dispositions de l'article 239 alinéa 1 de la Constitution, pendant une période de deux ans à compter de l'entrée en vigueur de la Constitution, les décisions du Tribunal sur la non conformité à la Constitution des lois votées avant le jour de son entrée en vigueur, donc votées avant le 17 octobre 1997, ne sont pas considérées comme définitives et sont en conséquence susceptibles d'examen par la Diète dans les conditions susmentionnées. Ces dispositions, limitant la portée des décisions du Tribunal en matière de constitutionnalité des lois, ne concernent cependant ni les décisions rendues à la suite des questions de droit adressées au Tribunal ni les décisions relatives aux lois votées sous l'empire de la nouvelle Constitution.

2. A partir de 1989, le Tribunal a pris à sa charge la compétence du Conseil d'Etat (organe supprimé par l'amendement constitutionnel d'avril 1989) en matière d'interprétation universellement obligatoire des lois, c'est-à-dire d'explication des dispositions d'une loi, soulevant des doutes quant à leur compréhension et de directives interprétatives qui fixent le sens et la portée de dispositions législatives. Le caractère universellement obligatoire de l'interprétation avait pour conséquence que l'interprétation du Tribunal s'imposait à toutes les autorités, et notamment aux juridictions, y compris la Cour Suprême.

Il convient de rappeler qu'à partir de 1989 le Tribunal effectuait - sur demande des pouvoirs publics autorisés - l'interprétation du droit universellement obligatoire. L'arrêt établissant l'interprétation définissait la signification d'une disposition aussi bien avant sa présentation (principe de rétroactivité de l'interprétation) que pour l'avenir, après la prise de la résolution. La généralité de l'interprétation signifiait qu'elle obligeait tout organe appliquant la loi, de la prendre en compte dans toutes les affaires non encore définitives. L'interprétation fixée liait les organes appliquant la loi autant dans les affaires terminées et reprises sur la base de dispositions pertinentes, que dans les affaires

⁴ Loi Constitutionnelle du 17 octobre 1992 sur les relations entre le pouvoir législatif et le pouvoir exécutif de la République Polonaise, et sur les collectivités territoriales, Dz. U. 1992, nr 84, poz. 426; 1995, nr 38, poz. 184 et nr 150, poz. 729; 1996, nr 106, poz. 488.

⁵ Le texte de la nouvelle Constitution a été adopté par l'Assemblée Nationale (Diète et Sénat réunis) le 2 avril 1997, puis soumis à référendum le 25 mai 1997. Il a été signé par le Président de la République le 1er octobre 1997 et publié au Journal des Lois le 2 octobre 1997. Cf *Documents à l'appui*, n° 1 (extraits).

⁶ Dz. U. 1997, nr 102, poz. 643 (texte voté en première lecture, pas d'amendement du Sénat); cf. *Documents à l'appui*, n° 2.

examinées à la suite d'une cassation ou d'une révision extraordinaire (qui peut être déposée devant la Cour Suprême pour une décision de la Haute Cour Administrative), si elle n'était pas examinée avant la promulgation de la résolution au Journal Officiel. Le Tribunal pouvait proclamer l'interprétation universellement obligatoire de dispositions dont l'interprétation avait été établie par la Cour Suprême. Enfin, le Tribunal pouvait établir une nouvelle interprétation d'une disposition déjà objet d'une interprétation, si le requérant invoquait un changement du contexte social qui justifierait une autre compréhension de la disposition.

Cette question de l'interprétation universellement obligatoire et abstraite de la loi était sujette à d'importantes controverses entre le Tribunal et la Cour Suprême. Cela tenait à deux éléments. Premièrement, l'interprétation universelle signifiait qu'elle liait aussi les juges - ce qui était difficile à mettre en accord avec le principe d'indépendance des juges. Deuxièmement, de sérieuses difficultés résultaient de la durée de la force obligatoire de l'interprétation. Le Constituant a retiré au Tribunal Constitutionnel pour la confier à la Cour Suprême⁷.

3. Durant la période au cours de laquelle le Tribunal a fonctionné sous l'empire de la loi sur le Tribunal Constitutionnel de 1985, le Tribunal a traité: 85 affaires concernant la conformité des lois à la Constitution, 27 affaires concernant la conformité d'autres actes normatifs aux lois et à la Constitution, 15 affaires concernant des questions de droit, 75 affaires en matière d'interprétation universellement obligatoire des lois, 112 affaires conclues par des décisions à caractère procédural ou des avis adressés à la Diète.

I. Le statut du Tribunal Constitutionnel: un statut réaffirmé

A. Le statut constitutionnel de l'institution

Sous l'empire de la précédente Constitution et de la loi relative au Tribunal Constitutionnel, le statut du Tribunal Constitutionnel était l'objet de vives controverses. S'il est vrai que de nombreux arguments plaident pour que le Tribunal soit reconnu comme une juridiction (son nom; la qualification de ses membres comme juges et la reconnaissance de leur indépendance; l'exercice de ses fonctions de justice se traduisant par une décision en forme de jugement sur la constitutionnalité et la légalité, ou sur les affaires relatives à l'activité des partis politiques), d'autres arguments intercèdent en faveur d'un statut distinct de celui des organes juridictionnels (système constitutionnelle, définition constitutionnelle de la Cour Suprême comme cour exerçant le contrôle juridictionnel sur toutes les juridictions). On admettait donc que le Tribunal soit un organe de type juridictionnel, et que sa sphère de compétence soit le contrôle de conformité de la loi à la Constitution, réalisé dans la forme d'un jugement.

La Constitution du 2 avril 1997 résout de façon décisive les doutes concernant le statut du Tribunal Constitutionnel. Les dispositions concernant le Tribunal Constitu-

⁷ L'attribution de cette compétence au Tribunal Constitutionnel depuis 1989 était l'objet de critiques de la part de la Cour Suprême qui acceptait très mal cette situation juridique de dépendance.

tionnel (art. 188-197) sont comprises dans le chapitre VIII intitulé «Cours et Tribunaux». Les cours, c'est-à-dire la Cour Suprême, les tribunaux de droit commun, les cours administratives et les tribunaux militaires rendent la justice. La Constitution règle le statut de deux tribunaux: le Tribunal Constitutionnel et le Tribunal d'Etat, qui statue sur la responsabilité constitutionnelle pour atteinte à la constitution ou à la loi, dans l'exercice de leurs fonctions de: Président de la République, Président et membres du Conseil des Ministres, Président de la Banque Nationale de Pologne, Président de la Chambre Suprême de Contrôle, membres du Conseil National de la Radiophonie et de la Télévision, personnalités auxquelles le président du Conseil des Ministres a confié la mission de diriger un ministère, Commandant en Chef des Forces Armées, ainsi que de députés et de sénateurs en cas de violation des règles d'incompatibilité (interdiction d'exercer une activité économique rétribuée ou d'acquérir la propriété du patrimoine du Trésor Public ou des collectivités territoriales - art. 197 en lien avec l'art. 107).

A la différence du régime constitutionnel antérieur, la nouvelle Constitution de la République de Pologne règle de façon très détaillée le domaine d'activité du Tribunal, le caractère juridique de ses jugements, les sujets ayant le droit de déposer une requête en confirmation de la constitutionnalité du droit, ainsi que la composition du Tribunal.

B. Le statut des juges constitutionnels

Sous l'empire de la précédente Constitution, les juges du Tribunal n'étaient pas qualifiés déjugés mais de «membres du Tribunal». Il est vrai que le statut de «membre» était incontestablement celui déjugé, mais il est toutefois bien venu que la Constitution et la nouvelle loi sur le Tribunal Constitutionnel recourent à une notion précise pour définir le juge du Tribunal.

1. La composition du Tribunal Constitutionnel

Le Tribunal se compose de quinze juges. Le nombre des juges composant le Tribunal a été augmenté de trois par rapport au nombre déjugés du Tribunal qui fonctionnait sous l'empire de la loi de 1985. Ceci est justifié par l'augmentation des compétences du Tribunal et en particulier par l'afflux prévu des plaintes constitutionnelles individuelles, mécanisme introduit en 1997. A la différence de la législation précédente, le nombre des juges est défini dans la Constitution.

2. La nomination au Tribunal Constitutionnel

Pour pouvoir être juge au Tribunal Constitutionnel, il faut remplir deux conditions.

La première condition exigée par les dispositions constitutionnelles concerne la qualité de juriste requise. Le candidat doit pouvoir «se distinguer par sa connaissance du droit».

A cette première condition, s'ajoutent, aux termes de la loi sur le Tribunal Constitutionnel, les qualifications exigées pour occuper le poste déjugé à la Cour Suprême ou à la Haute Cour Administrative. Cela signifie que pour être juge au Tribunal Constitutionnel, la personne doit remplir les critères suivants: a) disposer de la citoyenneté polonaise et de tous ses droits civils et civiques b) avoir un caractère irréprochable c)

avoir fini des études supérieures de droit et obtenu le titre de magister d) se distinguer par un très haut niveau de connaissance du droit et son expérience professionnelle e) disposer des qualifications légales prévues pour être juge, ainsi que pouvoir justifier d'une durée de travail de dix ans ou d'un emploi déjugé, procureur, arbitre, conseiller juridique, avocat, ou encore d'un emploi sur un poste indépendant dans les organes de l'administration publique impliquant une pratique juridique associée à la prise de décision. Les qualifications pour exercer les fonctions à la Haute Cour Administrative, dans les points a - c, sont convergentes avec les qualifications énumérées nécessaires pour être nommé juge à la Cour Suprême. A part cela, la loi sur la Haute Cour Administrative du 11 mai 1995 exige que le candidat au poste de juge soit âgé au minimum de trente cinq ans, qu'il ait occupé pendant au moins dix ans la fonction de juge ou procureur, ou qu'il ait exercé pendant au moins dix la profession d'avocat, notaire ou conseiller juridique, ou encore qu'il ait occupé dans des institutions publiques un poste lié à l'exercice ou la création du droit administratif. Le candidat doit faire preuve d'une grande connaissance dans le domaine de l'administration publique, du droit administratif et des autres domaines du droit liés au fonctionnement des organes de l'administration publique.

Les professeurs ou docteurs habilités en sciences juridiques, travaillant dans des écoles supérieures polonaises, à l'Académie Polonaise des Sciences ou bien sur tout autre emploi scientifique et de recherche, ne sont pas obligés de remplir les conditions relatives aux qualifications pour la fonction déjugé (juge stagiaire et assesseur) et, de plus, ne doivent pas justifier d'une période de travail de dix ans ou d'un emploi dans la fonction déjugé, procureur, arbitre, conseiller juridique ou avocat ou encore d'un emploi dans une fonction indépendante au sein d'un organe de l'administration publique auquel est lié une pratique juridique associée à la prise de décision.

Sur les douze membres en poste jusqu'au 30 novembre 1997, dix sont professeurs de droit et deux sont juges. A compter du 1er décembre, le Tribunal comptera quinze membres (cf infra), et trois juges arriveront au terme de leur mandat. C'est donc six nouveaux juges qui entreront au Tribunal.

3. La durée du mandat déjugé

Elle est de neuf ans et a un caractère individuel. Cela constitue un changement important par rapport au régime précédent selon lequel les membres du Tribunal étaient choisis pour huit ans avec renouvellement par moitié tous les quatre ans. C'est seulement par le biais de l'interprétation des dispositions de la loi sur le Tribunal qu'avait été apprécié le caractère individuel du mandat d'un membre du Tribunal, dont la durée devait être comptée à partir du moment de la nomination sur le poste vacant. Avec le nouveau texte, nous avons donc une prolongation d'une année de la cadence de renouvellement par rapport au régime précédent. Ceci se justifie par la volonté de dissocier la période de renouvellement des juges de celle de l'organe qui les nomme, la Diète, dont le mandat est de quatre ans.

Les juges du Tribunal sont choisis pour un mandat unique. Le renouvellement du mandat est interdit (art. 194 al. 1, point 2). Cette limitation du mandat est absolue, c'est-

à-dire aussi bien immédiatement après la fin du mandat du juge qu'après un certain délai. Cette disposition est considérée comme une garantie de l'indépendance des juges.

4. Le mode d'élection des juges

L'organe compétent pour désigner les membres du Tribunal reste la Diète. Dans les projets de Constitution présentés, ainsi que durant les travaux constitutionnels, il avait été proposé d'attribuer le choix de certains juges à d'autres pouvoirs publics constitutionnels. L'objectif était d'augmenter le niveau d'indépendance des juges et en particulier d'empêcher qu'une majorité parlementaire se reflète dans celle des juges. Était également invoqué l'argument de l'inopportunité de l'élection des juges par l'organe dont les actes sont précisément contrôlés par le Tribunal. Le contrôlé ne devrait pas choisir lui-même ses contrôleurs. Certaines propositions suggéraient que participent aussi à la procédure d'élection des juges, le Sénat, le Président de la République ou encore le Conseil National de la Magistrature considéré sans raison comme un organe d'autogestion des juges. Finalement, on a maintenu la procédure d'élection des juges par la Diète. La doctrine en droit constitutionnel accorde à cette solution une pleine justification sur la base des principes fondamentaux du régime de l'Etat démocratique de droit.

Le droit de présenter des candidats à la fonction de juge au Tribunal est accordé uniquement au Présidium de la Diète ou à au moins cinquante députés (auparavant à au moins quinze députés ou une commission parlementaire). Le Présidium de la Diète est un organe dirigeant les travaux de cette chambre du Parlement et se compose du Président et des Vice-Présidents. Le fait de confier au Présidium de la Diète le droit de présentation des candidats est une indication de la volonté de rechercher un accord des plus grandes formations politiques parlementaires sur la composition du Tribunal. En même temps, si cet accord s'avérait impossible, pour ne pas prolonger la période de vacance, au moins cinquante députés ont le droit de présenter à la Diète un candidat. Il serait souhaitable que les plus importants groupes parlementaires puissent aboutir à un compromis quant à la composition du Tribunal et n'abusent pas du monopole de nomination dont dispose le Parlement. L'élection du juge a lieu à la majorité absolue des voix en présence d'au moins la moitié des députés. La pratique fait apparaître un certain consensus débouchant sur l'instauration d'une représentativité du Tribunal au sein duquel on trouve des juges représentant les principales forces politiques. Une tentative de la majorité sortante de vouloir élire avant la fin de son mandat les six prochains juges (cf *supra*) a fait sortir de sa réserve habituelle le Président du Tribunal, Andrzej Zoll. Face aux protestations pré-électorales que cette affaire a suscitées, ce renouvellement anticipé n'a pas eu lieu⁸.

⁸ Une fois de plus, même si à cette occasion le Tribunal Constitutionnel n'était pas pris sous le feu médiatique en qualité d'arbitre du débat politique - effaçant la prépondérance exercée auprès des citoyens par le Défenseur des Droits Civiques (ombudsman) comme symbole de l'autorité indépendante qui les protège - on a pu de nouveau mesurer l'importance politique du Tribunal.

5. Les garanties d'indépendance du juge

La Constitution, aussi bien que la loi sur le Tribunal Constitutionnel, prévoient les garanties principales d'indépendance des juges.

- Il s'agit avant tout du principe de **non renouvellement du mandat** (cf supra).
- D'autre part, le juge a **droit au retour sur le poste occupé antérieurement** ou un poste équivalent.
- Un facteur important d'indépendance est aussi le **niveau de rémunération**, qui doit correspondre à la dignité de la fonction et au champ des devoirs du juge. La loi sur le Tribunal d'Etat prévoit que cette rémunération est égale à celle du Vice-Président de la Diète.
- L'indépendance du juge est garantie par le mécanisme de **l'incompatibilité** de la fonction avec l'exercice de fonctions publiques qui serait en contradiction avec les règles d'indépendance telles qu'elles existent pour les juges ordinaires, et avec le fait d'être membre de certaines organisations sociales. Pendant la période d'exercice des fonctions de juge, il est donc interdit d'être membre d'un parti politique ou d'un syndicat, d'être député ou sénateur.
- La garantie d'indépendance du juge nécessite aussi **l'immunité**, c'est-à-dire la garantie constitutionnellement définie de ne pas voir engagée sa responsabilité pénale ou qu'il ne soit pas attenté à la liberté du juge sans l'accord préalable du Tribunal Constitutionnel. Le juge du Tribunal ne peut être arrêté ni détenu, sauf en cas de flagrant délit, si sa détention est indispensable à la bonne marche de la procédure. Le Président du Tribunal est informé sans délai de la détention. Il peut ordonner la libération immédiate du détenu.
- Le juge du Tribunal est par principe **inamovible**. L'interruption du mandat du juge a lieu seulement dans quatre situations et reste exceptionnelle: 1. Le renoncement par le juge à ses fonctions 2. La constatation par une décision de la commission médicale de son incapacité permanente à s'acquitter des devoirs de sa tâche en raison d'une maladie, d'un handicap ou d'une perte de force 3. La condamnation par un jugement définitif 4. Une décision, rendue avec autorité de chose jugée, de révocation de la fonction de juge.
- La procédure est dirigée par le Tribunal; sa transmission au Président de la Diète est assurée par le Président du Tribunal. Il faut noter que sous l'empire de la loi précédente, le droit de révocation était attribué à la Diète.
- Le juge du Tribunal **n'est pas responsable à raison de son comportement dans l'exercice de ses fonctions sauf pour cause disciplinaire**, atteinte aux dispositions légales, atteinte à la dignité de son office ou tout autre comportement non éthique qui pourrait entamer la confiance envers sa personne. La procédure disciplinaire est à double degré et se déroule devant le Tribunal qui statue en première instance en collège de cinq juges et en seconde instance en assemblée plénière.

6. La nomination du Président et du vice-président du Tribunal

Sous l'empire de la loi précédente, le Président du Tribunal était désigné par la Diète. La Constitution de la République de Pologne accorde désormais cette compéten-

ce de nomination du Président et du vice-président au Président de la République. Bien que cette compétence soit conditionnée par une proposition de l'Assemblée Nationale (Parlement), c'est une compétence propre du Président. L'acte de nomination est un acte officiel du Président, qui n'est pas soumis à contreseing du Premier Ministre. Le Président de la République nomme le Président et le Vice-Président obligatoirement parmi les deux candidats présentés pour chaque poste, par l'assemblée générale des juges du Tribunal. Le choix des candidats proposés par l'assemblée générale a lieu à bulletin secret et parmi les membres de cette même assemblée. Sont retenus candidats ceux qui ont obtenu le plus grand nombre de voix. Le Tribunal est donc dirigé par des personnes ayant la reconnaissance de la majorité de ses membres.

II. La compétence du Tribunal Constitutionnel: une compétence renforcée

Nous l'avons vu en introduction, l'interprétation universellement obligatoire des lois a été retirée de la compétence du Tribunal Constitutionnel. Pour le reste, la nouvelle législation vient renforcer cette compétence dans certains domaines et introduire de nouvelles tâches.

A. La compétence ratione temporis du Tribunal Constitutionnel

La loi sur le Tribunal Constitutionnel de 1985 disposait que le contrôle de constitutionnalité concernait uniquement les actes législatifs et autres actes normatifs publiés ou validés, quant il s'agissait de décret-lois, après le 1er janvier 1986, donc après le jour d'entrée en vigueur de la loi. La seule exception concernait l'autorisation pour le Tribunal de déclencher la procédure relative aux actes publiés, validés ou revêtus de la force obligatoire, après le jour d'entrée en vigueur de la révision constitutionnelle de 1982 introduisant le Tribunal Constitutionnel. Le but de cette limitation de compétence était d'exclure du contrôle de constitutionnalité le décret sur l'état de siège du 12 décembre 1981, ainsi que toute législation liée directement à l'état de siège.

Une deuxième limitation temporelle concernait le dépôt de la requête. Un délai de cinq ans avait été établi pour déposer une requête devant le Tribunal Constitutionnel, le point de départ de ce délai étant la publication, la confirmation ou la création de l'acte normatif objet de la requête. L'intention de cette limitation, à l'instar d'autres pays européens, était la sécurité juridique: si un acte juridique ne fait pas l'objet d'un recours dans la période de cinq ans, il faut admettre sa constitutionnalité. Il faut toutefois signaler que la limitation de cinq ans - conformément à l'avis du Tribunal lui-même - ne s'appliquait pas aux questions de droit.

B. La compétence ratione materiae du Tribunal Constitutionnel

Le Tribunal statue sur les types d'affaires suivants: la conformité à la Constitution des lois (1), la conformité des lois aux traités ratifiés, dont la ratification exige une

autorisation législative préalable et la conformité des normes juridiques édictées par les autorités centrales de l'Etat à la Constitution, aux traités ratifiés et aux lois (2), la conformité à la Constitution des objectifs ou de l'activité des partis politiques (3), la plainte constitutionnelle (4), les conflits de compétence entre les pouvoirs publics constitutionnels (5), la constatation d'un empêchement dans l'exercice de la fonction de Président de la République ainsi que la délégation au président du Sénat de l'exercice temporaire des obligations du Président de la République (6), ainsi que les questions de droit (7).

1. Le contrôle de constitutionnalité des lois

Des dispositions particulières - résultat des expériences de la jurisprudence du Tribunal au cours des dernières années et des principales discussions politico-doctrinales sur cette jurisprudence - sont prévues concernant le contrôle des lois, y compris la loi budgétaire, dans lesquelles la décision du Tribunal peut entraîner des coûts financiers non prévus dans la loi budgétaire ou la loi de programmation budgétaire.

Le caractère particulier de la réglementation concerne les éléments suivants.

Premièrement, le délai d'examen de la requête concernant la constitutionnalité de la loi budgétaire. Dans ce cas, quand le Président s'adresse au Tribunal pour la confirmation de la conformité à la Constitution de la loi budgétaire ou de la loi de prévision budgétaire, le Tribunal statue sur cette affaire au plus tard dans le délai de deux mois à compter de la date de dépôt de la requête devant le tribunal (art. 43 de la loi).

Deuxièmement, la coopération du Conseil des ministres. Dans les affaires sur la conformité d'un acte normatif à la Constitution, dans lesquelles la décision du Tribunal peut entraîner des coûts financiers non prévus dans les loi susmentionnées, le Président du Tribunal s'adresse au Conseil des ministres pour obtenir un avis dans le délai de deux mois (art. 44 de la loi). C'est un avis simple et son absence à l'expiration du délai de deux mois ne suspend pas l'instance.

Troisièmement, les décisions du Tribunal sont généralement obligatoires, définitives et publiées sans délai par l'organe auteur de l'acte normatif contesté. L'arrêt du Tribunal entre en vigueur le jour de sa publication, ce qui veut dire que, en cas de censure, l'extinction de la force obligatoire de l'acte normatif a lieu au même moment. La Constitution autorise simultanément le Tribunal à fixer un autre délai d'extinction de la force obligatoire de l'acte normatif, qui ne peut dépasser dix huit mois pour une loi et douze mois pour d'autres actes normatifs. Si l'arrêt entraîne des charges financières non prévues par la loi budgétaire, le Tribunal fixera la date de la perte de la force obligatoire de l'acte normatif après avoir pris connaissance de l'avis du Conseil des ministres (art. 190 al. 3 de la Constitution).

2. La conformité au droit international

Le second reproche adressé au contrôle de constitutionnalité antérieur concernait l'absence de compétence du Tribunal en matière de décisions quant à la conformité au droit international, en particulier aux traités, même ratifiés, des actes normatifs de droit interne. En effet, sous l'empire du régime juridique précédent, le Tribunal Constitution-

nel n'avait pas compétence pour statuer en matière de conformité du droit interne au droit international, en particulier avec les traités internationaux, même ratifiés.

Le Tribunal a tracé la voie d'une reconnaissance des traités comme fondement autonome de contrôle du droit interne. Il y est parvenu grâce à la notion «d'Etat démocratique de droit», notion devenue principe constitutionnel dès 1989, qui a permis de considérer que les traités ratifiés sont des normes de référence du contrôle de constitutionnalité du droit interne. De plus, la «Petite Constitution» disposait que certains traités nécessitent le vote d'une loi autorisant le Président à les ratifier. C'est dans ce cas la loi de ratification qui est directement soumise au contrôle de constitutionnalité. En avalisant la constitutionnalité de cette loi, le Tribunal peut contrôler le contenu du traité à l'égard de la Constitution. En reconnaissant sa compétence quant au contrôle de la loi autorisant la ratification d'un traité, le Tribunal aurait ainsi aussi pu accepter de vérifier si l'autorisation de ratification d'un traité n'implique pas l'introduction en droit interne des normes découlant d'un traité, contraires à la Constitution. Le Tribunal a jugé qu'il ne contrôlait pas le traité en lui-même, mais qu'il analysait seulement le contenu de l'autorisation incluse dans la loi. Cette autorisation, en outre, ne vaut pas autorisation d'introduction de normes dérivées contraires à la Constitution.

La Constitution du 2 avril 1997 accorde au Tribunal compétence sur les questions de conformité des lois aux traités ratifiés dont la ratification exige l'autorisation préalable d'une loi. Cette attribution de compétence est assez originale pour mériter d'être soulignée:

- premièrement, une des règles constitutionnelles est le respect par la Pologne des normes de droit international par lesquelles elle est liée (art. 9).
- deuxièmement, les traités ratifiés sont des sources du droit en vigueur en Pologne (art. 87 al.1).
- troisièmement, le traité ratifié, après sa publication au Journal des Lois de la République de Pologne, est directement applicable, sauf si son application est conditionnée par la promulgation d'une loi (art. 91 al. 1).
- quatrièmement, le traité ratifié en vertu d'une loi d'autorisation a une autorité supérieure à celle de la loi, lorsque celle-ci est incompatible avec le traité (art. 91 al. 2).
- cinquièmement, ont été fixées les conditions du consentement nécessaire à la ratification d'un traité sous la forme d'une loi. La ratification d'un traité et sa dénonciation exigent l'autorisation préalable d'une loi, si le traité concerne: 1) la paix, les alliances, les accords politiques ou militaires; 2) les libertés, les droits et les devoirs des citoyens définis par la Constitution; 3) la participation de la République de Pologne à une organisation internationale; 4) des charges engageant considérablement les finances de l'Etat; 5) les questions régies par une loi ou pour lesquelles la Constitution exige une loi (art. 89 al.1).

Statuant sur la conformité du traité à la Constitution, le Tribunal examine aussi le respect des règles de compétence et de procédures dans la conclusion et la ratification du traité. Le Tribunal peut statuer aussi bien sur les questions - sur requête du Président de la République - relatives à la conformité d'un traité à la Constitution, avant sa ratification (il statue dans ce cas-là en assemblée plénière), que sur la conformité à la Consti-

tution des traités ratifiés (collège de cinq juges), ainsi que sur la conformité d'autres actes normatifs aux traités ratifiés (collège de trois juges).

Avant la ratification d'un traité, dont la ratification n'exige pas l'autorisation d'une loi, le Président de la République peut saisir le Tribunal de la conformité à la Constitution (art. 133 al. 2). Dans ce cas, le Tribunal statue en assemblée plénière.

Pendant l'audience sur la conformité des traités ratifiés à la Constitution, la présence des représentants du Président de la République, du ministre des Affaires Etrangères et du Procureur Général est requise et dans le cas des traités dont la ratification exige l'autorisation préalable d'une loi, celle du représentant de la Diète.

3. La conformité à la Constitution des objectifs ou activités des partis politiques

Le Tribunal dispose de ce droit depuis décembre 1989, lorsque l'on a abrogé dans la Constitution de 1952 les dispositions sur le monopole du parti communiste et introduit le principe du pluralisme politique. Le nouveau régime constitutionnel, dans la partie consacrée aux partis politiques, mentionne le principe du pluralisme politique («La République de Pologne garantit la liberté de fonder des partis politiques et la liberté de leur activité. Les partis politiques rassemblent, en respectant le principe de la libre participation et de l'égalité, les citoyens polonais en vue d'exercer, par des méthodes démocratiques, une influence sur la politique de l'Etat» - art. 11, al. 1). En même temps, la Constitution contient l'interdiction de partis politiques et organisations qui auraient recours, dans leurs programmes et leurs pratiques, aux méthodes totalitaires du nazisme, du fascisme et du communisme, et aussi de ceux dont le programme ou l'activité admettent ou autorisent la haine raciale ou ethnique, le recours à la violence en vue de s'emparer du pouvoir ou d'exercer une influence sur la politique de l'Etat ou encore prévoient des structures ou une organisation secrètes (art. 13 de la Constitution).

La requête en conformité à la Constitution des objectifs ou des activités des partis politiques, peut être déposée devant le Tribunal par: le ministre de l'Intérieur et de l'Administration, le Procureur Général de la République, ainsi que la cour qui tient le registre des partis politiques. Le Tribunal Constitutionnel examine la requête sur la conformité à la Constitution des objectifs ou activités des partis politiques, en assemblée plénière des juges du Tribunal. A cette procédure, sont appliquées les dispositions du code de procédure pénale. La charge de la preuve de la non conformité à la Constitution repose sur le requérant. Dans le cas où le Tribunal rendrait une décision sur la non conformité à la Constitution des objectifs ou activités d'un parti politique, le tribunal tenant le registre des partis politiques rend sans délai la décision sur la radiation du registre de ce parti. La décision du tribunal est définitive et n'est donc pas susceptible d'appel. L'effet de ce jugement est la liquidation de ce parti.

A ce jour, aucune requête en conformité à la Constitution des objectifs ou des activités des partis politiques n'a été déposée auprès du Tribunal Constitutionnel.

4. La plainte constitutionnelle

a) Le Tribunal Constitutionnel peut connaître de plaintes constitutionnelles individuelles.

La plainte peut être déposée par toute personne, dont la liberté ou les droits ont été violés. Son objet est de statuer sur la conformité à la Constitution de la loi ou d'un autre acte normatif, en vertu duquel une juridiction ou un organe de l'administration publique se sont définitivement prononcés sur les libertés ou les droits de cette personne ou sur ses droits tels que garantis par la Constitution (art. 79). La plainte constitutionnelle n'est pas recevable dans les affaires concernant le droit d'asile et l'attribution à un étranger du statut de réfugié cherchant protection contre la persécution. En revanche, la violation des droits économiques et sociaux - le salaire minimum; le chômage; la sécurité et l'hygiène du travail; les congés; les normes de temps de travail et les journées de repos; l'aides aux personnes handicapées; la sécurité écologique; le droit au logement et les droits du consommateur - pourront être l'objet d'une plainte constitutionnelle dans les limites de la loi.

b) La loi sur le Tribunal Constitutionnel détermine les conditions de dépôt de la plainte:

- premièrement, la plainte ne peut être déposée qu'après épuisement des voies de recours ordinaires;
- deuxièmement, le délai de dépôt est de deux mois à partir du jour de la notification au plaignant de la décision définitive qu'il conteste;
- troisièmement, la personne qui dépose une plainte doit payer un droit d'enregistrement, dont la hauteur et les règles de perception seront fixés par décision en du Conseil des Ministres;
- quatrièmement, la loi sur le Tribunal Constitutionnel définit les exigences minimales concernant le contenu de la plainte. Celle-ci doit comprendre outre les éléments qui doivent figurer dans tout mémoire, trois éléments supplémentaires: 1) l'indication précise de la loi ou autre acte normatif sur le fondement duquel la juridiction ou l'organe d'administration publique s'est prononcé définitivement sur les libertés, droits ou devoirs définis par la Constitution et à l'égard desquels le plaignant exige une déclaration de non conformité à la Constitution; 2) l'indication des libertés ou droits constitutionnels qui, selon le requérant, auraient été méconnus; 3) la justification de la plainte avec un descriptif précis de l'état des faits. Il est exigé de joindre à la plainte le jugement ou la décision, avec la date de sa remise, rendu sur la base de l'acte normatif contesté.
- les exigences formelles concernant le contenu de la plainte, expliquent l'introduction, par la législation, d'une cinquième condition, la prise en charge de la plainte par un juriste professionnel. Le ministère d'un avocat ou d'un conseiller juridique est obligatoire, sauf si le plaignant est un juge, procureur, notaire, professeur ou agrégé en droit. Le ministère d'avocat est considéré comme un facteur efficace contre l'afflux de plaintes non justifiées, ce qui peut avoir une grande influence dans la première période d'utilisation par les citoyens de ce moyen de protection juridique.

c) La décision préalable en matière de plainte constitutionnelle.

Dans le cadre de la procédure mise en oeuvre par le dépôt d'une plainte constitutionnelle, le Tribunal peut rendre une décision temporaire de suspension de l'exécution de la décision dans l'affaire concernée par la plainte, si l'exécution du jugement ou de la

décision peut entraîner des dommages irréparables pour le plaignant ou si cela est justifié par un important intérêt public ou par un intérêt primordial pour le plaignant. Cette décision est remise sans délai au plaignant ainsi qu'à l'autorité juridique compétente ou à l'organe exécutoire (art. 50 de la loi).

Le Tribunal examine la plainte constitutionnelle selon les règles et la procédure prévus pour l'examen des requêtes en conformité. La procédure varie selon que la plainte constitutionnelle porte sur la conformité à la Constitution d'une loi ou d'un acte exécutif.

5. Le règlement des conflits de compétence.

Le Tribunal tranche les conflits de compétence entre les pouvoirs publics. Le conflit positif a lieu lorsque deux ou plusieurs des pouvoirs publics constitutionnels se sont considérés comme compétents à résoudre une même question, ou ont chacun rendu une décision dans la même affaire. Le conflit négatif de compétence a lieu, à l'inverse, lorsque deux ou plusieurs des pouvoirs publics constitutionnels se sont déclarés incompétents à résoudre une affaire. La requête en règlement du conflit de compétence doit indiquer l'action ou l'inaction contestée, ainsi que la disposition de la Constitution ou de la loi qui est violée. Cette requête peut être déposée par le Président de la République, le Président de la Diète, le Président du Sénat, le Président du Conseil des ministres, le Premier président de la Cour Suprême, le Président de la Haute Cour Administrative et le Président de la Chambre Suprême de Contrôle (art. 192 de la Constitution). Les parties à la procédure sont le requérant, les pouvoirs publics constitutionnels concernés par le conflit de compétence et le Procureur Général. L'effet du déclenchement de la procédure devant le Tribunal est la suspension de la procédure devant les autorités saisies. Après avoir pris connaissance des arguments des parties à la procédure, le Tribunal peut prendre par ordonnance des mesures conservatoires, en particulier pour prononcer le sursis des actes exécutoires, si ceci est nécessaire pour empêcher des dommages irréparables, ou pour préserver un intérêt public particulièrement important. En matière de conflit de compétence, le Tribunal statue en assemblée plénière.

6. La constatation d'un empêchement dans l'exercice de ses fonctions du Président de la République

La Constitution (art. 131) prévoit la délégation provisoire des fonctions du Président de la République au Président de la Diète dans le cas où le Président de la République ne peut temporairement exercer ses fonctions. Le Président de la République en informe le Président de la Diète qui prend provisoirement à sa charge les fonctions présidentielles. Au cas où le Président n'est pas en état de l'informer, c'est au Tribunal qu'il revient de constater l'empêchement. Le Tribunal se prononce sur le fondement de la requête du Président de la Diète. Les interventions dans la procédure de constatation d'empêchement est précisément définie. Les parties à la constatation doivent être personnellement présentes à la procédure devant le Tribunal. Les parties sont le Président de la Diète, le Président du Sénat, le Premier président de la Cour Suprême et le Procureur Général. Le Tribunal se prononce par une décision prise en assemblée plénière.

7. Les questions de droit

Conformément à l'article 193 de la Constitution, chaque juridiction peut présenter au Tribunal une question de droit quant à la conformité d'un acte normatif à la Constitution, à un traité ratifié ou à une loi, si de la réponse à cette question dépend la solution d'une affaire en cours devant cette juridiction. La question de droit peut être présentée uniquement si elle concerne une procédure administrative ou judiciaire, ou encore une affaire délictuelle ou contraventionnelle en matière fiscale, en cours. La question de droit doit avoir un lien avec le procès en cours en ce sens que de la réponse à cette question dépend la résolution de l'affaire individuelle. La question doit exclusivement concerner la constitutionnalité de l'acte juridique sur le fondement duquel les pouvoirs publics ont statué sur l'affaire. La question juridique constitue donc une forme de contrôle concret de la constitutionnalité. Le résultat d'un contrôle concret est plus large qu'en cas de contrôle abstrait car la constatation d'inconstitutionnalité d'un acte normatif influe sur la validité de l'acte lui-même mais aussi sur l'issue de l'affaire pendante.

La question de droit doit répondre aux exigences formelles exigées pour le mémoire dans le cas d'un procès, ainsi que contenir tous les éléments exigés pour une requête en contrôle de constitutionnalité. La question de droit doit aussi contenir toute explication relative à l'impact de cette question sur la résolution de l'affaire en cours et indiquer l'organe devant lequel la procédure se déroule ainsi que la description de l'affaire (art. 32 de la loi). La question de droit est examinée sur la base des règles et selon la procédure prévues pour l'examen des requêtes en conformité des actes législatifs à la Constitution et d'autres actes normatifs à la Constitution ou à un acte législatif.

Conclusion

La loi sur le Tribunal Constitutionnel est entrée en vigueur le même jour que la nouvelle Constitution de la République Polonaise, soit le 17 octobre 1997.

L'analyse des normes constitutionnelles et des dispositions de la loi sur le Tribunal Constitutionnel conduit à conclure que la conception polonaise de la juridiction constitutionnelle répond au modèle européen de justice constitutionnelle.

Certaines imperfections de la conception polonaise, comme par exemple les dispositions transitoires de la Constitution qui prévoient la prolongation de deux ans du caractère non définitif des décisions du Tribunal pour les lois édictées sous la Constitution précédente, ne remettent pas en cause l'appréciation positive des nouvelles dispositions.

La riche expérience des dix premières années d'activité du Tribunal Constitutionnel constitue une solide base pour la réalisation des missions anciennes aussi bien que nouvelles du Tribunal Constitutionnel.

LES COLLECTIVITES LOCALES DANS LA NOUVELLE CONSTITUTION DE LA REPUBLIQUE DE POLOGNE

Piotr Winczorek*

1. Le régime constitutionnel polonais jusqu'en 1989 posait la règle de l'homogénéité du pouvoir d'Etat comme l'un de ses principaux fondements. De cette règle résultait non seulement un ferme rejet de l'idée montesquienne et bourgeoise de séparation des pouvoirs, mais aussi de celle de collectivités locales, institutions distinctes des organes étatiques¹.

Dans les années d'après-guerre (1944-1950), certains éléments du système d'autogestion locale ont été maintenus². L'on a tenté de les concilier avec la conception d'un nouveau type de conseils en tant qu'organes du pouvoir public. Aux trois niveaux de la division territoriale du pays: voïvodies, districts et communes, on a créé des conseils du peuple, qui devaient être en même temps des organes d'autogestion locale, liés par des dépendances hiérarchiques. Jusqu'en 1954, les conseils du peuple n'étaient pas élus au suffrage universel mais nommés par les formations politiques. Entre 1945 et 1947, il y avait six partis politiques dont deux représentaient l'opposition et après l'élection à la Diète de 1947 il y avait en fait 4 groupements, appartenant au «camp démocratique». Cette appellation désignait la coalition des partis politiques soumis à la domination prépondérante et croissante du parti communiste.

En 1950 a eu lieu une réforme de l'administration territoriale. On a aboli les restes du système de collectivités et créé un système d'organes du pouvoir étatique uniforme, sous forme de conseils du peuple au niveau des voïvodies, des districts et des communes. Les communes ont été ensuite transformées en unités plus petites de division territoriale - les «gromady». Des 17 voïvodies on a séparé 5 villes les plus grandes (Warszawa, Kraków, Poznań, Wrocław) en leur accordant le statut de voïvodie. Et des districts on a séparé plusieurs villes de taille moyenne, dont les compétences correspondaient à celles des pouvoirs de district.

La structure des pouvoirs publics aux différents niveaux de la division administrative était la même. Le conseil du peuple de l'échelon de voïvodie, de district et de

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¹ Voir p.ex. *Polskie prawo konstytucyjne* [Le droit constitutionnel polonais] (red.) W. Skrzydło, Lublin 1997, p. 60-71.

² Plus d'informations sur le système des conseils du peuple dans les années 1944-1990 et ses changements comp. p. ex.: *Polskie prawo administracyjne* [Le droit administratif polonais] (red.) J. Słuzewski, Warszawa 1992, p. 107-130.

«gromada» constituait l'organe législatif, et le présidium du conseil au niveau respectif avec le président en tête, assumait la fonction exécutive et administrative. Le corps auxiliaire du conseil du peuple se composait de sections départementales du présidium, de type fonctionnaire.

Dès 1954 les conseils du peuple étaient élus au suffrage universel pour quelques années de législature. Par contre, les présidiums des conseils étaient nommés et révoqués par les conseils.

La Constitution de la République Populaire de Pologne du 22 juillet 1952 en vigueur dans ce domaine jusqu'en 1990 prévoyait une tutelle sur les conseils du peuple, exercée par le Conseil d'Etat, et depuis 1989, après la suppression de ce dernier, par le Président de la République. Les conseils de districts étaient supervisés, jusqu'à la suppression des districts, par les conseils du peuple de voïvodie. Et les conseils communaux dépendaient des conseils de district. A leur tour, les présidiums de conseils étaient subordonnés, d'une part au gouvernement en tant qu'organe central de l'administration d'Etat et aussi aux présidiums des conseils situés plus haut dans la hiérarchie, et, d'autre part, aux conseils du peuple de niveau correspondant. Le présidium du conseil de district dépendait donc du présidium du conseil de voïvodie et était en même temps l'organe exécutif du conseil du peuple du district.

Il faut tout de même rappeler que ce système assez compliqué fonctionnait en réalité selon des règles un peu différentes. Elles n'étaient pas établies par la loi, mais elles jouaient un rôle dominant dans la formation de l'image de la vie publique en Pologne jusqu'à la fin des années 80. Derrière la façade du système constitutionnel et legal de conseils se cachaient de réels centres du pouvoir décisionnel, situés au sein des formations politiques existantes, et avant tout au sein du P.O.U.P (Parti Ouvrier Unifié Polonais). C'est l'appareil politique et administratif du P.O.U.P. qui dirigeait et contrôlait le travail des conseils du peuple à tout niveau, de leurs organes exécutifs et fonctionnaires. La vraie direction du jeu d'influences au sein du système de conseils était donc la suivante: l'appareil directeur du parti communiste - l'appareil exécutif (y compris celui des fonctionnaires) des conseils du peuple - les conseils du peuple³.

Il faut souligner l'ostentation des élections aux conseils du peuple (ainsi qu'à la Diète de la RPP) qui ont eu lieu à quelques reprises après 1954. Les réformes, très restreintes, qui avaient pour but de démocratiser le système électoral des conseils du peuple et qui ont été entreprises en Pologne au milieu des années 80, n'ont pas vraiment changé cette image.

Au milieu des années 70 (1972-1975) on a cependant réformé radicalement le système de la division territoriale du pays⁴. On a supprimé les «gromady» en rétablissant

³ Ce phénomène a déjà été décrit à la fin des années 60 par W. Sokolewicz: *Reprezentacja i administracja w systemie rad narodowych* [La représentation et l'administration dans le système des conseils du peuple], Ossolineum 1968, surtout p. 371; comp. aussi M. Rybicki: *System rad narodowych w Polskiej Rzeczypospolitej Ludowej* [Le système des conseils du peuple de la République Populaire de Pologne], Warszawa 1971, p. 350, 381.

⁴ J. Mołenda: «Podział terytorialny państwa. Podstawowe problemy» [La division territoriale de l'Etat. Problèmes fondamentaux], dans: *Administracja terenowa a rozwój lokalny* [L'administration territoriale et le développement local], réd. A. Piekara, Z. Niewiadomski, Warszawa 1996.

les communes territorialement plus grandes, on a liquidé ensuite les districts en procédant à un nouveau découpage des voïvodies. On a remplacé les 17 grandes voïvodies par des voïvodies plus petites, au nombre de 49. Il en a résulté une division territoriale du pays à deux degrés. On est revenu (partiellement) aux appellations traditionnelles des fonctions, en rétablissant le poste unique de voïvode (chef de voïvodie) en tant que premier fonctionnaire dans la voïvodie. Dans la commune, son chef était l'organe exécutif unipersonnel et dans le district, jusqu'à sa suppression - le chef de district.

Le motif officiel de la réforme de la division et de l'administration territoriales des années 70 était le nivellement des structures administratives, la limitation de la bureaucratie et l'amélioration de l'efficacité dans la gestion de l'Etat. Mais il y avait aussi d'importantes raisons sous-jacentes, peut être même plus importantes que le motif officiel. Avec l'augmentation du nombre des voïvodies leur taille a diminué aussi bien que leur importance en tant que sujets politiques potentiellement autonomes. L'affaiblissement de la position de la voïvodie avait une influence sur l'affaiblissement du rôle des leaders régionaux du P.O.U.P. au sein de l'appareil directeur du parti, et - compte tenu de la position de ce parti dans le pays - dans l'Etat. Ce fait favorisait le renforcement de l'influence de la centrale varsovienne du P.O.U.P. et sa libération relative de la pression des cellules du P.O.U.P. de l'échelon de voïvodie (parfois très influentes). En somme, cette opération favorisait plutôt la centralisation que la décentralisation du pouvoir public en Pologne à l'époque.

Cependant, en 1983 on a entrepris certaines démarches pour restituer l'autogestion locale dans le pays, conformément à l'idée «d'autogestion sociale», qui émergeait à l'époque

dans certains pays du bloc soviétique. Son renforcement progressif devait annoncer le passage aux niveaux supérieurs du développement du socialisme. En Pologne, cette idée a trouvé un terrain plutôt favorable parce qu'elle était associée aux conceptions de l'autogestion

ouvrière, fort répandues dans certains milieux dans les années 1956-1958, ainsi qu'aux aspirations à la décentralisation de l'administration, qui revenaient de temps à autre. En plus, l'idée de l'autogestion développée a été reprise dans le programme d'une partie des milieux réformateurs dans les années 1980-1981 et aussi - sous une forme nettement anti étatique et oppositionnelle à l'égard du régime en place - elle est devenue un élément important du programme de «Solidarité» (1980-1989).

Pourtant, les démarches dont il est question ci-dessus, ont pris une forme assez superficielle. Dans une grande partie elles se sont réduites aux déclarations politiques et à une série de dispositions constitutionnelles et légales d'ordre général, qui appelaient les conseils du peuple organes du pouvoir l'Etat et en même temps «organes de base de l'autogestion sociale du peuple travailleur des villes et de la campagne dans les communes, les villes, les quartiers des villes plus grandes et dans les voïvodies». Dans ce cadre le voïvode devait remplir trois fonctions: a) celle de représentant du gouvernement dans la voïvodie; b) celle d'organe territorial de l'administration dans le cadre du système du pouvoir étatique uniforme; c) celle d'organe exécutif de l'autogestion sociale sur le territoire de la voïvodie.

Ces solutions, vraiment équivoques et ambiguës, étaient critiquées par l'opposition démocratique, illégale à l'époque, pour leur caractère illusoire du point de vue de l'idée de l'autogestion territoriale.

2. Le problème de la restauration en Pologne des collectivités locales dans leur forme authentique et développée est apparu pendant les discussions de la «table ronde» (février-avril 1989) entre les groupes oppositionnels réunis autour du syndicat «Solidarité» et les forces gouvernementales. Certes, le postulat de l'opposition concernant ce problème n'a pas été rejeté, mais sa réalisation a dû être remise à plus tard. On s'est concentré en priorité sur les réformes au niveau des organes centraux de l'Etat.

On est revenu sur la question après les élections parlementaires de juin 1989, remportées par l'opposition. Entre 1989 et 1990 on a commencé les travaux sur l'établissement d'un système d'autogestion locale au niveau communal. Ceci exigeait entre autres la modification des dispositions respectives de la Constitution de 1952 et l'adoption d'un certain nombre de lois organiques.

Quant à la Constitution, les premières modifications ont été apportées encore en décembre 1989. Elles consistaient à remplacer ses deux premiers chapitres par un nouveau premier chapitre intitulé «Bases du régime politique et économique». Conformément à l'article 5 de ce chapitre, la République de Pologne devait garantir «la participation des collectivités territoriales dans l'exercice du pouvoir et la liberté d'activité pour les autres formes d'autogestion». Ainsi, la notion d'autogestion territoriale est apparue dans la Constitution, en remplaçant, dans le domaine qui nous intéresse, la notion plus vaste d'autogestion sociale, utilisée jusqu'alors.

Cette disposition générale a été précisée dans les dispositions constitutionnelles adoptées à la suite de l'amendement du 8 mars 1990. Elles ont abouti à l'abolition du système de conseils du peuple et étaient liées à deux lois adoptées le même jour: celle sur les collectivités territoriales et celle sur le régime électoral des conseils communaux⁵. Ces deux lois, modifiées à plusieurs reprises, restent toujours en vigueur, bien que les dispositions constitutionnelles aient été changées deux fois depuis.

Le 18 mai 1990, a été adoptée la loi sur le régime de la ville-capitale de Varsovie, qui a été remplacée plus tard par la loi du 25 mars 1994, amendée déjà à plusieurs reprises. Les autres grandes villes polonaises (au nombre de 46), y compris les communes de Varsovie, ont aussi acquis un statut juridique séparé, grâce à la loi du 4 novembre 1997 sur la modification du champs d'activité du service public de certaines villes et sur les zones urbaines.

La législation en matière d'administration territoriale comporte encore une série d'actes postérieurs comme surtout: 1) la loi du 22 mars 1990 sur les agents des collectivités locales; 2) la loi du 22 mars 1990 sur les organes territoriaux de l'administration d'Etat; 3) la loi du 17 mai 1990 sur la répartition des compétences entre les organes de la commune et ceux de l'administration gouvernementale; 4) la loi du 11 octobre 1991 sur le référendum communal; 5) la loi du 12 janvier 1991 sur les impôts et charges locaux; 6) la loi du 7 octobre 1992 sur les chambre régionales des comptes; 7) la loi du 10 décembre 1993 sur le financement des communes; 8) la loi du 12 octobre 1994 sur les collèges d'appel auprès des dictins. Toutes ces lois ont fait l'objet de modifications.

⁵ Sur l'administration communale, voir M. Kułesza: *Administracja terenowa (teksty zebrane)* [L'administration territoriale (textes réunis)], p. IX-XXVIII et la bibliographie donnée, Warszawa 1996.

En 1994, la Pologne a ratifié la Charte Européenne de l'Autonomie Locale du 15 octobre 1985 qui, en vertu de l'article 91 de la loi et de la Constitution du 2 avril 1997 constitue une partie de l'ordre juridique national: elle est donc directement applicable.

Le système issu de la loi du 2 mars 1990 se présente dans ses grandes lignes de la façon suivante:

- tous les citoyens - habitants de la commune - forment, en vertu de la loi, une collectivité locale autonome; la collectivité prend des décisions essentielles soit directement, soit par l'intermédiaire de ses organes;
- initialement, les conseils municipaux étaient au nombre de 2121; leur nombre a augmenté en 1985 jusqu'à 2483, en conséquence d'une division des communes plus grandes en des communes plus petites;
- la commune réalise ses propres missions et peut réaliser des missions qui lui sont déléguées par les organes de l'Etat;
- l'organe délibérant de la commune, à savoir le conseil municipal, est issu d'élections au suffrage universel direct; dans les communes rurales et dans les communes urbaines jusqu'à 40 mille habitants, les élections ont lieu au scrutin majoritaire, et dans les villes de plus de 40 mille habitants, les élections ont lieu au scrutin proportionnel;
- les habitants de la commune peuvent révoquer le conseil municipal par l'intermédiaire d'un référendum communal; toutes les autres décisions importantes peuvent aussi être prises par voie référendaire;
- la commune jouit de la personnalité morale et dispose de ses propres biens (biens communaux); elle profite aussi de ses revenus propres (taxes et impôts locaux) et des subventions de l'Etat;
- l'autonomie des communes bénéficie de la protection judiciaire;
- le conseil municipal nomme et révoque la municipalité et le maire (dans les villes, le bourgmestre, et dans les grandes villes, le président), qui sont les deux organes exécutifs. Ce dernier est un organe d'administration de la collectivité et il prend des décisions administratives. Il est possible de révoquer les décisions du maire auprès du collège d'appel près de la diétine de voïvodie, en tant qu'organe de seconde instance;
- les communes peuvent agir de concert entre elles et elles peuvent créer des associations de communes à vocations multiples; elles peuvent également créer des associations avec les communes étrangères;
- le contrôle de l'administration territoriale appartient au Président du Conseil des ministres et aux voïvodes; et le contrôle du budget appartient aux chambres des comptes régionales;
- les conseils du peuple de voïvodie ont été supprimés. La voïvodie est devenue l'unité de la division territoriale, administrée par l'organe unipersonnel aux attributions générales, à savoir le voïvode, qui est en même temps le représentant du Gouvernement sur ce territoire. Son organe auxiliaire est l'office du voïvode;
- l'administration d'Etat dispose aussi d'un échelon intermédiaire - «rejon» - qui correspond territorialement aux anciens districts (powiat). En 1995, il y avait 267 «rejons», qui est le cadre tant de l'administration générale que d'administrations spécialisées;
- la diète de voïvodie - diétine - est l'institution qui représente les communes auprès du pouvoir central et du voïvode. Ses membres sont les représentants délégués des

conseils municipaux. Elle n'a pas de compétence décisive; elle dispose de compétences de consultation et d'avis.

3. En général, la réforme territoriale réalisée en Pologne au début des années 1990 est considérée comme une entreprise réussie. Cependant, sa mise en oeuvre s'avère plus difficile dans le cas des grandes villes, et plus particulièrement à Varsovie. On est toujours en train de chercher des formes d'organisation des autorités municipales les plus convenables et susceptibles d'assurer le bon fonctionnement de l'administration des grandes collectivités communales.

La limitation de la réforme territoriale aux unités de base, à savoir celles de commune et de ville, était dès 1990 l'objet de doutes et critiques⁶. Plus précisément, on a constaté la nécessité de créer un second échelon de collectivité locale au-dessus de la commune. Dans ce cas, on se référait à différents arguments, notamment historiques, qui, dans le contexte des discussions des années 1989-1997 sur le régime constitutionnel, présentaient une force persuasive remarquable.

Dans la période de l'entre-deux-guerres⁷, les institutions de l'autogestion locale fonctionnaient à l'échelon des communes et des districts. D'ailleurs, la Constitution de 1921 prévoyait aussi la création de collectivités locales au niveau des voïvodies, mais cela n'avait pas été réalisé. Seulement deux voïvodies - celles de Poznan et de Poméranie - avaient leurs propres institutions d'autogestion locale. Par contre, la voïvodie de la Silésie constituait dans le cadre de l'Etat unitaire, un territoire autonome. En 1933, une réforme dite d'unification a été effectuée. Elle devait aboutir à l'uniformisation du régime de l'administration locale sur tout le territoire polonais hérité de la période des partages (au sein de trois Etats). Quoique la réforme d'unification fût liée à l'établissement d'une tutelle très forte sur les collectivités locales de la part de l'administration gouvernementale, les compétences des collectivités étaient, à cette époque-là, plus larges que dans la période de l'après-guerre et cela jusqu'en 1990.

Dans les débats sur l'évolution constante du phénomène des collectivités locales en Pologne, étaient invoqués les exemples d'autres pays démocratiques où cette autonomie joue un rôle important, mais aussi la volonté d'adapter les divers aspects du régime polonais aux exigences de la Charte européenne de l'autonomie locale.

Les discussions dont il est question ont été dominées, dans les années 1990-1998, par le conflit autour du système de la division territoriale du pays, et plus précisément autour de la question du rétablissement en Pologne d'un échelon intermédiaire entre la commune et la voïvodie, à savoir le district. Une des conséquences de ce rétablissement devrait être une nouvelle division territoriale du pays et plus particulièrement, la diminution du nombre des voïvodies et l'élargissement de leur territoire.

A une certaine période (principalement dans les années 1990-1993) une polémique vive portant sur la régionalisation du pays s'est aussi engagée. Certains milieux libéraux

⁶ Voir J. Stępień: «Reforma administracji państwowej» [La réforme de l'administration publique], dans: *Administracja terenowa a rozwój lokalny*, op. cit.

⁷ H. Izdebski: «Administracja terenowa w II Rzeczypospolitej» [L'administration territoriale de la II République de Pologne], dans: *Administracja terenowa a rozwój lokalny*, op. cit.

et les associations régionales (p. ex. le Mouvement pour l'Autonomie de la Silésie) se prononçaient pour la création de régions qui correspondraient, dans les grandes lignes, aux anciennes provinces polonaises ou aux régions géographico-culturelles comme la Grande-Pologne, la Petite-Pologne, la Poméranie, la Masovie, Warmia et la Masurie, la Haute-Silésie, la Basse-Silésie. Dans la conception de certains libéraux, la régionalisation pourrait jouer un rôle positif dans le processus d'intégration de la Pologne à l'Union Européenne qui subit des transformations semblables. D'autre part, les groupements se disant de tendance nationalo-indépendantiste se prononcent contre les régions. Selon eux, la régionalisation du pays pourrait mener à son démembrement et son affaiblissement, voire à la perte de la souveraineté nationale et de l'identité culturelle de la Pologne dans l'Europe Unie. Dans la période postérieure, l'intensité de ces polémiques a considérablement diminué.

Cependant, la majorité écrasante des participants au débat se prononçait pour la décentralisation du pays dans le cadre de l'autonomie locale entre autres et de l'expansion continue des collectivités territoriales. Par contre, la question de l'organisation, des missions, des attributions et des échelons de cette autonomie reste une question ouverte.

4. Dans les projets de Constitution⁸ présentés au Parlement dans les années 1993—94 beaucoup d'attention a été accordée à l'expansion des collectivités territoriales. Tous ces projets (au nombre de 7) comprenaient des chapitres entiers consacrés à cette question et dans certains cas aussi aux autres formes d'autogestion, notamment professionnelle et économique.

De même, tous les projets de Constitution, excepté celui de la KPN (Confédération de la Pologne Indépendante), comprenaient une définition globale des collectivités territoriales, dans laquelle l'accent est mis sur le fait qu'elles constituent «la forme fondamentale d'organisation de la vie publique locale, servant à satisfaire les besoins collectifs (art. 80, le 1er projet du Sénat, art. 149, le 1er projet de la SLD, art. 130, le 1er projet de l'UW).

Tous les projets admettaient que la collectivité locale possède une personnalité morale ou, selon la définition du projet du Président L. Wałęsa, la personnalité publique et morale. La situation se présente de la même façon quand il s'agit de la reconnaissance à la collectivité locale le droit de propriété et celui de la gestion du bien collectif.

Dans tous les projets, il y avait des dispositions concernant les ressources des collectivités territoriales, dont une partie proviendrait des impôts et des taxes locales. De plus, les collectivités territoriales devaient bénéficier des subventions et des dotations gouvernementales.

⁸ B. Zawadzka: «Administracja samorządowa w projektach konstytucji» [L'administration autonome dans les projets de Constitution], dans: *Jaka konstytucja? Analiza projektów Konstytucji RP przedłożonych Komisji Konstytucyjnej Parlamentu w 1993 r* [Quelle Constitution? Analyse des projets de Constitution de la RP proposés à la commission constitutionnelle du Parlement en 1993], réd. M. Kruk, Warszawa 1994; J. Mordwiłko: «Administracja terenowa w tekstach siedmiu projektów konstytucji» [L'administration territoriale dans les textes des sept projets constitutionnels], dans: *Administracja terenowa a rozwój lokalny*, op. cit.

Ce n'est que le projet de KPN qui a omis la question des missions des collectivités territoriales. Tous les autres projets disposaient que les collectivités réalisent leurs missions propres et aussi les missions déléguées. Dans la plupart des projets il était question de présomption des tâches publiques en faveur des collectivités territoriales.

En ce qui concerne les unités d'autogestion locale, cette question était interprétée différemment. Cependant, dans tous les projets, on prévoyait l'existence de l'autogestion à l'échelon de la commune qui était reconnue d'habitude comme unité de base. Certains projets (celui de UW et de L. Wałęsa) prévoyaient aussi l'existence des districts, d'autres, celle des voïvodies autogestionnaires. Dans certains cas, l'établissement des collectivités territoriales au niveau des voïvodies (dans celui de UW et de L. Wałęsa) ou, plus généralement, au niveau supracommunal (SLD, «projet citoyen») était perçue comme possible par la voie légale. Ce ne sont que les projets de PSL (Le Parti Populaire de Pologne), de UP (l'Union du Travail) et celui du Sénat de la 1ère législature qui n'ont pas évoqué la question des unités d'autogestion locale au niveau supracommunal. Tout de même, en se servant de la définition disant que «la commune est la collectivité territoriale de base» (art. 123, alinéa 3), le projet du Sénat admet *implicitement* la création d'autres unités d'autogestion locale.

Tous les projets de Constitution, exceptés celui de KPN, PSL et de UP prévoyaient la possibilité de la création des associations de collectivités locales. De même, tous réglaient de la même façon la question du régime des organes des collectivités locales (sauf le projet de KPN, qui se distinguait par son originalité particulière). Ce régime devait fonctionner selon les principes de démocratie et, dans certains cas, prendre en compte les institutions de démocratie directe (le référendum).

En général, il est possible de constater que la question de collectivités territoriales a été appréciée par les auteurs des projets constitutionnels, qui furent l'objet de la première lecture de l'Assemblée nationale en septembre 1994. Dans leurs grandes lignes, ces projets se ressemblaient beaucoup, quoique dans les détails et le choix des questions importantes (par exemple, le contrôle des collectivités, leur protection juridique) ils aient différé. La plus grande différence entre eux concernait la question de l'existence de collectivités territoriales au niveau supracommunal.

5. Le déroulement et le contenu de la discussion⁹ sur les collectivités territoriales au sein de la commission constitutionnelle, et du Parlement lui-même, reflétaient l'ambiance générale accompagnant les travaux constitutionnels dans les années 1994-1997. La question de l'autonomie locale restait dans l'ombre des autres questions. Ce sont plutôt

⁹ P. Winczorek: «Zakres prac nad nową konstytucją Rzeczypospolitej Polskiej» [Le cadre des travaux sur la nouvelle Constitution de la République de Pologne], *Państwo i Prawo* [L'Etat et le droit] 1997, nr 11-12; R. Chruściak: «La préparation de la Constitution de la République Polonaise du 2 avril 1997. Le déroulement des travaux parlementaires», *Etudes de la politique*, t. 2, Warszawa 1997. La plupart des remarques que j'insère ici sont basées sur l'observation des travaux de la commission constitutionnelle du Parlement dans les années 1993-1997 menée en qualité de membre du Groupe des Experts Permanents de cette commission. Les matériaux comportant la relation sténographique de la discussion sur les problèmes de l'administration territoriale ont été publiés dans le Bulletin de la commission constitutionnelle du Parlement, surtout dans les nr. XXVII, XXVIII, XXIX et XXX.

les problèmes axiologiques de la Constitution, le champs et le contenu des libertés et des droits de l'homme et du citoyen, le système des sources du droit, la structure des organes principaux de l'Etat et les rapports entre eux qui attiraient le plus l'attention. Il vaut la peine de signaler que le fait que la ressemblance dans la façon de percevoir l'idée de l'autonomie locale entre les deux principaux partis politiques, c'est-à-dire SLD (l'Alliance de la Gauche Démocratique) et UW (L'Union de la Liberté), s'est manifestée relativement tôt. A la suite des négociations informelles qui ont eu lieu dans les couloirs de la commission constitutionnelle, les représentants de ces deux partis ont présenté un point de vue commun sur plusieurs questions étant l'objet de dispositions constitutionnelles. Les grandes lignes de la division se manifestaient donc entre SLD et UW d'un côté, entre PSL et les représentants des partis liés à «Solidarité» de l'autre. Les problèmes principaux discutés au sein de la commission étaient:

- le concept constitutionnel général de l'autogestion locale, et plus précisément de collectivités territoriales;
- l'intérêt de consacrer un chapitre entier de la Constitution à la question de l'autogestion locale;
- la définition du champs de compétences des collectivités territoriales;
- type de personnalité juridique dont disposera la collectivité locale;
- la division territoriale de l'Etat et dans ce contexte la question du nombre des collectivités locales;
- le champ du contrôle de l'activité des collectivités locales;
- le mode de nomination des organes exécutifs des collectivités locales;
- la position du chapitre sur les collectivités locales dans la systématique de la Constitution;

Quant à la notion générale de collectivité locale, deux conceptions se sont affrontées. Selon la première, les collectivités locales seraient traitées comme toutes les autres formes d'association volontaire de personnes dans les diverses sphères de la vie publique. La volonté de créer des collectivités locales, exprimée par un groupe social donné, est considérée comme une condition nécessaire et suffisante pour créer de telles institutions et pour les équiper en fonctions et compétences concrètes. Cette vision de l'autogestion locale était principalement celle des partisans du projet «citoyen» de Constitution. On peut supposer qu'ils voulaient renouer ainsi avec l'idée de la »République Autogestionnaire» qui constituait un des éléments du programme constitutionnel de »Solidarité» dans les années 1981-1989. Cette idée était à son tour apparentée avec la doctrine de l'autogestion généralisée, proclamée par certains milieux non communistes de la gauche en Europe dans les années 70-80.

Selon la seconde conception, l'autogestion locale serait une forme démocratique de l'administration publique décentralisée. La participation, dans les communautés locales, des personnes appartenant à des catégories sociales précises (p. ex. les habitants d'une même commune, les gens exerçant le même métier) résulte de la force de la loi et n'est donc pas une question de libre choix. La collectivité locale accomplit, par ses organes et dans le cadre de ses missions propres et missions déléguées, des fonctions d'autorité d'un caractère de droit public. Cette conception renoue avec l'idée de l'autogestion

locale, traditionnelle dans la doctrine européenne du droit constitutionnel et administratif. Principalement ce sont l'Union de la Liberté (UW) et l'Alliance de la Gauche Démocratique (SLD) ainsi que les experts, qui se sont prononcés pour cette conception. Elle a été soutenue au sein de la commission constitutionnelle et au Parlement.

Une partie des partisans de la première conception, ainsi que ceux d'entre les membres de la commission constitutionnelle qui attachaient beaucoup d'importance à une régulation constitutionnelle de la question des organisations d'autogestion professionnelle, économique et parfois même syndicale, étaient d'avis qu'il fallait consacrer un seul chapitre commun à toutes formes d'autogestion. Tandis que les partisans de la thèse selon laquelle les collectivités locales sont des institutions constitutionnelles à tel point importantes et spécifiques qu'elles ne devraient pas être mises au même rang que les autres formes d'autogestion, étaient de l'avis contraire. D'où l'idée de consacrer un chapitre séparé de la Constitution aux collectivités locales et de traiter de manière laconique les questions concernant les autres formes d'autogestion. C'est ce qui a été fait.

Les articles 15 et 16 de la Constitution qui ont trait aux collectivités locales, sont intégrés au chapitre I - «la République», qui contient les principes généraux sur lesquels est basé l'Etat polonais. Un chapitre séparé - VII - qui contient dix articles (art. 163-172) concerne aussi ce sujet. Pour les autres formes d'autogestion, on a consacré un seul article intégré au chapitre «la République». Cet article, dans sa forme présente, n'est apparu que dans la phase finale des travaux constitutionnels, en partie en tant que réponse aux postulats des différents groupes sociaux et milieux économiques qui aspiraient à la constitutionnalisation des organisations d'autogestion avec lesquelles ces groupes s'identifiaient.

Quant aux missions des collectivités locales, on était d'accord que celles-ci devraient participer à l'exercice du pouvoir public. Il s'agissait essentiellement de formuler le principe selon lequel les missions des collectivités locales englobent tout ce qui est important du point de vue des besoins des communautés locales, mais aussi ce que les collectivités locales sont capables de faire elles-mêmes en utilisant leurs propres moyens. Il a été décidé qu'elles accomplissent «la partie considérable des missions publiques» (art. 16 al. 2) et que l'expression «partie considérable» serait précisée dans les lois concernant l'administration publique.

Au cours de la discussion sur les collectivités locales, et aussi sur la question générale du modèle d'Etat dans ses relations avec la société civile défini par la Constitution, est apparu le postulat du principe de subsidiarité¹⁰. Tous étaient d'accord que c'est un principe constitutionnellement très important. Au début on ne savait pas l'exprimer verbalement de manière adéquate. Ce n'est qu'à la fin des travaux sur le texte de la

¹⁰ Comp. M. Kułesza: *Zasada suhdydiarnos'ci - klucz reform systemu administracyjnego państw Europy Środkowej i Wschodniej* /Le principe de subsidiarité - la clef des réformes du régime administratif des Etats de l'Europe centrale et de l'Est (l'exemple de la Pologne); P. Winczorek: *Zasada suhdydiarnos'ci w świetle dyskusji konstytucyjnych w komisji konstytucyjnej Zgromadzenia Narodowego* [Le principe de subsidiarité dans les discussions constitutionnelles de la commission constitutionnelle de l'Assemblée nationale]; E. Popławska: «Wpływ zasady suhdydiarności na zmiany konstytucyjne w Polsce» [L'influence du principe de subsidiarité sur les changements constitutionnels en Pologne]. Tous ces travaux ont été publiés dans le tome intitulé: *Suhdydiarność* [La subsidiarité], red. D. Miłczarek, Warszawa 1996.

Constitution que ce principe a été formulé dans le préambule, parmi les principes et les valeurs tels que la liberté, la justice, la coopération entre les collectivités, le dialogue social. On dit à propos du principe de subsidiarité qu'il renforce «les droits des citoyens et de leurs collectivités».

Sur la question de la personnalité juridique des collectivités locales, on a présenté deux postulats. Certains experts étaient d'avis qu'il fallait se référer à la notion de personnalité morale de droit public. La reconnaissance des collectivités locales comme personnes morales de droit public est liée à la conception traditionnelle de l'autogestion locale avec laquelle la Constitution a définitivement renoué. D'autres considéraient cette conception comme périmée, chargée de mauvais souvenirs et d'ailleurs pas entièrement claire dans son fondement doctrinal.

La discussion sur le type de personnalité morale des collectivités locales a plus été l'affaire des experts que des hommes politiques. Etant donné le fait que les opinions des spécialistes étant partagées et que du point de vue des besoins collectifs il importe que les collectivités locales puissent agir en tant que sujets autonomes pour les questions de propriété et autres droits patrimoniaux dans la sphère économique, on s'est contenté de proclamer (art. 165 al. 1) que «les collectivités territoriales ont la personnalité morale». Cela signifie certainement qu'elles sont des personnes morales envers le droit civil et donc privé.

Ausi bien avant le début des travaux parlementaires sur la nouvelle Constitution dans les années 1993-1997, qu'après l'entrée en vigueur de la Constitution, la question des degrés de division administrative du pays et celle des collectivités locales au niveau supra-communal, étroitement liée à cette première, éveilla des discussions des plus animées¹¹.

Pour la constitutionnalisation de la division du pays en communes, districts et voïvodies se sont prononcés l'Union de la Liberté (UW) et l'Alliance de la Gauche Démocratique (SLD). Le Parti Paysan (PSL) était décidément contre cette division, désirant conserver la division qui s'était formée dans les années 70. L'Union du Travail (UP) semblait porter cette position. En conséquence de l'accord entre UW et SLD, on a introduit dans le texte du projet de Constitution élaboré par la commission constitutionnelle et le Parlement (texte du 19 mai 1996) l'article 12 qui prévoit la division territoriale de la République de Pologne en communes, districts et voïvodies. Les habitants de ces unités créent en vertu de la loi des communautés locales. Les collectivités locales devraient fonctionner, selon le constituant, à tous les degrés de la division administrative du pays.

Pour l'acceptation définitive du projet, il était nécessaire d'obtenir au moins les deux-tiers des voix dans la commission constitutionnelle en présence d'au moins la moitié de ses membres. Cependant, les représentants du Parti Paysan ont annoncé qu'ils ne supporteraient pas le projet de création des districts. En prenant en considération le nombre des voix de l'Union du Travail dans la commission et aussi celui des groupements qui, ¹¹

¹¹ Au moment où ce travail est écrit (janvier 1998), les travaux parlementaires préparatoires précèdent l'introduction au Parlement des projets de lois sur la réforme territoriale de l'Etat, dont les districts (powiat).

pour d'autres raisons, étaient contre l'adoption de la Constitution par cette commission et cette Assemblée, il fallait s'attendre au rejet du projet dans sa totalité.

On a donc entrepris des négociations intensives en vue de trouver des solutions de compromis qui convaincraient les représentants du Parti Paysan et de l'Union du Travail. C'est pourquoi, dans le projet de Constitution accepté à une majorité écrasante par la commission constitutionnelle le 16 janvier 1997, et présenté en deuxième lecture au Parlement, l'alinéa 1 de l'article 15 (équivalent de l'ancien article 12), dit seulement que »le régime territorial de la République Polonaise garantit la décentralisation de la puissance publique«. Le texte de cet article n'a plus été modifié.

Quoique des concessions au profit du Parti Paysan aient été faites aussi bien par l'Alliance de la Gauche Démocratique (SLD) que par l'Union de la Liberté (UW), c'est surtout cette dernière qui les a traitées comme fondamentales, à la limite de l'abandon complet de ses principes doctrinaux. Au sein du Gouvernement, composé dans les années 1993-1997 par la coalition SLD-PSL, ainsi qu'au Parlement, se déroulaient parallèlement des travaux sur les districts. L'Alliance de la Gauche Démocratique (SLD) qui en principe soutenait l'établissement des districts, prenant en considération la position de son partenaire, n'a pas fait avancer les travaux parlementaires sur cette question.

La question du contrôle de l'activité des collectivités locales est apparue principalement à l'occasion de la discussion sur la sphère d'activité de la Chambre suprême de Contrôle. Il était question de savoir si les critères du contrôle mené par la Chambre suprême de Contrôle auquel sont soumis les organes de l'administration gouvernementale et du contrôle de la part des autres unités d'organisation de l'Etat, devaient concerner aussi les organes des collectivités locales et les différentes personnes morales communales. Dans le premier cas, les critères retenus sont les suivants: légalité, bonne gestion, opportunité, probité (art. 203 al. 1 de la Constitution).

Une partie des participants au débat, dont des représentants de la Chambre suprême de Contrôle, postulaient que ces critères soient uniformes dans tous les cas. On soulignait en particulier que l'expérience fait craindre que les autorités des collectivités locales ne gèrent pas toujours correctement les biens communaux, en exposant ainsi les communautés locales à des dommages. Il est donc nécessaire de soumettre ces autorités au contrôle d'opportunité. Les opposants de cette position soutenaient que le contrôle d'opportunité limiterait dramatiquement l'autogestion des communautés locales. Il suffit donc que la Chambre suprême de Contrôle contrôle les autorités et les autres unités d'organisation des collectivités locales seulement du point de vue de la légalité, de la bonne gestion et de la probité. Si les collectivités locales fonctionnent dans le cadre de la loi, il suffit en vérité de contrôler la légalité de leur fonctionnement. En conséquence de ces discussions et après certaines hésitations, la deuxième de ces positions l'a emporté au sein de la commission constitutionnelle. Au cours des discussions, il n'y avait pas de doutes que les autorités délibérantes des collectivités locales c'est-à-dire les assemblées des collectivités locales, devraient être, comme jusqu'à présent, mis en place par l'ensemble des habitants par des élections locales démocratiques. Une question est toutefois apparue: celle du mode de nomination des autorités exécutives.

Parallèlement aux travaux constitutionnels, se déroulaient des discussions sur la réforme de la loi de 1990 sur les collectivités locales. Une partie des forces politiques postulait que l'élection des maires dans les communes rurales, des bourgmestres ou présidents dans les villes - organes exécutifs unipersonnels - ait un caractère direct et qu'elle soit effectuée au suffrage universel direct. Ces propositions n'ont pas été retenues, mais l'idée de ce genre d'élections a gagné un appui considérable parmi les auteurs de la nouvelle Constitution.

Finalement, la Constitution n'a pas déterminé le mode d'élection et de révocation des autorités exécutives des collectivités locales. Cela n'a cependant pas fermé la voie aux élections directes et universelles (voir art. 169 al. 3).

La place du chapitre sur les collectivités locales dans la systématique de la Constitution serait d'une certaine manière le résultat de la discussion sur la conception de l'autogestion. En admettant que les collectivités locales sont une forme de l'administration publique décentralisée, c'est-à-dire qu'elles appartiennent au pilier du pouvoir exécutif, on aurait pu intégrer ce chapitre à celui sur le Conseil des Ministres et l'administration d'Etat. Mais d'un autre point de vue, on pouvait placer ce chapitre après tous les chapitres consacrés aux pouvoirs publics: législatif (la Diète et le Sénat), exécutif (le Président, le Conseil des Ministres) et judiciaire (les cours et tribunaux). Telle était justement la place initiale réservée au chapitre sur les collectivités locales.

C'est finalement la première proposition qui a prévalu, et le chapitre portant sur les collectivités territoriales a été placé après celui sur le Conseil des Ministres et sur l'administration gouvernementale et avant celui sur les cours et tribunaux.

6. La nouvelle régulation constitutionnelle des questions des collectivités territoriales ne s'écarte pas trop de la régulation contenue dans la loi constitutionnelle du 17 octobre 1992, sur les rapports réciproques entre le pouvoir législatif et le pouvoir exécutif et sur l'administration territoriale. Pourtant la Constitution de la République de Pologne du 2 avril 1997 introduit plusieurs précisions et nouveautés importantes. Pour ne pas entrer dans des considérations trop détaillées sur les ressemblances et les différences entre ces régulations, nous allons nous contenter d'une présentation générale des solutions nouvelles.

Parmi les éléments principaux sur lesquels reposent les solutions constitutionnelles dans le domaine de l'administration territoriale on peut compter:

- le principe de subsidiarité, mentionné supra. La subsidiarité doit être comprise de manière à ce que les structures sans pouvoir de la vie privée ou publique aient la priorité sur les structures de pouvoir dans la satisfaction des besoins des particuliers et des groupes sociaux, et que celles plus petites et inférieures (p. ex. territoriales) l'aient sur les plus grandes et supérieures (p. ex. structures nationales ou internationales);
- le principe de la décentralisation de la puissance publique (art. 15 al. 1). Il convient de noter que selon la terminologie appliquée consciemment par les auteurs de la Constitution, la notion de «puissance publique» comporte également le pouvoir réalisé dans l'Etat («le pouvoir d'Etat») par ses organes ainsi que le pouvoir réalisé dans le cadre des collectivités territoriales (comp. art. 16 al. 1). La décentralisation comprend alors non

seulement des déplacements des missions et des attributions à l'intérieur du système d'Etat pour le bien des structures autonomes mais aussi à l'intérieur de ces structures.

- le principe selon lequel la division de base du territoire national devrait avoir un caractère naturel c'est-à-dire prendre en considération des «liens sociaux, économiques ou culturels» de même qu'assurer aux «unités territoriales la capacité d'accomplir leurs missions publiques» (art. 15 al. 2);
- le principe de la «double présomption» des missions pour le compte de l'administration territoriale. Premièrement, la Constitution décide qu'en cas de doute pour déterminer à qui appartient l'accomplissement des missions publiques, c'est à l'administration publique que profite ce doute (art. 163). En deuxième lieu, en cas de doute relatif au niveau d'administration territoriale auquel est confié la réalisation de ces missions, il faut supposer que ce sont les missions des communes (art. 164 al. 3). Ce principe se rattache d'une manière évidente au principe de subsidiarité;
- le principe d'indépendance des niveaux d'administration territoriale dans l'exercice de la puissance publique leur incombant en vertu des lois. Ce principe est proclamé à l'article 16 al. 2 phrase 2: «les collectivités territoriales accomplissent en leur propre nom et sous leur propre responsabilité la partie considérable des missions publiques». L'autonomie des collectivités territoriales est garanti judiciairement (art. 165 al. 2), tandis que les conflits entre les organes des administrations territoriale et gouvernementale sont tranchés par la juridiction administrative (art. 166 al. 3);
- le principe selon lequel l'ensemble des habitants d'un territoire constituant au terme de la loi une unité de la division territoriale représente une collectivité territoriale (art. 16 al. 1).

La Constitution ne précise pas quelles sont, mis à part la commune (art. 164 al. 1), les niveaux fondamentaux de la division territoriale de l'Etat. Il est utile de signaler qu'à côté des collectivités de base peuvent exister, et effectivement existent en Pologne, des collectivités locales répondant à des besoins particuliers (p. ex. la justice, les arrondissements énergétiques, les réseaux de routes publiques, etc.). Cependant, toutes les collectivités territoriales vont avoir un caractère administratif autonome (art. 16 al. 1).

La Constitution décide que «les autres (sauf la commune) collectivités régionales soit, locales et regionales sont définies par la loi» (art. 164 al. 2). La stylistique de cette disposition pourrait indiquer que les communes peuvent constituer des unités de l'administration régionale. Pourtant il serait plus raisonnable de reconnaître que les niveaux régionaux (et locaux), dont les noms ne sont pas donnés ici, devraient fonctionner à un niveau supra-communal. La Constitution ne barre donc pas le chemin au rétablissement des districts ni au changement de division territoriale de l'Etat au niveau des voïvodies; elle ne préjuge pas non plus la direction de ces changements.

Les missions concernant la satisfaction des besoins de la collectivité sont accomplies par elle comme ses missions propres (art. 166 al. 1). En plus, si cela résulte de besoins publics justifiés, la loi peut charger ces collectivités d'exécuter des missions dites déléguées (art. 166 al. 2). Les collectivités territoriales accomplissent des missions publiques en bénéficiant de la personnalité morale et du droit de propriété et des autres droits patrimoniaux (art. 165 al. 2).

La Constitution traite en détail les autres (sauf les droits patrimoniaux) moyens de réalisation des tâches de l'administration. Ceci est la conséquence de l'observation après 1990 de l'accroissement par la loi des missions propres ou déléguées de la commune sans augmentation équivalente des moyens. La Constitution admet alors que les collectivités locales doivent avoir à leur disposition des revenus propres, des subventions générales et des dotations à une affectation spéciale du budget de l'Etat (art. 167 al. 2). L'une des sources de revenus propres est constituée par les impôts et les taxes locales (art. 168) définis par la loi et dont le niveau est fixé par ces collectivités.

La participation des collectivités locales à la répartition des recettes publiques doit être proportionnelle aux missions leur incombant (art. 167 al. 1). Les changements de ces missions et attributions doivent «entraîner des modifications dans la répartition des recettes publiques» (art. 167 al. 4).

Le régime interne des collectivités locales a un caractère démocratique et connaît deux formes de démocratie: directe et indirecte. Une forme de la démocratie directe constitue le référendum. Les domaines de ce référendum ne sont pas précisément délimités par la Constitution. La Constitution se borne à constater que peuvent être l'objet d'un référendum des questions concernant la collectivité, y inclus la révocation des autorités de la collectivité élues au suffrage direct (art. 170). Des précisions ou des restrictions dans ce domaine peuvent être introduites par la loi désignant les règles et la voie de la réalisation du référendum (art. 170).

Les collectivités locales disposent d'autorités délibérantes et exécutives (art. 169 al. 1). La Constitution ne caractérise pas en détail ces organes ni ne donne leurs noms. Toutefois, il est clair qu'au moins les autorités délibérantes doivent provenir d'élections universelles, égales, directes et réalisées au scrutin secret (comp.: art. 169 al. 2 et 3). Par contre, la durée de leur mandat n'est pas précisée. Ces questions devraient être réglées par une loi, peut-être d'une manière différente pour chaque niveau de collectivités locales.

Outre les régulations constitutionnelles et législatives, le pouvoir réglementaire des collectivités locales est défini, en vertu des lois, par les actes des autorités délibérantes (art. 169 al. 4).

Les autorités des collectivités locales édictent des actes juridiques locaux, obligatoires sur le territoire de ces organes, sur le fondement et dans le cadre des délégations contenues dans la loi et selon les principes et le régime définis par la loi. Les actes juridiques locaux sont des sources de droit obligatoire, c'est-à-dire à la base desquelles on peut prendre des décisions concernant les citoyens, les personnes morales, et autres sujets de droit (comp.: art. 87 al. 2 et art. 94).

Le champ d'autonomie des collectivités locales dépend dans une large mesure de l'étendue du contrôle de leur fonctionnement. La Constitution prévoit que ce contrôle peut concerner uniquement la légalité de l'activité des collectivités territoriales (art. 171 al. 1), et les sujets autorisés à contrôler sont: pour les affaires générales le Président du Conseil des Ministres, et les voïvodes et dans le domaine des questions financières, les Chambres des comptes régionales (art. 171 al. 1 et 2). La Constitution ne définit pas les objets (p. ex. les organes de l'administration) et ne précise pas les moyens de ce con-

trôle. Dans cette matière, les lois ont une valeur prépondérante. Cependant, dans des cas très limités, si l'autorité délibérante d'une collectivité territoriale «porte une flagrante atteinte à la Constitution ou à la loi», la Diète, à la demande du Président du Conseil des Ministres, peut dissoudre cette autorité (art. 171 al. 3).

Conformément aux dispositions de l'article 10 de la Charte Européenne des Collectivités territoriales, la Constitution de la République de Pologne du 2 avril 1997 déclare que «les collectivités territoriales peuvent s'associer» (art. 172, al. 1). Ces associations peuvent aussi avoir un caractère international. Ces entités ont droit de coopérer avec les sociétés locales et régionales des autres pays (art. 172 al. 2). C'était une source d'angoisses de certains milieux dans la période précédant le vote de la Constitution et son acceptation au référendum, mais en aucun cas cela ne représente de violation du principe d'unité de l'Etat polonais (art. 3), ni ne constitue de danger pour sa souveraineté.

7. En évaluant la totalité des dispositions constitutionnelles, il faut souligner qu'elles sont relativement peu discutables. On a obtenu sur toutes ces questions une acceptation assez large des divers milieux politiques. On peut également croire que sur le plan juridique ces dispositions ne devraient pas entraîner de difficultés lorsque de la discussion sur leur contenu on passera à leur réalisation.

THE “CONSTITUTIONALIZATION” OF THE LEGAL ORDER

Ewa Popławska*

I. The Notion of “Constitutionalization” of the Legal Order

The constitutionalization of the legal order, understood as the direct influence exerted by constitutional norms and principles upon the application of law in relations between the individual and the State or between individuals, occurs nowadays in many countries of the world. The term “constitutionalization”, as suggested by its semantic form, denotes a continuous process and refers, in particular, to a situation where such phenomenon has occurred secondary to an already established system of State organization and resulted from constitutional amendments, adjudicative practice or appeared after a new constitutional act had been adopted. The United States is a good example of a State where the legal order is highly constitutionalized.¹

The main reason for the phenomenon of constitutionalization of legal order is the very nature of Constitution as an act of self-limitation of the state, preventing the future possible “tyranny of the majority”. The role of the Constitution in the light of the doctrine of liberal constitutionalism was well described by Cass Sunstein, “Constitutions can be understood as *precommitment strategies*, in which nations use a founding document to protect against the most common problems in their usual political processes. Constitutions should therefore work against a nation’s most threatening tendencies.”^{* 1 2} From the point of view of the legitimization requirement, the Constitution should at the same time be an act of minimum of national consensus, which determines the fundamental principles accepted by the community which constitutes the State and it should define the “rules of the game” concerning the relations between public authorities and individuals. If the Constitution is to fulfil such role, it must acquire a normative significance and its observance must be sanctioned.³

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¹ L. Favoreu: “La Constitutionnalisation du droit” [in:] *L’Unité du droit. Mélanges en hommage à Roland Drago*, Paris 1996, p. 25-35; *idem*: “La Constitutionnalisation de l’ordre juridique”, theses and outline of the report for 15th Congress of Comparative Law, Bristol, 1998.

² C. Sunstein: “Against Positive Rights”, *East European Constitutional Review* 1993, vol. 2, No. 1, p. 36. More on this subject in W. Sadurski: “Konstytucyjna kwadratura kola” [Constitutional Squaring of the Circle], *Civitas* 1997, vol. 2, No. 1, p. 11-36.

³ See: W. Sadurski: *Racje liberala* [Liberal’s Arguments], Warszawa 1992; *idem*, *Myślenie konstytucyjne* [Constitutional Thinking], Warszawa 1994.

It would be difficult to ascribe identical views to all authors of constitutional acts currently in force, as they come from different, sometimes distant times. However, such view of the Constitution and its role seems to correspond at least to the American model of State organization, which envisages protection of the Constitution by common courts (judicial review), and those European states where separate constitutional courts exist (constitutional review). Naturally, there are also national particularities resulting from different traditions and development of constitutions in individual states, as well as from the version of the institution of constitutional control adopted in a given country, based on different specific doctrinal assumptions.

As a consequence of perceiving the Constitution as a principal point of reference, one seeks in it important messages, concerning the fundamentals of State organization in the situation where statutes - the next level in the hierarchy of sources of law - have become an instrument of regulation of specific issues, sometimes even technical ones.⁴ Keeping in mind the differences in the content of constitutional acts, they owe their special position in the system of sources of law to laying down the socially accepted principles and general rules which public authorities are obliged to observe in their actions. This is, in turn, connected with such messages, fundamental for the State organization, becoming especially lasting by virtue of greater rigidity of constitutional acts, which are ascribed higher status in comparison to ordinary legislation, easily changeable with changes of political groups constituting the parliamentary majority.

The rigidity of the Constitution, where principles and procedures are formulated, in confrontation with their changeable social context is softened by the institution, referring to the Common Law system, of control of constitutionality of law, by courts (or quasi-judicial organs) whose task is making interpretations and relaxing the rigidity. Judicial control of compliance of laws with the Constitution is an instrument particularly frequently used in order to enforce observance of constitutionally guaranteed citizens' rights and freedoms by public authorities.⁵ On the other hand, it is also used as a weapon by parliamentary opposition, which strives to ensure that authorities observe fundamental rules of State organization enacted in the Constitution. However, sometimes - in the case of initial control - such actions aim at slowing down the legislative process.

The constitutionalization of the legal order has, in its essence, a lot in common with international mechanisms of protection of human rights, especially those within the framework of the European Convention of Human Rights and Fundamental Freedoms (to a lesser extent within the framework of the International Treaty on Civil and Political Rights of the UNO). As for rights and freedoms, to which regulations of the Convention apply they are equal to the typical constitutional regulations. Yet, the most important thing is the similarity of method, which in both cases consists in referring to higher norms (Constitution, international commitments) when looking for legal protection.

⁴The phenomenon of the so-called "inflation of law", and especially of statutes results, among other things from expanding the organizational activities of the State and from increasing interference of the state, including legislative bodies, into various fields of activity of its citizens. See e.g. papers presented at the Round Table Conference of the International Association of Constitutional Law, Warszawa, October 1985.

⁵See J. Zakrzewska: *Spór o konstytucję* [Dispute around the Constitution], Warszawa 1993, p. 147.

Effective constitutionalization of the legal order is contingent upon the above mentioned main requirement, that is the recognition of the direct validity of constitutional norms, either those explicitly formulated in constitutional provisions or interpreted secondarily by common courts and courts of public law. However, an equally important factor is the social awareness: familiarity with the Constitution as a source of laws, the methods of inferring them and readiness to apply them. It seems that representatives of legal professions, who act as a link between individuals and the public authorities applying law, have particular influence upon the formation of such awareness.

II. The Mechanism of Constitutionalization. How Does the Constitutionalization Operate?

In the Polish context, the meaning of the term "constitutionalization" is not limited to the increasing significance of directly regulative character of constitutional norms, judgments of the Constitutional Tribunal and their influence upon particular branches of law, or to vesting the constitutional judge with the task of resolving conflicts as to competence or even political disputes between authorities.

The source of the above mentioned - by way of example - occurrences is the social phenomenon of increasing prestige of law in general, and of constitutional law in particular. In Poland, the tremendous growth of awareness of the significance of law coincided with the adoption of the new Constitution, which sets the institutional framework for constitutionalization.

A. The fundamental conditions

Polish post-war constitutions did not contain any provisions confirming their character of directly operative legal instruments. Such rule was not introduced even by the constitutional amendment of 1989, which formulated new principles of State organization. Yet in the post-war doctrine of constitutional law in Poland the opinion of the normative character of the Constitution was present: its legal function and the normative character of its provisions were emphasized, and also it was pointed out that it needed to be applied in legal relations between various subjects, including the contacts between public authorities and citizens.⁶ At the same time, certain provisions were regarded as having a limited normative value due to their character, formulation or subject matter.⁷ Also, the normative value of the Constitution was usually understood in a specific way since it was, at the same time, impossible to apply constitutional

⁶ See, for example, S. Rozmaryn: *Konstytucja jako ustawa zasadnicza PRL* [The Constitution as the Fundamental Law of the People's Republic of Poland], Warsaw 1967; J. Trzcíński: *Funkcja prawna konstytucji socjalistycznej* [Legal Function of a Socialist Constitution], Wrocław 1978.

⁷ See, for example, W. Zakrzewski: "Konstytucja państwa a konstytucja społeczeństwa" [The Constitution of the State and the Constitution of the Society], *Państwo i Prawo* 1969, vol. 11; K. Działocha: "Stosowanie Konstytucji PRL" [Application of the Constitution of the Peoples' Republic of Poland], *Acta Universitatis Nicolai Copernici, Prawo XXIV*, 1985, vol. 156.

provisions as a sufficient basis for courts' adjudication (Rozmaryn), or, exceptionally, in the cases of lacunas in laws (Działocha). An extended interpretation of the doctrine of "special scope of legislation" established traditionally, according to which certain matters are reserved for regulation in the form of a statute (which in fact aimed at excluding acts of lower status). Without statutory regulation, the constitutional regulations of such matters would hang in mid-air. Later, in order to negate the normative value of the constitution, it was claimed that such had been the intentions of the creators of the 1952 constitution, who saw it mainly as a political document, confirming the rules of State organization and fulfilling educational and propagandist functions.

The contrary opinion as to the permissibility of applying the constitutional provisions as the basis for courts' adjudication was also expressed, especially in the 1980s. Among other arguments it was stressed that the Constitution is also a statute, in spite of its specific nature.⁸ It was generally approved in the doctrine that courts should apply the Constitution together with the statutes.

In practice, the application of the Constitution in judgments of State organs within the scope of "substantive" constitutional law was different for administrative organs, quasi-judicial organs (e.g. State economic arbitration, petty offences boards) and courts. Administrative organs, being hierarchically and, in fact, politically subordinate, and acting on the basis of specific provisions and directives, did not treat the Constitution as the source of legal norms. The case of quasi-judicial organs was similar, and even though they were not hierarchically subordinate, they were subject to supervision by the central organs of administration. All this favoured atomization of the law. The position of courts was different, as, according to the 1952 Constitution, they were independent and subject only to statutes, and due to specific organizational and procedural principles had more possibility of utilizing constitutional provisions. However, until 1980, when the Chief Administrative Court was established, they had not used this possibility too often, since the whole sphere of administrative substantive law, closely connected with the constitution, was beyond their competence.

In the precedential judgment of 13 November 1954, the Supreme Court showed great reserve as to the courts' possibility of applying the constitution. Similarly, the resolution of the Civil Chamber of the Supreme Court of 12 February 1955 stated that the Constitution did not lend itself to direct application. For long years, the opinion of the Supreme Court influenced the practice of common courts in a decisive way. However, there appeared the practice of coexistence of the Constitution and the statutes, and also the practice of making references to the Constitution while substantiating court rulings. Constitutional provisions served then as an additional "ornament", a political and ideological argument.

After the fall of communism, and especially after the introduction into the Constitution of a capacious formula of the "democratic state of law", courts have made fre-

⁸ See, for example, J. Trzcíński, op. cit.; P. Sarnecki: "Stosowanie konstytucji PRL w orzecznictwie Naczelnego Sądu Administracyjnego" [Application of the Constitution in Judgments of the Chief Administrative Court], *Studia Prawnicze* 1988, vol. 3.

quent use of the Constitution as a guideline while establishing the interpretation the applied law. The Supreme Court formulated a principle of interpreting law in such a way that the interpretation applied should not be contrary to constitutional principles (III AZP 14/92). Constitutional norms are applied subsidiarily and not independently. Both the Supreme Court and the Chief Administrative Court make references to the constitutional norms in this manner. Occasionally, those instances use constitutional norms as the basis for resolving concrete disputes (examples from the Supreme Court judgments: freedom of association belongs to fundamental human rights and to the foundations of democracy and as such cannot be limited at the discretion of the administration; international law shall be directly applied to internal relations (I ARN 45/93); administration guided by commercialism and fiscalism must not violate fundamental human rights (I ARN 45/93); the right of ownership belongs to fundamental human rights (III ARN 49/93)).⁹

The new Polish Constitution of 2nd April 1997 recognizes explicitly and unambiguously the normative character of the fundamental law. In the first chapter entitled "The Republic of Poland" (Rzeczpospolita) and containing the principles of State organization, Article 8 states that "1. The Constitution shall be the supreme law of the Republic of Poland. 2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise." Consequently, in the chapter devoted to the sources of law, Article 87, paragraph 1 refers to the Constitution in the first place in the catalogue of sources of universally binding law of the Republic of Poland.

Contrary to the hitherto operative constitutional provisions, the new Constitution states that "judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes" (Article 178, paragraph 1) - previously only the statutes were invoked in this context. This means an explicit indication of the Constitution as the basis for quotidian adjudicative activity, being at the same time the limit of a judge's subordination. It seems that what the creators of the Constitution had in mind was not the problem of direct application of the Constitution as the basis for judgment in a concrete dispute, as the factual circumstances of a dispute hardly ever permit or require doing so. What they had in mind was rather persuading courts to seek in the Constitution - the structural and axiological keystone of the legal system - some interpretative inspiration, a "code" for reading ordinary legislation. According to Ewa Łętowska and Janusz Łętowski, a change of the constitutional provision on the basis of adjudication entails the necessity of reevaluating of the concept of "statute" in the consciousness of courts: from, as it was seen so far, "a concrete basis for decisions, beyond which the power of a judge does not extend and whose legality he does not deal with" to "a non-erroneous component of the legal system, complying with the Constitution and interpreted in compliance with the latter." Since then more creativity has been required on the part of judges while interpreting the law: "the narrow positivist vision

⁹ See K. Działocho, op. cit., p. 85; E. Łętowska, J. Łętowski: *O administrowaniu, państwie prawa i sądach w okresie przekształceń ustrojowych* [On Administration, State of Law and Courts in the Period of Systemic Transformations], Warszawa 1995, p. 228-234.

of searching for the ‘basis’ for decision is over, and the methods of reading the text cannot neglect systemic and axiological matters connected with the constitution.”¹⁰

Under the rule of the new Constitution, however, judges did not acquire any special rights in the event of finding statutes not to be in conformity to the fundamental act - the decision on unconstitutionality of any acts is vested exclusively in the Constitutional Tribunal and remains beyond the scope of competence of the judiciary. In such an event a court should follow the procedure of referring a question of law to the Tribunal (Article 193 of the Constitution) and the latter shall resolve the question within its competence.¹¹

B. The Emergence of “Constitutional Justice”

The Constitutional Tribunal was introduced into the Constitution in 1982 and commenced its adjudicative activity early in 1986. It is an organ of constitutional justice of the continental European type, where the basic assumption is the control of constitutionality of law exercised through special proceedings by a separate constitutional court (concentrated control). This control is abstract - it is exercised without making reference to individual cases of application of law, on the basis of a general conviction of unconstitutionality. If a norm is declared to be unconstitutional, it is eliminated from the legal system.¹²

The control of constitutionality exercised by the Constitutional Tribunal finds its doctrinal justification in the supreme position of the constitution in the system of sources of law, and its judicial justification in the constitutional obligation of conformity of law to the constitution. According to the new Constitution, the Constitutional Tribunal shall adjudicate regarding the conformity of statutes and international agreements to the Constitution, the conformity of statutes to ratified agreements which ratification required prior consent granted by statutory law, the conformity of legal provisions issued by central State organs with the Constitution, ratified international agreements and statutes, the conformity to the Constitution of the purposes or activities of political parties, as well as regarding complaints concerning constitutional infringements (Article 188). The Constitutional Tribunal also resolves disputes as to competence between central constitutional State organs, upon a motion of the President of the Republic, the Marshals of both Chambers, the Chairman of the Council of Ministers, the First President of the Supreme Court, the President of the Chief Administrative Court (Article 189).

¹⁰ E. Łętowska, J. Łętowski: “Co wynika dla sądów z konstytucyjnej zasady podziału władz” [What Results from the Constitutional Principle of Separation of Powers for Courts], [in:] *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej* [Constitution and Guarantees of the Observance Thereof. In honour of Prof. Janina Zakrzewska], Warszawa 1996, p. 391-393.

¹¹ See A. Zoll: “Związanie sędziego ustawą” [Binding the Judge with the Statute], [in:] *Konstytucja i gwarancje jej przestrzegania* [Constitution and Guarantees of the Observance Thereof], op. cit., p. 241-251; L. Garlicki: “Konstytucja a ustawy przedkonstytucyjne” [The Constitution and the Acts Preceding the Constitution], [in:] Z. Witkowski (ed.), *Wejście w życie nowej Konstytucji RP* [Entry into Force of the New Constitution of the Republic of Poland], Toruń 1998, p. 42-66.

¹² See W. Skrzydło (ed.): *Polskie prawo konstytucyjne* [Polish Constitutional Law], Lublin 1997, p. 28-29.

Many of the above mentioned competence of the Constitutional Tribunal was only introduced in the constitution which came into force as of 17th October 1997 and developed in the new act on the Constitutional Tribunal of 1st August 1997. Among the new institutions which may influence the constitutionalization of the legal order in Poland we can mention adding international agreements to the controlling competence of the Constitutional Tribunal, and also the institution of constitutional charge and the competence of the Constitutional Tribunal to resolve competence disputes. The position of the Constitutional Tribunal in the State organization will be basically changed by the recognition of its judgments on unconstitutionality of statutes with the Constitution as final reference, since at present these judgments are subject to revision by the Sejm (this principle will become operative after two years from the Constitution coming into force).

The practice of the new solutions is only emerging, which does not allow the evaluation of its effectiveness. We may limit ourselves here to the information on the legal conditions of submitting a complaint concerning a constitutional infringement to the Constitutional Tribunal. In the systemic organization of the Constitution it is placed in the chapter "Means for the defence of freedoms and rights". In accordance with principles specified by the statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to apply to the Constitutional Tribunal for its judgments on the conformity of a statute or another normative act upon which basis a court or an organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution (except for the right of asylum and granting the status of a refugee - Article 79 in connection with Article 56). Also here, like in other cases, a judgment on unconstitutionality of a hitherto operative norm results in its abolition; it has a constitutive character and causes effects *ex nunc*. The abolition takes effect by being made public in an official organ. The complaint concerning a constitutional infringement is treated as subsidiary means of protection of the rights guaranteed by the Constitution since the subject, whose basic rights have been infringed by the application of a legal instrument incompatible with the Constitution as the legal basis for the judgment, may only submit the complaint after having used other methods of appeal and means of protection of his/her rights (completion of the instance procedure). A complaint concerning a constitutional infringement may only be submitted if the court's judgment, decision or another administrative adjudication infringes a constitutional right of the appellor, but only if the applied legal provision is contrary to the constitution. Therefore, this institution is also subsidiary in relation to other procedures of enforcing cohesion and compliance with the Constitution of the whole legal system: it increases the number of instruments found to be contrary to the constitution. It may be feared, however, that its scope will prove to be disproportionately narrow as compared with the social expectations which arose, chiefly, due to unfamiliarity with law. *Ignorantia iuris nocet*, but a large number of unsatisfied citizens who have resorted to the complaint concerning a constitutional infringement is likely to decrease the Tribunal's popularity in the society.

In order to realize the two important factors of "constitutionalization" of the legal order in Poland, it is helpful to go back to the period before the new Constitution was

adopted. The Constitutional Tribunal played a crucial role in creative interpretation of the principle of a “democratic state of law”, introduced as a feature of the Republic of Poland by the December 1989 amendment to the Constitution of 1952. “Democratic state of law” is a general clause and has frequently served the Tribunal in issuing judgments on the conformity or unconformity to the Constitution where the text of the fundamental law, the majority of which came from the previous epoch, provided no independent bases for issuing judgments. This concerned especially the principles of shaping the relations between citizens and public authorities, such as principle of proportionality, principle of retroaction of law, or protection of rights of acquisition. The messages interpreted by the Tribunal from the principle of a democratic state of law began to exist independently and became elements of the legal system; for example they were referred to in judgments of the administrative court. Despite the usefulness of the work done by the Tribunal, from the point of view of the need of an axiological rebuilding of the legal order in Poland, one may have doubts as to the limits of its freedom of interpretation. Even in the judgments it has frequently admitted that the principles drawn from the principle of a democratic state of law were not found expressly formulated in the Constitution (see e.g. K 3/88, K 5/90, K 7/89, K 15/91), admitting consequently to arbitrariness, which seems to be in conflict with the explicit, this time, constitutional principle that the State organs shall act within and pursuant to the law.¹³

When writing about the factors of constitutionalization, one must stress the role which the Commissioner for Citizens’ Rights (the National Ombudsman) has played in this issue, and especially the role of the first Commissioner, Prof. Ewa Łętowska. It was in fact the Commissioner that acted as the moving force of many Tribunal’s actions in the field of control of the constitutionality of law and establishing the commonly binding interpretation of statutes (the Tribunal has already lost this competence), by which the principle of a democratic state of law and international standards of human rights were promoted. It is also impossible to overestimate the Commissioner’s education work for building the legal awareness of Poles in the field of rights which are granted under the Constitution or international law instruments.

III. Areas or Scope of Constitutionalization

A. *The “Constitutionalization” and “Juridicization” of Political Life*

So far, no cases of abusing constitutional means for political fight have been noticed in Poland. Where the mechanisms of functioning of the central State organs are, in principle, regulated by the Constitution in a way which is, quite naturally, general and, thus, leaves a certain margin of interpretative freedom, the viewpoints of political

¹³ See J. Nowacki: “Klauzula ‘państwo prawne’ a orzecznictwo” TK [The Clause of a ‘Democratic State of Law and Judgments of the Constitutional Tribunal], [in:] E. Zwierchowski: *Prawo i kontrola jego zgodności z konstytucją* [The Law and Control of Its Conformity with the Constitution], Warszawa 1997, p. 163-174.

adversaries will unavoidably differ. Some of such instances are resolved by the Constitutional Tribunal. In the course of establishing the commonly binding interpretation of statutes, the Tribunal expressed its opinion in disputes concerning, among other things, the competence of the President of the Republic of Poland to recall the president of the National Radio and Television Council (W 7/94), the competence of the Sejm regarding the decision of the Constitutional Tribunal declaring a statute unconstitutional, such decision being issued as a result of initial control (W 1/95), the President's competence to dissolve the Parliament if it has not adopted the Budget Act in time (W 2/95). Naturally, these are not the only cases where the initiators of submitting certain actions of their political opponents for the Tribunal's evaluation were not only concerned about the cohesion of law. For example, the famous judgment of 21st November 1994 on the unconstitutionality of the Budget Act with the constitutional principle of separation of powers, due to infringement of the government's competence to decide freely on budgetary spending was issued after an application of the President, who, at this time, remained in the relation of "cohabitation" with political opposition being the parliamentary majority. The system of executive dualism and the procedure for electing the head of State by universal direct suffrage makes such situation likely to repeat. It depends on the main political actors and on how often they will use the Tribunal to achieve temporary goals.

Among the subjects holding the right to submit applications to the Constitutional Tribunal there are groups of at least 50 Deputies or 30 Senators. This enables parliamentary opposition to efficiently control the compliance of the actions of those in power with the Constitution. Practically, the most frequently attacked acts before the Tribunal are those containing ideological connotations (see the question whether it is permissible to oblige emitters of radio and television programmes to respect Christian values or whether a pregnancy may be terminated for social reasons).

The new Constitution clearly foresaw the Tribunal's competence connected with evaluating the observance of the Constitution in the process of application of law: resolving competence disputes. The Tribunal's task is resolving horizontal dispute - those between central constitutional State organs, which simultaneously claimed to be competent to resolve the same matter, or issued an adjudication, or where both such organs claimed to lack competence. An application to the Tribunal should indicate the questioned action or cessation together with the provision of the Constitution, or of statutory law, which has been infringed (Article 53 of the Act on the Constitutional Tribunal). The result of the Tribunal's arbitration is a statement. The practice will show to what extent the institution of involving the constitutional court in resolving disputes, in which frequently political antagonism is implied, will be applied.

B. The Constitutionalization of the System of the Sources of Law

The Constitutional Tribunal has made a great contribution towards the constitutionalization of the sources of law in Poland, even in the period before the principle of a democratic state of law was introduced into the Constitution and the sources of law were clearly specified in the fundamental act.

The object of the Tribunal's control is the activity of the legislative organ, and especially its effect which is a specific legislative instrument. Such instrument should satisfy certain requirements concerning its form and content. Both the quality (content) of such instrument and the manner in which it was adopted by the law-making organ are subject to the Tribunal's evaluation from the point of view of the observance of norms of the Constitution. The latter usually contains only the basic elements of the "organizational status of the state": adopted system of normative instruments, division and scope of legislative competence of individual organs, elements of the procedure for the establishment and promulgation of normative instruments, as well as the scope of their operation. Constitutional norms may also determine the permissible content of legal instruments. The limits of the part of this norm granting legislative competence are formed, on the one hand, by the necessity, resulting from systemic assumptions, of compatibility of all legislative instruments with instruments of a higher status, and especially with the Constitution, and on the other hand by certain evaluative assumptions formulated by the founder of the State organization in the text of the Constitution, and relating to the content of law (formulated as general clauses they offer the possibility of further determination in the course of the Tribunal's adjudicative activity).

The Tribunal formulated, among other things, the following rules of formation of the system of law: exclusiveness of statutory law in regulating the duties and rights of citizens and other subjects of law (U 1/86, U 3/88, Uw 4/88); unlimited objective scope of statutory law (K 3/89); conditions for issuing regulations: of the Council of Ministers, pursuant to a statute, in order to implement a statute (K 1/87); prohibition of sub-delegation not being justified in statutory law and related to the essentials of a statutory instrument (U 3/86).

The binding force of interpretation of the constitutional norms, made in the course of the adjudicative activity of the Constitutional Tribunal derives from the binding force of its judgments. Assuming that, in similar future situations, the Tribunal would take a similar standpoint as to compliance with the Constitution, the central organs of administration - especially in the first period of the Tribunal's activity - practised amending the charged, but not yet resolved, provisions in accordance with the adopted adjudication of the Constitutional Tribunal. As Józef Repel justly observed, "The binding force of the interpretation of the Constitution made by the Constitutional Tribunal with respect to courts and other organs which apply the law is not based on *ratione imperi* but on *imperio rationi*, mainly on the authority of an organ founded especially to adjudicate on the compatibility of legal norms with constitutional ones." In practice, it is the content of the adjudication and force of argumentation that decide upon the recognition of binding force by courts, and in particular by the Chief Administrative Court and the Supreme Court.¹⁴

¹⁴ J. Repel: "Zasady orzecznictwa TK RP i ich znaczenie w procesie stosowania norm konstytucji" [Principles of Adjudication of the Constitutional Tribunal of the Republic of Poland and their Importance for the Process of Application of Constitutional Norms!], [in:] E. Zwierchowski, op. cit., p. 143-162.

The regulation of the question of the sources of law, mentioned earlier, is a new standard in the Polish Constitution. The concept of the sources of law expresses new principles of State organization and a new idea of the State apparatus. Beside a catalogue of sources of the commonly operative law of the Republic of Poland, a special chapter dedicated to this matter regulates: principles of individual types of legal instruments entering into force, principles of operation of international agreements in the legal order of the state, agreements whose ratification requires prior statutory consent, conditions on which the Republic of Poland may delegate the competences of organs of State government to an international organization, conditions for issuing regulations, orders and local provisions. The system of the sources of law is discussed in the Constitution right after the Preamble and chapters devoted to the principles of State organization and citizens' rights and freedoms. This fact proves the great weight attached to it by the creators of the Constitution.

In the new formulation, normative instruments and relations between them do not reflect the positions and relationships between the organs issuing them. A great novelty is the distinction between the sources of commonly operative law and those of an internal character. The Constitution lists only five types of instruments in the first category: Constitution, statute, ratified international agreement, implementing regulations and regulations of the President having the force of a statute. Implementing regulations are issued by the organs indicated in the Constitution, which means exclusion of those central organs of administration which are not mentioned in the Constitution as authorized. On the one hand, this solution is justified by the concern with an appropriate legislative level of such instruments, but, at the same time, it forces centralization of the legislative activity of the organs of administration, which seems contrary to the principle of subsidiarity, set forth in the Preamble to the Constitution. Internal provisions are a separate category, and the only types mentioned here are resolutions of the Council of Ministers and regulations of the President of the Council of Ministers and Ministers. It seems likely that this enumeration is not limitative and that internal instruments may continue to be issued at lower levels of the State apparatus. The regulation concerning the category of internal provisions is so brief (issued "pursuant to and within the limits of authorization granted in the Act") that it is imaginable to apply it, without amendments, to various levels of local self-government above the commune level, which are being created now.

Another new solution is taking into account the impact of closer integration with the European Union on the legal system in Poland. As Andrzej Balaban observes, "decisions in this scope [...] result in the necessity of re-valuation of previous opinions based on autonomy of the sources of law within a country." It is symptomatic that the creators of the Constitution assumed that it would meet the conditions of a closed system of the sources of commonly operative law, which had long been postulated in the doctrine. By taking into account unspecified instruments which are directly operative and having force over statutory law, the system acquires an open character.

The same author expresses also the opinion that constitutional regulation of problems of the system of sources of law (beyond Chapter III as well) will require under-

taking immediate legislative work, which could lead to the codification of the principles of law-making, including those formulated in the judgments of the Constitutional Tribunal.¹⁵

C. The Constitutionalization of Fundamental Rights and Freedoms

Until the new Constitution came into force, the operative regulation of the problem of protection of citizens' rights and liberties was that of 1952 with numerous amendments. Simplifying slightly, we can say that until 1989 those amendments were concerned with verbal widening of the scope of citizens' rights, particularly within the scope of social rights. The stylistics of the chapter of the Constitution devoted to those matters corresponded to the Constitution's function of political propaganda. The judicial implementation of constitutional rights was not practised for the reasons quoted above. It was the first Commissioner for Citizens' Rights that first departed from the old perception of the binding the State character of constitutional norms (and also its international commitments in this matter) and referred to them in applications to the Constitutional Tribunal or speeches before the Supreme Court (for example, prohibition against discrimination on grounds of sex, political membership, confessed beliefs and the right to marry).

The amendments made to the constitutional regulation of rights and freedoms at the time of State systemic transformation were paradoxically small and consisted mainly in "clearing" the relevant chapter of the Constitution of 1952 of any ideological and completely outdated formulas (such as citizens' duty to observe socialist work discipline). The main novelty was the introduction of the formula of a "democratic state of law, implementing the principles of social justice", which became the main point of reference, particularly for the Constitutional Tribunal and the Commissioner for Citizens' Rights, in interpreting provisions of law (as we have already mentioned, often widening them "creatively").

The new Constitution normalizes citizens' rights and freedoms in such a way as to ensure their being real: it provides for a number of institutions which individuals may use for effective defence, like the above mentioned complaints concerning constitutional infringements. Besides, everyone has the right to compensation for any harm done to him by any action of an organ of public authority contrary to the law and the right to recourse to the courts of in pursuit of claims alleging infringement of freedoms or rights (under Article 77, paragraph 2, the statute cannot bar recourse to courts). The last item in the catalogue of means for the defence of freedoms and rights is the right to appeal against judgments and decisions made at first stage (exceptions to this principle and the procedure for such appeals are specified by statutes). The Constitution differentiates between rights in this respect: certain rights can be asserted subject to limitations specified by statute. These rights are: the right to ownership, other property rights; the right of succession, the freedom to choose and pursue one's occupation and to

¹⁵ See A. B a ł a b a n: "Źródła prawa w polskiej konstytucji z 2 kwietnia 1997 r." [Sources of Law in the Polish Constitution of 2 April 1997], *Przegląd Sejmowy* 1997, vol. 5, p. 39-62.

choose one's place of work; the right to safe and hygienic conditions of work, to statutorily specified days free of work, annual paid holidays and to maximum permissible hours of work, the right of disabled persons to aid ensuring their subsistence, adaptation to work and social communication, the right of families in difficult material circumstances, families with many children or single parents, as well as of mothers, before and after birth, to special assistance from public authorities; the right to ecological security and to information of the quality of environment, the right of tenants to protection; the right of consumers to protection by public authorities against activities threatening their health, privacy and safety, as well as against dishonest market practices. The majority of rights listed above have the character of a commitment of the State to undertake special social and organizational actions in order to satisfy specified needs of certain categories of individuals, which entails a considerable financial burden. The limitation of possibility to assert such rights demonstrates the realistic attitude of the creators of the Constitution, however, their long catalogue is a departure from the established rule, giving way to the constitutionalization of the protection of rights and freedoms in Poland.

In spite of the fact that formulating the constitutional catalogue of rights and freedoms reveals strong inspiration derived from instruments of international law in this field (particularly as to individual and political freedoms and rights - from the European Convention and the International Covenant on Civil and Political Rights), it is often more elaborate and casuistic. This solution was affected by earlier judgments of the Constitutional Tribunal, where the content of fundamental rights had been expanded, for example the ones derived from the definition of a democratic state of law. The principle of equality, beside the general formula ("All persons shall be equal before the law." - Article 32, paragraph 1, sentence 1), is expanded in many aspects, like the right to equal treatment by public authorities (Article 32, paragraph 1, sentence 2); the prohibition of discrimination in political, social or economic life (Article 32, paragraph 2); equal rights of women "in family, political, social and economic life", women's "equal rights regarding education, employment and promotion; the right to equal compensation for work of similar value, to social security, to hold offices and to receive public honours and decorations" (Article 33); citizens' right of "access to the public service based on the principle of equality" (Article 60); equal rights of churches and other religious organizations (Article 25) - all these "concretizations" have had their antecedents in judgments of the Constitutional Tribunal.¹⁶

Many of the newly introduced in rights and other regulations, indirectly influencing a citizen's position in relation to public authorities, previously had been formulated in the judgments of the Constitutional Tribunal. Among them are, for instance, the right to trial and the principle of publication of legal instruments, which is a necessary condition for the principle of citizens' trust to the State. It is difficult to establish whether the inspiration for including them in the Constitution came from the judg-

¹⁶ See more in B. Banaś: "Prawa człowieka i obywatela w nowej Konstytucji RP" [Human and Citizens' Rights in the New Constitution of the Republic of Poland], *Przegląd Sejmowy* 1997, vol. 5, p. 56-57.

merits of the Constitutional Tribunal, instruments of international law or from the concern for “internal morality of the law”.¹⁷

One may attempt a theory that a certain overload of content and excessive casuistry of the Constitution are logical consequences of the shortcomings of the limited normative material, which remained from the previous epoch, and also the lengthy period of preparation of the Constitution and, by the fact that before it was adopted (which was problematic because of unstable support of individual political groups), several motions of deputies representing particular interests were adopted. One cannot exclude the influence of “constitutional fetishism” either. The casuistry of the chapter on rights and freedoms may be seen as a vote of no confidence for judges, who are responsible for the practical defence thereof. As this mission of the judiciary became real such a short time ago, we can accept such pedagogical function of the Constitution for a certain period, yet in the long run it would not be necessary.

As we have already mentioned, the contents of rights and freedoms guaranteed in the Polish Constitution correspond, to a large extent, to international standards (one of the few exceptions is treating the institutionalized ethnic minorities as Polish citizens and not, as in the document of the Human Rights Committee, all persons remaining in the territory of Poland). The relationship between domestic and international mechanisms of protection of rights remains an open question. In particular, we do not know what will be the interpretation of the requirement of completing domestic procedure of appeal when submitting a complaint to the control institutions of the European Convention, and especially whether the complaint concerning constitutional infringements will be required (in certain cases of complaint to Strasbourg. We can find here some similarity to the Spanish institution of *amparo*.).

IV. The Results and Effects of the Constitutionalization

The adoption of the new Constitution puts Poland in a special situation, where the first manifestation of constitutionalization is amending the whole legislation in conformity to its content. Not excluding, and rather expecting - in the light of the new constitutional provisions - the application of the provisions of the fundamental law by courts and the formation of the adjudicative practice of the Tribunal on the new basis, we now can observe activities of the authorities aimed mainly at amending legislation and bringing its content in conformity to the content of the new fundamental law as fast as possible. The new Constitution does not present any opinion on the hitherto existing legal order. In cases where the Constitution regulates differently matters previously regulated by statutory law (it is of course one of the hypotheses), such Acts are deemed unconstitutional. The Constitution sets forth, in the transitional and final provisions, a special obligation of the Council of Ministers: to present to the Sejm, within two years of the coming into force of the fundamental act, draft legislation which is necessary in order to apply the Constitution

¹⁷ See W. G r o m s k i: "Autonomia prawa wobec polityki i jej konstytucyjne uwarunkowania" [Law's Autonomy from Politics and its Constitutional Conditions], [in:] E. Z w i e r z c h o w s k i, op. cit., p. 49-62.

(Article 241, paragraph 6). It can easily be noticed that this provision does not contain a norm maintaining in force those provisions which are contrary to the Constitution, that is classic collision rules are applied. The situation, however, varies significantly, according to how detailed the old and new provisions are and to their character (e.g. that of constitutional norms). Referring to judgments of the Constitutional Tribunal of 1924, Leszek Garlicki distinguishes between two situations: the principle *lex posterior derogat priori* would apply in the event of a hitherto existing statute being contrary to the new Constitution, which might occur in the situation of formal sameness or closeness of norms. Whereas incompatibility of an earlier statute with the new Constitution would occur in the case of lack of symmetry between them, and, especially if new constitutional principles came into play, the principle *lex posterior derogat priori* would not apply, and the matter should be solved by the Constitutional Tribunal.¹⁸

The question appears who should decide whether a given situation is a case of contrariness or incompatibility of the former statute with the new Constitution. Only in a limited scope is this question answered by Article 241, paragraph 6 of the Constitution, quoted above, imposing on the Council of Ministers the obligation to be actively involved in the process of bringing legislation in accordance with the new Constitution by initiating appropriate legislative activity. Undertaking legislative initiative by the government and both chambers of the parliament is connected with their political views and expresses a certain legislative policy.

The judiciary plays a very special role in making this distinction, and this concerns common and administrative courts and also the Constitutional Tribunal, which follows from the principle of completeness of judicial proceedings in all cases and disputes concerning the citizen and similar subjects, and also, among others, from the principle of judicial protection of independence of local self-government. The role of courts will be important in the cases where the entry into force of the Constitution will be directly linked with the derogative effect ("contrariness" according to the above presented distinction) and especially in such cases as will concern the legal situation of citizens. This results from the full competence of courts to protect the rights and freedoms of an individual (Article 77 of the Constitution: "1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.") It will depend on the courts whether to recognize the derogation which occurred or to submit a question of law to the Constitutional Tribunal for an evaluation of conformity to the Constitution of the questioned Act. It seems that it may be said that the necessary participation of the judiciary in the process of bringing the previous legislation in conformity to the new Constitution, which is possible thanks to the creators of the fundamental act having adopted a certain vision of the function of the Constitution and of courts in a democratic state of law, is a particularly important manifestation of the phenomenon of constitutionalization of the legal order in Poland.

See L. G a r l i c k i: "Konstytucja a ustawy przedkonstytucyjne", op. cit., p. 39-62.

A. The Direct Effects: The Constitutionalization of the Various Branches of the Law

It is too early to State how big the share of norms of the new Constitution will be in the adjudication of courts in cases belonging to various branches of law, though, undoubtedly, favourable legal conditions have been established. Now, one of noticeable effects of the new constitutional regulations, and especially including in the fundamental act provisions relating to many fields of human activity, legally regulated, is the fact that public authorities have undertaken the task of bringing former legislation in conformity to them. By way of example, we will mention selected proposals of amendments to statutory law, put forward during a session, entirely devoted to this matter, of the Legislative Council of the Chairman of the Council of Ministers - a consultative body composed of distinguished representatives of legal sciences.

In the field of constitutional law, the new Constitution introduced numerous institutions regulated differently than previously or completely new institutions, which were not known in the previous Constitution. The need to make amendments to legislation is also a result of indirect influence exercised on the law of State organization by new elements in the character of the state, new principles and standards of democracy. New criteria of self-government and of territorial division of the country, as well as the principle of subsidiarity formulated in the Preamble, demand that, for example, the structure and competence of local authorities be in compliance with them, however, the Constitution formulates this matters flexibly enough to leave legislators a large margin of freedom. Yet, there are matters which are unequivocally decided upon in the Constitution and they must be taken into account in the future legislation. The principles of relations between the State and churches are determined in a different way than up to now, which entails the necessity of making amendments to respective Acts. Amendments must also be made to the Act on Polish Citizenship of 1962, representing a completely outdated view of this issue: the amendment must follow the constitutional norms which foresee that one cannot lose Polish citizenship otherwise than by renunciation thereof.

The new right to information and right to silence require the introduction of a separate statutory regulation, since the hitherto existing regulations in various Acts are incomplete and chaotic.

The new Constitution demands that legislative provisions in the field of criminal law, economic law, financial law, civil and family law, administrative law, organization of the judicature, labour and social insurance law, and other, be brought in conformity to its provisions. The scope and detailed character of the necessary amendments do not allow an exhaustive discussion here.

B. The Indirect Effects

It is difficult to predict what shape the constitutionalization of the legal order will take under the rule of the new Constitution, although the latter creates favourable conditions for it by vesting the courts with an important and, at the same time, independent role in the application of constitutional norms. It is beyond a shadow of a doubt that before the entry into force of the new fundamental act, the Constitutional

Tribunal played a particularly positive role in such interpretation of constitutional provisions as to draw from them messages corresponding to contemporary standards of State organization. As we have already mentioned, on the basis of the clause of a democratic state of law and regulations originating from the previous epoch, like the principle of equality, the Tribunal interpreted the principle of proportionality, the principle of prohibition of retroaction of law, the principle of validity of international law which binds Poland in the internal legal order, the principle of the citizen's trust in the state, the principle of positive discrimination, the principle of protection of rights of acquisition, the right to information and a number of rules concerning the legal order. Similar trends appeared also in judgments of the Supreme Court and the Chief Administrative Court, but whereas the judgments of the Tribunal were of greater importance for shaping wide social awareness of the binding character of these principles (judgments were publicized in the media), the judgments of the remaining two judicial instances contributed greatly to educating judicial staff. The principles of a modern and citizen-friendly state, mentioned here just as examples, have thereby been considered permanent elements of the order of State organization, and some of them were concretized and petrified in the new Constitution. Thus we can refer to a specific Polish course of constitutionalization - from creative judicial interpretation of anachronistic and limited in content constitutional provisions to a more complete and exhaustive formulation of modern principles of State organization in the new Constitution, as a written law, while the role of courts in the application of constitutional law is also granted in this Constitution.

V. The Limits and Obstacles of Constitutionalization

A. Technical Limits

The conditions and limits of effective constitutionalization are, to a large extent, determined by the competence of the Constitutional Tribunal.

In the present legal status, competence of the Constitutional Tribunal comprises adjudicating: on the conformity of statutes and international agreements to the Constitution, on the conformity of statutes to ratified international agreements, if such ratification required prior consent expressed in statutory law, and on the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutory law. Such forms of control have the character of consequent control, which is one of the principles of activity of the Polish Constitutional Tribunal. It should be distinguished from the Tribunal's competence to determine, upon the President's application, whether an Act before signing or an international agreement before ratification are in conformity to the Constitution, which has the character of initial control. The Tribunal has expressed several times its opinion on the special rules connected with its exercise of initial control: due to the fact that it is unable to evaluate the functioning of an instrument submitted for such control, the assumption of constitutionality of such instrument is reinforced (K 32/95). If an instrument is declared consti-

tutional in the course of initial control, it can still be subject to the procedure of consequent control (K 12/95, K 23/95). Also, the formal effects of declaring unconstitutionality in the course of initial control and in the course of consequent control are different (W 1/950).

In some cases the control of constitutionality of law by the Tribunal has an abstract character: if the subjects specified in the Constitution submit an application for declaring incompatibility of legal instruments with the Constitution. In other cases they have a concrete character: when the Tribunal answers questions of law and inquiries in the form of complaints concerning a constitutional infringement.

The fundamental limitation of the Tribunal's competence, until the Constitution of 2nd April 1997 was adopted, had been the fact that its judgments on incompatibility of statutes with the Constitution were not considered final and they could be rejected by the Sejm. The new Constitution preserves this legal status for the period of another two years from its coming into force (Article 239, paragraph 1), which seems a highly controversial solution.

Another significant limitation was excluding of instruments of international law from its cognition, which the Tribunal tried to circumvent slightly by referring to them in reasons for its judgments and for commonly binding interpretations of statutes.

A limitation of the Tribunal's competence was time restrictions on legal instruments submitted for its control. The Act on the Constitutional Tribunal of 1985 stated that its provisions applied to legislative instruments and other normative instruments promulgated, approved or established after its entry into force. As for legislative instruments or other normative instruments issued by the Council of the State, the President, supreme and central organs of State administration before the day of the Act entering into force, proceedings before the Constitutional Tribunal could be initiated if they were promulgated, and decrees - approved, or if they became binding after the day of the entry into force of the Act of 16th March 1982 on Amendments to the Constitution of the Polish People's Republic. Clearly, an important reason for introducing time restrictions was the intention to exclude, from the control of constitutionality the Decree on Martial Law of December 1981. The instruments which were examined according to the procedure of questions of law, were not subject to this restriction. The new Constitution abolished the time restriction established in 1985, which ensures completeness of the cognition of the Constitutional Tribunal in respect of the operative legal system.

A legal instrument, frequently and efficiently used by the Tribunal (often due to the initiative of the Commissioner for Citizens' Rights), was establishing the commonly binding interpretation of statutes (introduced in 1989). This competence was abolished in the new Constitution - to a large extent upon request of common judiciary and the Supreme Court, which gave rise to serious controversy. The Supreme Court, from the moment of granting the Constitutional Tribunal with this function, was of the opinion that the commonly binding interpretation of statutes by the Constitutional Tribunal limited the independence of judges, by subordinating the interpretation made in the course of a trial to the interpretation imposed by the Tribunal. The resistance against

considering the Tribunal's interpretation as binding increased when the "Small Constitution" of 1992 adopted the principle of separation of powers, since in an event of a conflict of both interpretations the Supreme Court would have to accept the interpretation of a provision as provided by the Tribunal. According to the Supreme Court such legal status was contrary to the principles of separation of powers and of a democratic state of law. The Supreme Court submitted this opinion to the Constitutional Commission of the National Assembly, requesting in the resolution of the General Assembly of Judges that the Constitutional Tribunal be deprived of this competence. The Supreme Court assumed a similar standing: it was expressed in the answer to a question of law of one of the voivodship courts in May 1995 where it openly opposed accepting the interpretation of the Constitutional Tribunal, making a diametrically different interpretation which the common court applied in the judgment. Depriving the Tribunal of the competence to make commonly binding interpretations of statutes in the new Constitution is a systemic consequence of adopting the principle of separation of powers, and the independence of courts and judges, who in their adjudicative activity are subordinated to the Constitution and statutory law. The bitterness of some Deputies about the Tribunal having lost this competence is connected with appreciation of the significance of its interpretations for "completing" the former legal order with principles and messages which made it more modern and allowing its application to the new social and economic relations. In the light of the entry into force of a more complete constitutional regulation and the consequent gradual transformation of the legislation in its entirety, the main reason for the Tribunal's competence becomes invalid.

B. "Theoretical" or "Pedagogical" Limits

As we have frequently reminded in this paper, it is only the new Constitution that created really favourable conditions for development of the constitutionalization of the legal order in Poland. It seems that neither the judicial environments, nor the doctrine of individual branches of law, nor any factions of the political environment negate this developmental tendency. A strong and influential environment connected with the Helsinki Foundation of Human Rights, which groups many distinguished representatives of legal science and - formerly oppositionist - protectors of citizens' freedoms, spoke particularly consistently for the appropriate shaping of constitutional provisions. It is a fact that the practical implementation of the constitutionalization of the legal order depends on the way of thinking and viewing the role of the Constitution and courts by practitioners. In the Polish judiciary, there occurred a serious generational change, which followed democratic transformations, and soon a formal examination [lustracja] of judges is due to take place. (It seems that its scope will cover a very small circle of judges who have broken their independence in a particularly drastic manner.) This does not signify, however, that education of judicial, prosecutorial or solicitorial/attorney staff in recent years emphasized the questions of direct operation of the Constitution in the legal order as neither the legal status, nor adjudication favoured doing so. It is probably only now that we can expect the development of the phenomenon of constitu-

tionalization, when the new Constitution has entered into force and the significance and “operativeness” of the fundamental law have been established firmly in social awareness as a result of a wide constitutional debate in the media before the referendum in which the Constitution was accepted. It would, however, be a mistake to overvalue the level of constitutional knowledge in the society (its presence in school programmes is definitely insufficient!), which usually becomes familiar with this knowledge in the case of seeking protection of rights.

VI. Does the Constitutionalization Process Appear Desirable or Necessary?

In Poland the phenomenon of constitutionalization has played a positive role in the process of democratic transformation of the State and law, when the “hunger for judges’ law” resulted from the discrepancy between the new reality of economy and social relationships and old legal regulations. It has not, however, achieved - except in the activity of the Constitutional Tribunal and, to a lesser degree, of the Supreme Court and the Chief Administrative Court - the size which it might have been ascribed and which would seem desirable. After the entry into force of the new Constitution, thanks to new legal instruments and its philosophy as a whole, this tendency seems to have the potential for significant further development. The promotion of awareness of the new possibilities which the Constitution offers will probably play the key role. This phenomenon must be evaluated as positive, since it will probably affect the “discipline” of legislators in observing the principles of State organization and it may reduce opportunism and instrumental treatment of law. It is of special importance in a country where political culture and culture of State organization, even that of the governing elite, is in the making. The possibility of progressing internalization of the principles of State organization by a wider circle of the society would not be insignificant, either. There are chances that together with constitutional education the sense of security in relation to the State apparatus would increase as well, if the arbitrariness of such apparatus had less chance in the case of confrontation with constitutional norms and if there existed appropriate, available procedures of protection of the citizen.

It seems that the boundary to the constitutionalization of the legal order should be the postulate of clarity and sureness of law. The domination of judges’ law (*vide* the USA) may lead to obstacles to the access of citizens, who do not deal with law professionally, to the sources of law, and particularly to judicial interpretations. This would force them to seek the intermediation of professionals - attorneys/solicitors. A complete regulation in the form of written law, in spite of its progressing hermetism has advantage over the above mentioned system from the point of view of the subject seeking legal protection.

THE 1997 REFERENDUM ON THE CONSTITUTION IN POLAND* The Controversies and the Compromise

Stanisław Gebethner**

1. Searching for a Compromise on the Constitution

The changes in constitutional law introduced in the years 1989-1992, which resulted in the adoption of the Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislative and the Executive Institutions, and on Local Government of the Republic of Poland, represented the only compromise based on political consensus which could be achieved at the time. This partial compromise made it difficult to reach a later agreement with regard to the contents of the new constitution.

In addition, the public mandate of successive parliaments to adopt a new constitution was questioned, since, it was argued, those parliaments did not have sufficient legitimacy to act as the Constitutional Assembly. It was asserted that this alleged lack of legitimacy was the result of imperfections in the electoral process and mechanisms.

Thus, the mandate of the parliament elected in 1989 was questioned because of the “contractual” character of the election to the Sejm (the main parliamentary chamber).¹ At the same time, the Senate, elected in a free competitive election, was set against the Sejm. The outcome was a diffusion of efforts which manifested itself in the establishment of a separate constitutional committee by each parliamentary chamber. The results of the work of these two separate constitutional committees show that the area of conflict was becoming larger and that the differences between the two bodies were

* The article is a shortened and updated version of “Referendum konstytucyjne - uwikłania społeczne i prawno-ustrojowe” [Constitutional Referendum - Social and Legal Involvements], in: *Referendum konstytucyjne w Polsce* [Constitutional Referendum in Poland] (M. T. S t a s z e w s k i, ed.), Warszawa 1997
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¹ The parliamentary election of 1989 was conducted on the basis of a contract agreed on at the “round table” (see: S. G e b e t h n e r: *Democratization in Poland, 1988-90. Polish Voices*. Edited by George Sanford, London 1992, St. Martin’s Press, pp. 57-65). According to that contract, in the election to the Sejm 65 per cent of the seats were secured in advance for the then ruling parties PZPR, ZSL, SD, and other groupings. 35 per cent of the seats were reserved for candidates from opposition groupings. The election to the Senate was conducted on principles of free competition. For more details on that parliamentary election system see D. M. O l s o n: “Compartmentalized Competition. The Managed Transitional Election System of Poland”, *Journal of Politics*, 1993, p. 415-441.

becoming more acute; this, in effect, made the possibility of reaching a compromise on the constitution more and more unrealistic.

The mandate of the parliament elected in October of 1991 was questioned due to the extremely low turnout. Only 43% of those entitled to vote participated in this election. That was why president L. Wałęsa proposed that the final decision with respect to the enactment of a new constitution should be left to the voters, who would conclusively accept or reject the text of the basic law in a national referendum.

An additional reason given for the lack of legitimization of the parliament elected in September of 1993 was the fact that, with turnout almost equally low (53%), the 5% threshold left one-third of the voters who participated in the election without representation in the Sejm and, while one political option - the Democratic Left Alliance (SLD) and the Polish Peasant Party (PSL) - achieved a socially unjustified overrepresentation in both chambers of the Parliament.

After the 1993 election, a political campaign aimed at undermining the newly-elected parliament's mandate to prepare and adopt a new constitution began.

The opponents of the political formations which were victorious in 1993 prejudged the contents of the new constitution, especially its axiological component, and rejected any possibility of compromise.² This unwillingness to reach a compromise on the constitution was maintained on their part until the referendum of 1997.

The right-wing opposition functioning outside of parliament treated its defeat in the 1993 election as an episode and was convinced that it would return to the Sejm after the election in 1997. Therefore, opposition groupings outside of parliament strove to delay the adoption of the constitution by the National Assembly elected in 1993, and to present the results of that parliament's work on the constitution in an unfavourable light.

At the same time, deputies of parliamentary opposition, for example the vice-marshal of the Sejm Olga Krzyżanowska, elected from the list of the Democratic Union (later: the Union of Freedom), publicly questioned the mandate of the newly elected parliament to enact a constitution. Whereas, during one of the first sessions of the Constitutional Committee (23 February 1994) the leaders of the Union of Freedom, Tadeusz Mazowiecki and Hanna Suchocka publicly called in question the new parlia-

² Already in October 1993 a commentator for the Catholic daily *Ślowo* wrote: *Adoption of a new constitution by the present Sejm, which is lame since it misses its right leg, would be a misfortune for the State; a misfortune that we would have to live with for many years. A basic law passed now, with the present composition of the Sejm, and even the Senate, would destroy Poland.* At the same time, senator Alicja Grzeškowiak, representing the Centre Alliance, in the same daily (*Ślowo*, October 29 and 31, 1993) declared that: *The Polish parliament, although it was elected democratically, does not reflect the true wishes of the electorate since 35 per cent of the volets have no representation in the Sejm. To the greatest extent, the parliament represents a uniformly leftist political option. Consequently, it is doubtful that the parliament will enact a democratic and lasting constitution.* A similar view was expressed by the Chairman of the Constitutional Committee of the National Assembly in the years 1992-1993, the representative of ZChN, who claimed: *The issue is not that in the new parliament [that is after the 1997 election] new political forces will appear and will change the constitution. It is just that this National Assembly is not able to prepare a constitution which would be good from the axiological, as well as the systemic point of view.* (W. Piotrowski: "Konstytucja jako pomnik" [Constitution as a Monument], *Gazeta Wyborcza*, October 13, 1994).

ment's mandate to adopt a new constitution: *from the moment this Committee began to operate it has been clear that we have to make a distinction between legal legitimization to adopt a constitution, which nobody questions, in any case my club does not question it, and political legitimization.*³ Almost 30 per cent of the society has no representation in this parliament. Since they are not represented in the parliament, it is to be expected that a constitution adopted in an atmosphere of tension and conflict will never be accepted by society, even if we submit it to a referendum and provoke a conflict in the final stages of the process.⁴

At the end of 1996 and the beginning of 1997 the Union of Freedom and its leaders, especially Tadeusz Mazowiecki, changed their position radically on the issue, arguing that even the parliament elected in 1997 would not be able to enact a new, better constitution quickly, if at all. The opposition groupings functioning outside of parliament never changed their minds and strove to prevent the enactment of a new constitution by the National Assembly elected in 1993. Also the PSL seemed to lean in this direction from mid 1996, taking an equivocal stand, to say the least, on the issue of the constitution.

It should also be remembered that the opinions from 1994 which have been quoted above were expressed in a situation when the Marshal of the Sejm Józef Oleksy was searching for a formula enabling him to involve the opposition functioning outside of parliament in the National Assembly's work on the draft of the constitution, and he met with a refusal. Meanwhile, President L. Wałęsa threatened to boycott the work on the constitution.⁵ The Sejm's rejection of L. Wałęsa's proposal to make it possible for 100,000 citizens to submit a draft of the constitution as a popular initiative, but also to establish a rule that the rejection of the constitution in a referendum would automatically mean the dissolution of the parliament and a new election, served as a pretext for these threats on the part of the President of the Republic of Poland.

After the 1993 election the opposition also disregarded Aleksander Kwasniewski's declaration given immediately after he was elected the chairman of the Constitutional Committee stating that: *The experiences of European constitutionalism clearly show that it is precisely through compromise between different social interests and expectations that effective basic laws were constructed in both established, as well as emerging democracies. Therefore, it would be good for us to follow their example and to be able to create a constitution of civic compromise -1 repeat: a constitution of civic compromise.*⁶

³ The Bulletin of the Constitutional Committee of the National Assembly (from now on *The Bulletin of CCNA*), 1994, vol. 5, p. 6, column 2.

⁴ *The Bulletin of CCNA*, 1994, vol. 5, p. 7, columns 1 and 2.

⁵ In a letter addressed to the Marshal of the Sejm, L. Wałęsa claimed that: *Due to the fact that my initiative was rejected already in the first reading, without an in-depth analysis or a serious discussion of its essential points, I have decided to withdraw my representative from the participation in the work of the Constitutional Committee. At the same time, I withdraw my draft of the constitution.* (*The Bulletin of CCNA*, 1994, vol. 5, p. 9, col. 1.)

⁶ *The Bulletin of CCNA*, 1993, vol. 1/2, p. 10, col. 1.

In the eight years efforts to postpone the enactment of the new constitution intensified every time a new parliamentary election drew nearer. That was the case in 1991, when two separate drafts of the constitution were ready, prepared by the Senate and by the Constitutional Committee of the Sejm, but an early parliamentary election was scheduled for the Autumn of that year. With the approach of the parliamentary election in the Autumn of 1997, similar tendencies to delay the adoption of the new constitution by the National Assembly began to emerge also in 1996 when the Constitutional Committee of the National Assembly was nearing the conclusion of its work.

The argument that the constitution should not be enacted by a parliament which is at the end of its term of office and faces a new election, is not unfounded. That is why it was so important that the constitution adopted by the parliament, i.e. by the joint session of both chambers constituting the National Assembly, should be ratified in a national referendum.

It should be pointed out that already in June of 1996, that is, more than one year before the end of the parliament's term of office, the Constitutional Committee of the National Assembly finished work on the first version of the preliminary uniform draft of the new Constitution of the Republic of Poland. In July and August the Committee started to work on the final draft of the text.⁷ It might seem at the time that the work on the constitution was near completion. However, it turned out, as could have been predicted, that the comprehensive text of the new constitution, completed in June of 1996, rested on a weak and brittle consensus.

That apparent consensus on the issue of the constitution was an illusion. Some politicians, however, especially these in the SLD, took it to be real. However, the fact that the Constitutional Committee adopted particular fragments of the constitution, and only by a simple majority, could guarantee only that the Committee reached partial agreements with respect to concrete questions and said nothing about an agreement with respect to the constitution at large.

In September of 1996 the Committee began the next stage of the debate on the final draft of the Constitution.⁸ In fact, it was, in a way, the third reading in the procedure adopted by the Constitutional Committee. Officially, the amendments concerning the final draft of the text were to be the subject of the debate. However, the discussion repeatedly came back to the essential issues stemming from axiological - in particular, ideological - conflicts. Those conflicts could be seen most clearly during the discussion of the preamble of the Constitution - especially, but not only, *the invocatio Dei*. The Episcopate of the Catholic Church also issued a statement on several other matters, for

⁷ The Sitzings of the Drafting Subcommittee of General Issues and Regulations Introducing the Constitution on the 12th to the 14th, 19th to 20th, and 26th to 27th of August 1996. *The Bulletin of CCNA*, 1997: vol. s 37 and 38. See also: P. Winczorek: "Szlifowanie treści przepisów" [Polishing the Content of Regulations], *Rzeczpospolita*, 12 September 1996; M. Zieliński: "Prawo w przyszłej konstytucji" [Law in the Future Constitution], *Rzeczpospolita*, 2 September 1996.

⁸ About the earlier stages of the work on the draft of the new constitution see: K. Działocha: *Towards a New Constitution of the Republic of Poland* oraz R. Chruściak: "The Role of the Constitutional Committee of the National Assembly in Creating the New Constitution of the Republic of Poland", *Polish Contemporary Law* 1996, No. 1-4.

example, on the question of the constitutional protection of the family based on the union between a man and a woman.⁹

The efforts to strengthen the constitutional position of the President of the Republic of Poland as an arbiter and as the organ moderating the activities of the government (responsible before the Sejm) constituted another area of revisions of the basic provisions of the previously accepted draft. The main issue was the réintroduction of the two-thirds majority required to overrule the President's veto of an act adopted by the parliament. The initiative in this case came from a member of parliament who was at the time an under-secretary of state in the Chancellory of the President of the Republic of Poland.¹⁰ In the following debates of the Constitutional Committee and of the National Assembly also the list of matters in which documents issued by the President did not require the countersignature of the Prime Minister was steadily becoming longer.

When this phase in the activities of the Constitutional Committee was nearing completion, in December of 1996, deputies of the Polish Peasant Party (PSL) and the Union of Labour (UP) demanded a revision of the decisions concerning the admissibility of charging fees for education in government institutions of higher education and the preservation of free services in the public health care system. These groupings argued also that the controversial question of the establishment of counties, as the third, intermediate level of the territorial division of the country, should not be decided in the Constitution.¹¹ Marian Krzaklewski, the leader of the Electoral Action Solidarity (AWS), and the bishops of the Catholic Church joined the debate on whether the postulates of the opposition remaining outside of parliament should be recognised in the Constitution. The main issues were: the acknowledgement in the Constitution of the superiority of natural law over the Constitution and over all enacted laws, the attitude towards the past (that is, the Polish People's Republic and the so-called issue of the continuity of the State), the condemnation of totalitarianism, as well as the ban on the operation of fascist and communist parties, and the issue of the so-called tri-partite commission, i.e. a consulting and mediatory body consisting of deputies of labour unions, employers' organisations, and the government. The question of the constitutional protection of human life from the conception to natural death returned as a significant moral issue.

In addition, arguments over the procedure of adopting the Constitution and over the conditions for conducting a referendum returned. These arguments further confirmed the lack of the necessary consensus on the question of the Constitution.

After intense negotiations between SLD, UW, PSL, and UP a compromise was finally reached on the guarantees of social welfare rights (conditions were imposed on

⁹ See: Declaration of the 284th Plenary Conference of the Episcopate of Poland on the Constitution of the Republic of Poland (Rzeszów, September 14th 1996).

¹⁰ See: *The Bulletin of CCNA*, 1997: vol. 40, p. 62, col. 2.

¹¹ Announcing at the beginning of the session of the Constitutional Committee on 10 December 1996 the submission on behalf of PSL and UP of the appropriate amendments to the draft of the Constitution, representative A. Bentkowski emphasised that the proponents of those amendments regard them as *essential and necessary in the draft of the constitution*. At the same time, we state that both factions will stand firmly by these proposals.

the admissibility of charging fees for education in government institutions of higher education, and on the availability of free services in the public health care system), on removing from the Constitution the requirement to create counties, and on the contents of the preamble. SLD also consented to including in the Constitution a ban on parties advocating totalitarian methods, with an explicit condemnation of communism together with fascism and nazism. The draft included a definition of a social market economy based on the dialogue of social partners, which did not, however, mention by name the already existing tri-partite commission.

During this stage of negotiations it was characteristic that the UW deputies were perceived as the advocates of the demands of AWS, which strove to infuse the contents of the new Constitution with national and Catholic values. At the same time, the UP deputies accepted the role of champions of the social welfare demands included in Solidarity's draft of the constitution.¹²

During the negotiations the four main parliamentary groupings, SLD, PSL, UW, and UP, made a number of significant concessions to each other in order to reach a consensus on the constitution. At the same time, they showed great willingness to make concessions towards AWS and to the bishops of the Catholic church.

Eventually, on 16 January 1997 the Constitutional Committee by the required majority of two-thirds of the votes adopted the entire draft of the Constitution and submitted a report, which contained also 46 minority motions. One of them was the whole draft of the Constitution of the Republic of Poland adopted by the Senate on October 22nd 1991. This made it possible for the National Assembly to hold the debate in the second reading. At this point it became clear that four groupings - the Democratic Left Alliance, the Polish Peasant Party, the Union of Freedom, and the Union of Labour - reached an agreement on the Constitution and decided that a national referendum ratifying the Constitution adopted by the National Assembly should take place as early as might be proclaimed. Initially, SLD argued that the referendum on the Constitution should be held in Autumn, together with the parliamentary election. However, the Union of Freedom pushed for holding the referendum at the end of May.

It can be said that a parliamentary coalition regarding the adoption of a new Constitution of the Republic of Poland only was formed as late as in January of 1997. This coalition may be called, following the Italian model of the years 1946-1947, "the constitutional arch".

¹² In reference to that, A. Smolár in his article "Wojna Światów" [War of the Worlds] (*Gazeta Wyborcza*, 30 May 1997) writes, not without reason: *To state things briefly, with the help of Lech Mazewski's handy wording, the constitution was built on a three fold compromise. The first one, was the one between GW and SLD. Its result was a project "for a liberal, civic society". The second compromise pertained to issues of welfare and was /ached due to the pressure from the Guion of Labour and the Polish Peasant Party. Finally, the third one, achieved at the end, was the result of the pressure from the Church and the Right. At that point, there appeared in the Constitution such phrases as "the Polish Nation" — with a political, however, not ethnic, definition of the concept of nation; the importance of the "Christian heritage of the Nation"; "the best traditions of the first, and the second Republic" were included; "the sense of responsibility before God" was appealed to; it was specified that "marriage is a union between a man and a woman"; the responsibility of the State for the family and motherhood was also included. There appeared, therefore, a "clear national-catholic context".*

The full debate in the second reading in the National Assembly took place from 24th to 28th of February 1997. After this debate, during which a number of amendments were proposed, the draft of the Constitution was sent once more to the Constitutional Committee.

For six days the Committee reviewed motions on amendments to the Constitution proposed during the debate in the National Assembly. The intense work in the Committee was partly motivated by their determination to take a position on all of the proposed changes as soon as possible. In this phase of the process, the role of the Committee was limited to formulating recommendations for the National Assembly as to whether a particular amendment should be accepted or rejected. In the end, the fate of every amendment was decided by the National Assembly. For an amendment to be accepted by the National Assembly, it had to pass by the qualified majority of two-thirds of the votes.

The process of considering the amendments proposed during the debate in the National Assembly was characterised by a spirit of compromise dictated by time. With respect to the most divisive issues the Committee strove to formulate the text of the amendments in a way which would take into account all the objections and critical opinions expressed in the parliament and outside of parliament. The goal was to eliminate, as far as possible, the differences between the draft of the Constitution that was under consideration and the Solidarity's draft of constitution. In regard to a number of issues that goal was achieved, although the supporters of Solidarity's draft of the constitution did not acknowledge the fact.

It also appeared that during this phase of work on the constitution, the arguments over the relative positions of natural law and enacted laws subsided. The deputies of the Episcopate declared even that they did not require that the Constitution should proclaim *expressis verbis* the absolute superiority of natural law over the Constitution; nor did they postulate a religious State. They signalled that it was sufficient for them that the universal principles of natural law be reaffirmed in the draft of the Constitution. This was to be further confirmed by an additional article in the Constitution stating that "The rights and liberties included in the Constitution cannot be interpreted in a way that would limit the human rights guaranteed in the Universal Declaration of Human Rights." The declaration referred to in the article is the 1948 UN Universal Declaration. This article was basically unnecessary, and in the end it was rejected by the National Assembly. In fact, all of the human rights proclaimed in the Universal Declaration, as the minimum of codified principles of natural law universally recognised by the international community, were guaranteed in the draft of the new Polish Constitution. What is more, since 1948 half a century had passed and international treaties, especially the 1966 international pacts on human rights and liberties, have since raised standards of respect for basic human rights. These new standards have been confirmed, by Poland among others, in ratified agreements and the Constitution clearly stipulates in article 9 that "The Republic of Poland shall respect the international law binding upon it."

The deciding factor in the adoption of the Constitution by the National Assembly was the change in the position of the Union of Freedom (UW). The leader of the Union, L. Balcerowicz, confirmed that the draft constructed by the Constitutional Com-

mittee secured a balance between social welfare rights and the opportunities for economic development. He argued that the Constitution should create the legal basis for the economy and for the stability of the Polish zloty, and it should also protect people from populism in economic policy: excessive national debt, passing budgetary expenses without having the necessary funds, political and bureaucratic interference in the activities of enterprises, manipulation of taxes for short-term political gain, undermining private ownership.¹³

After the vote on the 362 amendments to the Constitution proposed in the second reading and on the 46 minority motions, on 22nd March 1997 the National Assembly adopted the entire text of the Constitution. 497 deputies and senators out of a possible 560 participated in the vote. 461 members of the National Assembly voted for the adoption of the Constitution, 31 were against, with 5 abstaining. The adopted Constitution was on the same day submitted to the President of the Republic.

The President of the Republic exercised his rights and proposed his own amendments to the Constitution adopted by the National Assembly during the second reading. These amendments were examined in the third reading by the National Assembly and, with a few exceptions, accepted by the required majority. The final text of the Constitution was adopted during third reading on 2 April 1997.

Just as in the second reading, 497 deputies and senators participated in the vote and 451 of them were for the adoption of the Constitution in the third reading, 40 were against, with 6 abstaining. The distribution of votes was similar to the one in the second reading, although it is significant that this time among the PSL 6 members were against and 5 abstained (while 22 PSL members did not participate in the vote). This behaviour on the part of some of the deputies and senators from PSL, as well as the fact that during the vote in the Constitutional Committee on the final compromise concerning the text of the proposed preamble the leader of PSL abstained, foreshadowed the equivocal attitude towards the Constitution enacted by the National Assembly which the party was to assume during the campaign before the referendum.

The results of the vote, in the second as well as in the third reading, testify to the existence of a parliamentary compromise on the Constitution based on the agreement between four groupings: SLD, PSL, UW, and UP. The Constitution was also supported by the parliamentary groupings of PPS, New Democracy, German Minority, and the Faction of Independent Senators.

The senators representing NSZZ "Solidarność", deputies of the Parliamentary Faction of the Right, and the deputies of the Conservative People's Faction voted consist-

¹³ See *Gazeta Wyborcza*, 24 February 1997 in a report from the visit of the UW Chairman to Gdańsk. L. Balcerowicz emphasised then that the deputies of UW in the Constitutional Committee insisted on introducing into the draft of the Constitution regulations concerning: raising of the importance of property rights and of the right to inherit it, a ban on incurring or giving safeguards as a result of which the public/national debt would exceed three-fifths of the brutto annual national product, limitations on the increase in budget spending and budget deficit, and a guarantee of the independence of the central bank. He stated also that: *UW will defend these regulations. In the draft proposed by ROP and Solidarity there is no balance between welfare rights and the opportunities for the development of the economy. There are welfare rights elaborated there but no protection for the economy.*

ently against the Constitution. The behaviour of the members of the confederal faction of BBWR and KPN was less consistent.

The next day after the adoption of the Constitution by the National Assembly in the third reading the President ordered a referendum, which was to take place on 25th May 1997.

2. Formation of “Constitutional Arch”

The SLD-PSL coalition which governed in Poland in the years 1993-1997 lacked the required two-thirds majority in the National Assembly almost from the very beginning. It did not have this majority in the Constitutional Committee, either; and here a qualified majority was also required. Moreover, the SLD-PSL coalition was only a governmental coalition, not a coalition for the enactment of the constitution. Therefore, there were no reasons to fear that SLD would be able to impose its own vision of the constitution. From the beginning of the work on the constitution in 1994, there was no real threat that the constitution finally submitted to the referendum would be radically leftist and axiologically secular.

Contrary to the claims voiced in the aggressive propaganda campaign of the opposition, both parliamentary as well as the one functioning outside of parliament, supported also by the majority of the media, from the very beginning of that phase of work on the draft of the constitution (i.e. since Autumn of 1993) there were no attempts on the part of the ruling majority to impose a draft reflecting one political option.¹⁴

During the debate in the second reading in the National Assembly, it was argued by the opposition that this was a constitution of only four political parties, which came to a hasty agreement at the very last moment, or that it was simply the constitution of SLD and PSL. A polemic with these arguments developed since, in fact, the Constitution was based to a larger extent on the proposals of drafts submitted by (or rather, on of) L. Wałęsa, the Union of Freedom, or included in the so-called Senate’s draft of constitution.¹⁵ The problem is, that this unquestionable fact is known only to specialists and to

¹⁴ Aleksander Kwaśniewski, the leader of SLD assuming the position of the chairman of the Constitutional Committee stated that at the moment that he was elected the chairman of the Committee: *the draft which I signed - the draft proposed by the Democratic Left Alliance - from that moment has become [to him] one of the drafts, one of many drafts, that have been submitted. Therefore, it will be treated in the same way as the Senate draft, which senator A. Grześkowiak was talking about, in the same way as the other projects which were submitted by parliamentary groupings during the previous term. (The Bulletin o/CCNA, 1993, vol. I/II, p. 9, col. 2).*

¹⁵ Chairman of the SLD Club, J. Szmajdziński, pointed to that in his speech in the National Assembly: *The accusation of lack of legitimisation, or lack of full legitimisation, on the part of this parliament, to enact a constitution is based also on the fact that as a result of the existence of electoral thresholds, part of the electorate are deprived of their own representation in the parliament. That is true, but this is a double-edged sword. The awareness of that shortcoming was the stimulus for introducing in 1994 the citizens’ initiative on the constitution, which extended, but did not replace, the mechanism of representative democracy. This awareness was also a premise for the creation of such a wide constitutional field and for the gathering of opinions and propositions for the draft of the constitution. That failure, he wrote, was made up for. The citizens’ constitutional initiative was enabled, thus creating an additional chance for parties not*

those involved directly in the writing of the new Constitution of the Republic of Poland. It is not known to the average citizen. Moreover, it is not acknowledged by the opponents of the political camp which constituted the majority in the parliament elected in 1993.

It has also been pointed out, correctly, that during the campaign before the referendum on the Constitution, the concessions made by SLD were the least topic discussed. For the deputies of this grouping: *it is a painful subject, because some of the concessions undermine their historic legitimization and a large part of their ideological heritage. The Right and the militant faction in the Church are not interested in discussing the concessions of "the communists" either. This is because, if the true extent of the compromise on the part of the Left were revealed, it would be difficult to claim that this is a 'communist', 'pink', 'round-table' constitution, 'reaffirming the political order of 1944'. Besides, it would have to be acknowledged that the Right played an important role in achieving these concessions.*¹⁶

Adversaries of the ruling coalition of the years 1993-1997 - hostile especially towards SLD - after the electoral defeat, made the issue of the constitution a battle ground on which they were hoping to regain their lost positions. One of the leaders of a party which suffered a defeat in the 1993 parliamentary election openly admits to that hypocritical game aimed at short-term political goals.¹⁷

Although, in public, the opposition consistently advocated a policy of intransigence in regard to the contents of the future basic law, the Constitutional Committee's work on the draft of the constitution was conducted in the spirit of a search for a compromise. This does not mean, however, that the compromise was achieved.

In 1994 the post-Solidarity political groupings were arguing among themselves and differed significantly in their conceptions of the new constitution. Nevertheless, in June 1996, before the entire preliminary consolidated draft of the constitution was even ready, its contents and axiology were already prejudged and rejected in advance.¹⁸ The

*found in the parliament. As a result after submission by Solidarity of its draft the National Assembly had at its disposal three drafts arising from the right, not including president Wałęsa's draft. The draft prepared by the Constitutional Committee is not only the product of the last three years, written under the dictation of the SLD and the PSL. Careful tracing of the items in the draft and of their origins in proposals voiced since 1989 would lead to astonishing conclusions. It would turn out that the largest number of items derives from the constitutional proposals of president Wałęsa and the Democratic Union, many come from the draft of the 10th term Sejm which was adopted in large part by the PSL-UP draft, but more or less equally from the drafts of the 1st term Senate as well as the SLD. These proposals were reworked during the process of compromise and deputies of varied political orientations participated until the last moments. Thus defining the present draft as the draft of four parties, as Marian Krzaklewski stubbornly insists on doing, is an obvious falsehood. In sum, Wiktor Osiatyński concludes, the process of creating the constitution after 1993 suffered rather from an excess than a lack of legitimacy. See also W. Osiatyński: *Twoja Konstytucja* [Your Constitution], WSiP, Warszawa 1997*

¹⁶ A. S m o l a r: "Wojna światów" [War of the Worlds], *Gazeta Wyborcza*, 30 May 1997.

¹⁷ See: "Polska korupcją stoi" [Poland Stands on Corruption], An interview of Ewa Milewicz with Jarosław Kaczyński. *Gazeta Wyborcza*, 16 July 1997.

¹⁸ See: A. G r z e ś k o w i a k: "Aksjologia projektu Konstytucji RP" [Axiology of the Draft of the Constitution of the Republic of Poland] in: *Ocena projektu Konstytucji RP Komisji Konstytucyjnej Zgromadzenia Narodowego* [Evaluation of the Constitutional Committee of the National Assembly's Draft of the RP Constitution], J. K r u k o w s k i (ed.), Towarzystwo Naukowe KUL, Lublin 1996.

opposition, especially outside of parliament, declared itself against it and the deputies of the Church hierarchy threatened to evaluate the new constitution negatively still before the referendum.

This specific political climate in which the actual work on the draft of the constitution started, at the turn of 1994, must not be forgotten. Despite these obstacles, which had to be expected, 1995 and 1996 were characterised by tedious and time - consuming efforts aimed at reaching a minimum of compromise on the constitution, which consisted also in making significant concessions to the Episcopate of the Catholic Church.

Despite these unfavourable conditions, the final draft of the constitution, worked out by the Constitutional Committee as a result of a compromise between the above-mentioned parliamentary groupings of the “constitutional arch”, was ready to be submitted to the National Assembly, to be considered in the second reading, in the middle of February of 1997. Finally, on April 2nd 1997 the Constitution of the Republic of Poland was adopted by the National Assembly and the President ordered a ratifying referendum.

3. The Controversies over the Referendum on the Constitution

The referendum on the Constitution was also, just like the Constitution itself, an object of a sharp conflict between the opponents of the Constitution and the “constitutional arch”. Politicians from the opposition demanded that, in addition to the Constitution adopted by the National Assembly, the Solidarity’s draft of the constitution, proposed in 1994 as the popular initiative (the so-called citizens’ draft of the Constitution), should also be subject of voting in the referendum.

For this purpose, a proposal was submitted for a change of the Constitutional Act on the Procedure for Preparing and Adopting the Constitution of the Republic of Poland.¹⁹ The proponents of the change wanted to put to vote in the referendum both the Constitution adopted by the National Assembly and the Solidarity’s draft of the constitution. On March 6th 1997 the Sejm rejected this proposal by an overwhelming majority (357 against, to 36 in favour of the change). From the formal point of view, the Sejm decision put an end to the efforts on the part of the opposition outside of parliament to hold a referendum in which two drafts of the constitution would be put to an all-national vote. This was because the Constitutional Act of 1992 on the procedure of preparation and adoption of the Constitution of the Republic of Poland granted the exclusive power to enact a constitution to the National Assembly.

The proponents of holding a referendum on two drafts of the constitution quoted public opinion polls, which indicated that half of those polled in sociological surveys were in favour of choosing between many drafts of the constitution. Such preferences on the part of the general public were understandable. As the authors of the Centre for

¹⁹ The draft of the amendments of the Constitutional Act of April 23, 1992 was submitted by deputies on behalf of the AWS as well as deputies of the KPN, BBWR, the Right Alienee, as well as the Conservative People’s Party. They proposed that the constitution be the subject of a referendum and that it would pass if the majority of eligible voters supported it. They assumed therefore a higher threshold than under a normal referendum, which becomes valid when at least half of eligible voters take part.

Research on Public Opinion (CBOS) report correctly wrote that *the preferences with regard to choice between the two drafts result first of all from the desire to retain the highest possible degree of civic subjecthood, and less from the intent of submitting to vote one or another draft of the constitution.*²⁰ In previous polls, conducted in 1994, 1995, and 1996, the respondents preferred a preliminary, partial referendum on concrete constitutional issues. Their reaction to a referendum confirming the entire constitution was not favourable.²¹

In the 1993 election the political groupings of the “constitutional arch” received 57.8% valid cast votes. During that election, the groupings which in 1997 were part of AWS or ROP received together 31.9% of votes.

In the public opinion polls published in 1996 and 1997 the advantage of the “constitutional arch” over the opposition functioning outside of parliament supporting Solidarity’s draft of the constitution, stayed basically at the same level. In the February poll, conducted by the Centre of Social Research (PBS) in 1997, that advantage approached the proportions of a qualified majority, that is, two-thirds. According to the polls conducted by PBS and CBOS the distribution of opinions looked as follows:

The proportions of the advantage of the “Constitutional Arch” over the Anti-Constitution Block opposition functioning out of parliament in the period from June 1996 to May 1997, according to the polls conducted by the Centre of Social Research (in percentage)

	1996							1997			
	VI	VII	VIII	IX	X	XI	XII	I	II	IV	V
Constitutional Arch	60	58	61	60	58	59	62	58	62	55	56
Anti-Constitutional Block	40	39	35	36	37	38	35	38	34	35	33

The proportions of the advantage of the “Constitutional Arch” over the Anti-Constitution Block opposition functioning out of parliament in the period from July 1996 to April 1997, according to the polls conducted by the Centre for Research on Public Opinion (in percentage)

	1996							1997			
	VII	VIII	LX	X	XI	XII	I	II	III	IV	
Constitutional Arch	63	61	65	63	58	60	54	61	51	50	
Anti-Constitutional Block	37	39	35	37	42	40	46	39	33	34	

²⁰ Report from research by CBOS: *Polacy o konstytucji i referendum zatwierdzającym* [The Poles on Constitution and the Approving Referendum] (March, 1997).

²¹ See: Reports from research by CBOS: Report from research *Konstytucja w świadomości Polaków* [Constitution in the Consciousness of the Poles] (January, 1994), Report from research *Konstytucja w świadomości Polaków* [Constitution in the Consciousness of the Poles] (November, 1995) and Report from research *Znaczenie prawa i konstytucji* [Meaning of Law and Constitution] (March, 1996).

Therefore, it can be said that between 1993 and 1997 the balance of power in the electorate did not undergo any significant change. It would be difficult to point to any crucial shift of power strengthening the position of the opposition functioning outside of parliament. However, in 1997 it became better organised.

The opposition groupings outside of parliament which opposed the Constitution adopted by the National Assembly demanded also a change in the rules for holding a referendum on the Constitution, especially as regards the conditions under which the results of a referendum would be recognised as binding. They wanted it to be recognised that for the results of a referendum to be binding, at least half of the eligible voters must participate in the referendum. After the failure of the efforts to change the Constitutional Act of April 23rd 1992, which specified the conditions for holding a national referendum on a constitution adopted by the National Assembly, the opposition outside of parliament began to work on invalidating the referendum of May 25th 1997.

Thus, the AWS politicians addressed a protest to the Supreme Court against the validity of the referendum.²² The protesters claimed that the outcome of the referendum was not binding because only 42,86% of eligible voters participated in it. According to the authors of the protest, article 19 section 3 of the Constitutional Act of October 17th 1992, i.e. of the provisional constitution, had superior legal force over article 11 section 1 of the Constitutional Act of April 23 1992 on the Procedure for Preparing and Adopting of the Constitution of the Republic of Poland. The latter Act, referring to a referendum on the constitution, stipulates: "A constitution is adopted in a referendum if the majority of those participating in the referendum voted for the constitution." At the same time, article 19 section 2 of the provisional constitution, concerning an ordinary referendum, stipulates: "If more than half of the eligible voters participated in a referendum, then the result of the referendum is binding."

The AWS politicians who lodged the protest argued that article 11 of the Constitutional Act of April 23rd 1992 was incompatible with article 19 of the Constitutional Act of October 17th 1992, and according to them, the latter Act was more important. They demanded that the Constitutional Tribunal take a decision on the matter.

The President of the Constitutional Tribunal, prof. A. Zoll, declared that the Tribunal could not consider the matter since it had no power to examine constitutional acts and the relationship between them. Nevertheless, he admitted that in his opinion 50% participation in voting should be required also in the case of a referendum on the constitution. He made it clear, however, that this was a problem of the law-maker's rationality and not a question which the Tribunal could decide.

It is difficult to accept the implication of irrationality on the part of the Polish law-makers. Both of the 1992 Constitutional Acts, the one from April 23rd and the one from October 17th, are constitutional acts of equal legal force. Neither one of them is superior to the other. Moreover, these two Constitutional Acts contain regulations con-

²² See: protests of AWS' activists, J. Tomaszewski and A. Słomka, *Rzeczpospolita* of 4 July 1997.

cerning two different kinds of referendum. Therefore, the difference in the criteria determining binding results is fully rational.²³

The nation-wide referendum provided for in the provisional constitution (and regulated in a similar way in the new Constitution) is an example of direct democracy, supplementing the basic method in which the nation exercises a public power through its deputies. In an ordinary nation-wide referendum society can express its opinion on a particular question. When in a given case the majority of voters support a particular solution, and more than half of the eligible voters participate in the voting, then the outcome of the referendum binds the legislative body and other organs of the State. In other words, the qualified majority of citizens gives binding instructions to their deputies. And it is understandable that when such instructions are given, there should be a sensible threshold of participation which will sanction them as the will of a significant majority of voters. Otherwise, a small minority could impose its wishes on the majority. The will of the majority expressed in the ordinary referendum only initiates certain actions on the part of the deputies of the people.

A referendum on the Constitution works differently, however. The National Assembly is elected for a particular purpose, with the general task of adopting the Constitution; and the referendum is held in order to verify the final text of such an Act. Therefore, a referendum on the constitution is held in order to ratify a constitution adopted by the National Assembly. The National Assembly acted as the Constitutional Assembly, which by the will of the nation, the sovereign ruler, through a democratic election, is vested with the constitution-making power.

The Supreme Court received 433 protests questioning whether the referendum on the Constitution had been conducted correctly. 259 of them were not reviewed, due to their contents or formal premises. In 103 of the cases the objections turned out to be unfounded. With respect to 64 of the protests the judges of the Supreme Court found that the charges contained in them were formally grounded but that they did not influence the result of the referendum. Here were also included the 6 protests which were recognised as justified, and which led to the invalidation of the vote in 3 voting wards. The recognition of these protests had no effect on the outcome of the referendum. It only required the National Electoral Commission to make a correction into their earlier declaration on the results of the vote.

The Supreme Court, or more precisely, the Bench for Administrative Law, Labour Law, and Social Security, rejected the above-mentioned protests of the AWS leaders by passing, on July 15th 1997, a resolution confirming the validity of the referendum on the Constitution. The Supreme Court correctly distinguished between a referendum on the constitution and an ordinary referendum provided for in the provisional constitution.²⁴

The resolution was not passed unanimously by the entire Bench for Administrative Law, Labour Law, and Social Security of the Supreme Court. Two of the judges ex-

²³ S. Gebethner: "Obligatoryjne, wiążące i racjonalne" [Obligatory, Binding and Rational], *Trybuna*, 4 June 1997.

²⁴ See Resolution of the Supreme Court of 15 July 1997 on validity of the referendum on the Constitution performed on 25 May 1997 (*Dziennik Ustaw* [Journal of Laws], no. 79, item. 490).

expressed a different opinion. Earlier, one of the three-judge panels ruling on a protest demanding invalidation of the referendum due to low turnout (below 50%), recognised the arguments of the plaintiffs as reasonable. Those three judges claimed that the provisional constitution, being then in force, was violated since “it is a generally recognised rule that a later general norm annuls an earlier particular norm, which leads to the conclusion that article 19 of the small constitution annulled article 11 of the Constitutional act on the procedure of preparing and adopting the Constitution of the Republic of Poland”.²⁵ This juridical opinion seems to indicate that some of the judges were influenced in their decisions by political considerations, rather than by recognised legal principles. This attitude on the part of the above-mentioned judges, if shared by the entire Bench of the Supreme Court, would have constituted “a radical departure from the, known from time immemorial, rule of collision. This rule can be found in any introductory textbook of jurisprudence. If the opinions of the authors of textbooks from the last 50 years are not convincing, for any reasons, let us look at a pre-war book by a Polish theoretician and philosopher of law, prof. Eugeniusz Jarra who writes that: when there is a clash between two legal norms introduced by normative acts from different times, the rule is that the later law annuls the earlier law (*lex posterior derogat legi priori*), with the exception, however, of those cases where the later law is a general law while the earlier law is a particular one, that means, existing due to some particular circumstances (*lex posterior generali non derogat legi priori speciali*)”.²⁶

Moreover, the above-mentioned judges of the Supreme Court were trying to overstep their competence by attempting to verify the constitutionality of an ordinary act (the act on a referendum) and to interpret the constitutional acts, for which even the Constitutional Tribunal has no power.

4. The Outcome and Consequences of the Referendum

In accordance with the requirements of the Constitutional Act of April 23rd 1992, Poles adopted the new Constitution of the Republic of Poland in the referendum on May 25, 1997. From the formal point of view, the procedure for enacting the Constitution was duly fulfilled.

The initial Declaration of the National Electoral Commission from May 26th 1997 regarding the results of the vote and the result of the referendum was published on June 4 in *Dziennik Ustaw (Journal of Laws)*. The Supreme Court reviewed the protests and invalidated the vote in three electoral wards. In consequences the National Electoral Commission, on July 8th 1997, issued the Declaration containing the corrected results of the vote and the outcome of the referendum. The corrected results of the vote did not change the final result of referendum on the Constitution. According to that second

²⁵ See: *Rzeczpospolita* 1 July 1997.

²⁶ P. Winczorek: “Błąd i poprawka” [Error and Correction], *Rzeczpospolita*, 16 July 1997.

Declaration of the National Electoral Commission²⁷ the final results of the vote were as follows:

registered number of entitled voters	28 319 650	citizens
number of participants	12 140 858,	i.e. 42,86%
number of invalid ballots	1 068,	i.e. 0,004%
number of valid ballots (i.e. the number of citizens who participated in the vote)	12 137 136,	
of which invalid votes were cast by	170 002,	i.e. 1,4%
valid votes were cast by	11 967 234,	
of which:		
voted "yes" for the adoption of the Constitution	6 396 641,	i.e. 52,70%
voted "no" against the adoption of the Constitution	5 570 493,	i.e. 45,90%

On July 15th 1997, as mentioned above, the Supreme Court passed a resolution recognising the outcome of the referendum as valid.

On the next day, July 16th 1997, the President of the Polish Republic signed the Constitution, which was officially published on the same day in *Dziennik Ustaw* and came in force on October 17th 1997.

As a result of the nation-wide referendum, which took place on May 25th 1997, eight years after the memorable turning point of regime change, Poland was given the new Constitution.

However, the satisfaction derived from the enactment of the new Constitution must not overshadow the painful lessons which the constitution-making process inflicted on the society, its political elite, and moral authorities, including the Catholic Church. In the political sense, everybody sustained losses or set-backs in connection with the referendum.

The opponents of the Constitution - mainly AWS and ROP, who had the support of the Catholic clergy and who treated the referendum as a prelude to the Autumn parliamentary election - achieved success. They obtained the support of as many as 5,5 million voters. This was over 700,000 votes more than what the post-Solidarity political groupings, constituting in 1997 AWS and ROP, obtained in the 1993 parliamentary election. This was also more than the groupings of this political orientation obtained in the 1991 parliamentary election. The referendum on the constitution in May 1997 was also a harbinger of the success that AWS was to achieve in the parliamentary election in September 1997.

It is interesting to compare the outcome of referendum on the constitution with the parliamentary elections of 1991, 1993 and 1997 and the presidential election of 1995. The election statistics given below show a configuration of political orientations within the Polish electorate that had been fairly stable since 1991 (see Table 2 below).

In the referendum all of the political groupings of the "constitutional arch" (SLD, PSL, UD, and UP) sustained a set-back - all together, as well as each one of them

²⁷ *Dziennik Ustaw*, no. 75, item 476.

individually. First of all, they lost the pre-referendum campaign on the public radio and television. Politicians from these groupings were unable to present the advantages of the new Constitution in a way that would appeal to the average citizen.

The disputes that flared up over the contents of the Constitution and the manner of its adoption will last for some time still, but they will probably die down earlier than we expect. Many of the constitutions that are in force today have been adopted under similarly controversial circumstances, but few people remember it today. Just as an example let us remember here that July 1, 1997 was the 60th anniversary of the enactment of the Constitution of Ireland. That Constitution was adopted in 1937 by a 57% majority in the referendum in which only 43% of those eligible to vote participated. Let us also remember that the Japanese constitution from 1946 and the German Basic Law from 1949 - since they were partially granted by the foreign powers - had a very low degree of legitimacy. Similarly, the French constitution of the Fifth Republic was, for a long time after its adoption in the referendum in 1958, contested by groups on the Right as well as on the Left.

From both the social and political viewpoint the low turnout in the referendum and the marginal advantage of the supporters of the Constitution over its opponents must inspire reflection. The legitimacy of the new Polish Constitution is weak. In fact, only 22.59% of eligible voters supported it while 19.67% were against.

Politicians will keep on arguing for a long time over the evaluation of the results of 1997 referendum. The turnout in referendum can be interpreted in various ways.²⁸ Sociologists, psychologists, and political scientists will puzzle over this phenomenon for a long time.

It should be remembered, however, that, except for the unusually high turnout in the second round of the presidential election of 1995, a low level participation rate in public votes has become a norm in Poland after 1989. In the 1990 local government election only 42.3% of eligible voters participated - and in 1994 only 33.8%. In the 1991 parliamentary election the turnout was 43.2% and in 1993 - 52.1%, while in 1996 in the referendum on citizens' enfranchisement of the public ownership the turnout was 32.4%. In the presidential elections in 1990 and 1995 the turnouts were between 53.4% and 68.2%. (see Table 1 below).

This phenomenon of low turnout in elections and referenda in the 1990's in Poland seems to result from a throughgoing political alienation of the majority of Poles. We see conformation of this in the outcome of a sociological survey conducted just after

²⁸ Day after the referendum T. Mazowiecki said that *the low turnout* means that citizens either are not interested in public issues or they are discouraged. Poles do not recognize that the constitution is for citizens and not for officials. *Gazeta Wyborcza* from 26 May 1997. Authors of the Report from research by CBOS (Funkcjonowanie demokracji w Polsce. Opinie o Konstytucji przed referendum zatwierdzającym. May, 1997) warned before the referendum, that *the cognitive dissonance experience by a large part of Polish society due to the information campaign begun in the media at the start of the research appears to be causing a growth in scepticism as to the effects of the enactment of the constitution. That must have undoubtedly been a factor in lowering the level of turnout in the referendum.*

the 1997 parliamentary election. In this survey 59.4% of the respondents agreed with the opinion that "We are all just cogs in the machine of politics."²⁹

On the other hand, the political balance of power in Polish society, which is reflected in the outcome of the referendum, does not differ much from the one observed in previous votes. Despite the frequent change of labels of the particular political parties, and their electoral coalitions, the main political and ideological currents in Poland after 1989 are stable. This is illustrated in Table 2.

The results of the 1997 referendum are often compared with the results of the second round of the 1995 presidential election. However, a much more necessary comparison is the one between the outcome of the referendum and the results of parliamentary elections of 1997 and 1993, as well as of 1991.

The political parties of the "constitutional arch" obtained almost 8 million votes in the 1993 parliamentary election. In the referendum on the constitution, they commanded only 3/4 of their shared electorate of 1993. It seems that the largest number among those who stayed home constituted supporters of PSL (perhaps they even voted against the Constitution). The results of the referendum in voivodships such as Przemyśl, Krosno, Tarnów, Tarnobrzeg, Rzeszów, or Łomża, testify to that. In the 1993 parliamentary election PSL received about 30% of the voting in these voivodships. This attitude to the referendum on the part of PSL voters can be explained by the ambivalent position adopted by PSL leaders in reference to the new Constitution.

It can also be supposed that a significant number of SLD voters stayed at home. This is proven by the results of the referendum in the Włocławek voivodship, which in previous election cast large numbers of votes, if not the largest number of votes, for the SLD lists and candidates.

It seems that for some of the SLD voters the compromise on the constitution overstepped the limit of acceptability. One quarter of them did not participate in the referendum. (See Table 8).

The low turnout in the 1997 referendum, caused first of all by the absence of PSL voters, should give the two parties (SLD and PSL) a lot to think about. On the other hand, the mobilisation of the AWS and ROP electorate in the referendum was undoubtedly a success for these political groupings.

The results of the presidential elections of 1990 and 1995, the parliamentary elections of 1991, 1993 and 1997, and the results of the referenda of 1996 and 1997,

²⁹ The answers to the question: *Do you agree with the opinion that we are all just cogs in the machine of politics?*, was as follows:

I agree	31.8%
I agree to some extent	27.6%
I disagree to some extent	16.9%
I disagree	7.7%
It is difficult to say	15.4%
Decline to answer	0.5%

See: *Polish National Election Survey, 1997* which had been conducted between 26 September and 7 October 1997.

contrary to common opinions, reveal more stability in the election behaviours and more continuity of expressed political options.

In fact, the outcome of the 1997 referendum was not an accident. The results of the vote in the referendum on the Constitution, in May, and in the parliamentary election, in September, indicate a stable division in the Polish electorate. If we assume that the main dividing line was the attitude to the new Constitution, we may see that the political groupings supporting the Constitution gained similar numbers of votes in the referendum and in the parliamentary election - around 6,5 million. Likewise, the opponents of the Constitution also received similar numbers votes of support - around 5,5 million. Therefore, the outcome of the two votings in 1997 can be evaluated in two opposite manners. The attitude towards the Constitution in the referendum stemmed from deeper political divisions strongly rooted in history. On the other hand, the results of parliamentary election had been determined by the differentiated attitudes towards the new Constitution.

Turnout in the 1997 referendum was at the level of turnout recorded in the parliamentary election of 1991. It could mean that when voters feel lost and do not know what decision to make, they refrain from participating in the voting. One should remember at this point that in the parliamentary election of 1991 the multitude of political groupings which were difficult to recognise and to distinguish among them, made it extremely difficult for the voters to decide. The situation was similar during the referendum on the Constitution. The deluge of contradictory information on the subject of the new Constitution made it difficult for an average voter, unacquainted with the issues related to the enactment of the constitution, to reach an informed decision. And that is presumably why that voter stayed at home. Part of Poles also failed to notice the relevance between their own situation and the adoption of the new Constitution. In the pre-referendum campaign the voters were not made aware of what was beneficial to them in the Constitution enacted on April 2nd 1997. On the contrary, due to the agitation of the opponents of the Constitution, the voters could see threats to themselves ensuing from the adoption of the new Constitution.

The data from the exit polls conducted by the Centre of Social Research indicate that particular demographic factors clearly differentiated voting behaviours in the referendum on the constitution. This is illustrated in Tables 3 and 7.

According to, a survey conducted in July 1997 by the Polish Gallup, people did not participate in the referendum mostly because they were disheartened by public quarels on the substance of the Constitution. They also find it difficult to form an opinion whether it was a good or a bad document or the matter was indifferent for them.³⁰

³⁰ The answers to the question: *Why, in your opinion, did people not participate in the referendum on the Constitution?* were as follows:

They were disheartened by public quarrels on the substance of the Constitution	31.2%	25.4%
It was difficult to form an opinion over whether it was a good or a bad document	20.9%	24.9%
The matter was indifferent to them	20.9%	21.8%
They are not participating in any elections or referenda	16.1%	20.0%
There was no choice between two drafts of the constitution	13.2%	11.7%
This particular Constitution did not suit them	12.3%	11.6%

The data show in particular that the agitation of the opponents of the Constitution was more effective with lower educated, with women as well as with younger people and with people who were less educated and who lived in the rural areas. (See Table 3)

As far as the voting behaviours according to political preference are concerned, it is clear that the highest degree of loyalty was observed among the SLD electorate. The supporters of AWS, UW, UP, and ROP demonstrated a somewhat lower degree of party loyalty; 10-15% of them disregarded the appeals of their respective parties. The PSL and UPR supporters appeared to be the least disciplined ones. (See Table 4) The ROP supporters boycotted the referendum to the highest degree. (See Table 8)

The data in Table 5 indicate that the political parties which mobilised for participation in the referendum to the highest degree were SLD and AWS.

PSL demonstrated the lowest degree of mobilisation on the part of its supporters. Relatively many people in the rural areas - and among them the supporters of PSL - voted against the Constitution.

At the same time, the results of a survey conducted by CBOS in the middle of June 1997³¹ seem to indicate that the potential ROP voters were the most disciplined ones, while the ones who disregarded the pre-referendum appeals to the largest degree were the supporters of UP and PSL. (Table 6)

The data collected from the exit polls lead to the conclusion that the citizens' answer to the question posed did not, in fact, concern their opinion on the Constitution, but that it was first and foremost an expression of political options.

This conclusion seems to be confirmed not only by the comparative analysis of the election results' statistics which was given above, but also by the outcome of the surveys conducted by CBOS, one month before the referendum,³² as well as three weeks before the referendum.³³ In April only 9% of the respondents estimated their knowledge about the Constitution as good. At the same time, 43% of the respondents considered themselves poorly informed, while 26% knew nothing about the subject. What was most significant, however, was the growth of scepticism with respect to the importance and the consequences of the fact of enactment of the new Constitution. Half of those polled predicted that the chances of the citizens' having more of a say in the government of the country after the enactment of the Constitution, or of Poland's becoming a better ruled country, were small or non-existent. Moreover, more than half of the respondents (56%) thought that the adoption of the Constitution would create

Respondents could indicate three answers. In the second column is shown the percentage of answers given by respondent who declared that they did not participate in the referendum.

(Data from the survey conducted by MARECO/GALLUP INTERNATIONAL in July 1997)

³¹ Report from research by CBOS: *Motywy głosowania za odrzuceniem Konstytucji. Zadowolenie z przyjęcia ustawy zasadniczej* [Reasons of Voting for the Rejection of the Constitution. Satisfaction after Accepting the Basic Law], July 1997.

³² Report from research by CBOS: *Funkcjonowanie demokracji w Polsce. Opinie o Konstytucji przed referendum zatwierdzającym* [Functioning of Democracy in Poland. Opinions on the Constitution before the Approving Referendum], May 1997.

³³ Report from research by CBOS: *Motywy głosowania za odrzuceniem Konstytucji. Zadowolenie z przyjęcia ustawy zasadniczej* [Reasons of Voting for the Rejection of the Constitution Satisfaction after Accepting the Basic Law], July 1997.

one more plane of political polarisation and would become a source of conflict. Only one fourth of those questioned thought that the enactment of the Constitution would have a stabilising effect on the Polish political scene. In this survey 19% of respondents had no opinion on that matter.

The survey conducted by CBOS after the referendum indicated that an important inducement to vote against the Constitution was the conviction that it was not in conformity with the Christian faith or the teaching of the Catholic Church. This finding seems to confirm the hypothesis that voting behaviours in the referendum on the Constitution were to a large extent conditioned by the ideological and world outlook factors. Arguments about lack of proper protection of life from the conception to natural death, about threats to the sovereignty of the Republic of Poland, and also its objections pertaining to the form of the Constitution (the Constitution is bad because it is written unclearly and its construction is faulty) also proved effective in mobilising the opponents of the political parties which voted in the National Assembly for the Constitution.

It is not surprising, therefore, that only 52% of those questioned in the above mentioned CBOS survey declared themselves pleased that the Constitution had been adopted in the referendum (of those, only 22% were definitely pleased), while more than one fourth were displeased by the fact, when 20% of respondents had no opinion on that matter.

The results of the surveys conducted after the referendum on the Constitution seem to indicate, however, that the social acceptance of the new Constitution is perhaps higher than it might have seemed after the outcome of the vote of May 25th 1997 was announced.

The referendum on the Constitution has become a fact. It undoubtedly paves the way for the shaping and strengthening of democratic institutions. It is also a testimony to the difficulty of the process of building a political consensus around the adopted Constitution. The process of the legitimisation of the Constitution is a complex one. It is conditioned not only by legal decisions and guarantees (among them the resolution of the Supreme Court on the validity of the outcome of the referendum) but, most of all, by the practice of implementation of the new Constitution and by the perception of the Constitution by society.

The new Constitution is compatible with the requirements of a modern democratic state and has typical characteristics of a basic law adopted by a society which has experienced authoritarian rule and wants to safeguard itself from the return of such rule. At the same time, this Constitution refers to Polish national traditions favouring political independence and sovereignty. It also takes into account the world-wide tendencies of modern constitutionalism. It is a basic law which respects the international norms defining human and civic rights and liberties.

Abbreviations

AWS - Electoral Action Solidarity [Akcja Wyborcza Solidarność]

BBWR - Nonparty Bloc for the Support of Reforms [Bezpartyjny Blok Wspierania Reform]

ChD - Christian Democracy [Chrześcijańska Demokracja]

KdR - Coalition for Republic [Koalicja dla Rzeczypospolitej]

KLD - Liberal Democratic Congress [Kongres Liberalno-Demokratyczny]

KPN - Confederation for the Independent Poland [Konfederacja Polski Niepodległej]

KPRiE - National Party of Retired [Krajowa Partia Rencistów i Emerytów]

PC - Center Alliance - Polish Union [Porozumienie Centrum]

PChD - Party of Christian Democrats [Partia Chrześcijańskich Demokratów]

PSL - Polish Peasant Party [Polskie Stronnictwo Ludowe]

PSL-PL - Polish Peasant Party - Peasant Alliance [Polskie Stronnictwo Ludowe - Porozumienie Ludowe]

ROP - Movement for the Reconstruction of Poland [Ruch Odbudowy Polski]

“S” - “Solidarity” Trade Unions [NSZZ “Solidarność”]

SLD - Democratic Left Alliance [Sojusz Lewicy Demokratycznej]

UD - Democratic Union [Unia Demokratyczna]

UP - Union of Labour [Unia Pracy]

UPR - Union of Real Politics [Unia Polityki Realnej]

UW - Union of Freedom [Unia Wolności]

WAK - Catholic Electoral Action [Wyborcza Akcja Katolicka]

ZChN - Christian National Union [Zjednoczenie Chrześcijańsko-Narodowe]

Who Was for and Against the Constitution?

Table 3. Voting behaviour in the referendum on the Constitution according to gender, education, and place of residence (results of exit poll quoted after *Gazeta Wyborcza* of 26 May 1997)

	FOR %	AGAINST %
Gender:		
Women	55,0	45,0
Men	58,5	41,5
Age:		
18-24	57,5	42,5
25-39	52,0	48,0
40-59	60,0	40,0
over 60	67,0	33,0
Education:		
elementary	51,0	49,0
vocational	51,5	48,5
secondary	59,5	40,5
higher	63,0	37,0
Place of residence:		
Rural area	51,0	49,0
towns with inhabitants:		
up to 50 000	58,0	42,0
from 50 000 to 200 000	62,0	38,0
over 200 000	58,0	42,0

Table 4. Voting behaviour in the referendum on the Constitution according to expressed political preferences (results of exit poll quoted after *Gazeta Wyborcza* of May 26th 1997)

Supporters of	FOR %	AGAINST %
SLD	97,0	3,0
UW	84,0	16,0
UP	84,0	16,0
PSL	72,0	28,0
KPRiE	65,0	35,0
UPR	52,0	48,0
ROP	15,0	85,0
AWS	9,5	90,5

Table 5. Declared political preferences of voters participating in the referendum

on the Constitution (results of exit poll quoted after *Gazeta Wyborcza* of 26 May

Declared support for political grouping	%
AWS	22,6
SLD	22,3
UW	7,4
ROP	5,2
KPRiE	5,2
PSL	4,6
UP	3,6
UPR	2,0
will not vote	2,2
undecided	23,3

Table 6. Declared participation in the referendum of the supporters of particular

political groupings (based on results of the survey conducted by CBOS from the 13th

Supporters of	Declaration of participation in referendum	
	YES	NO
	(in percentage)	
ROP	82	18
SLD	76	24
KPRiE	76	24
AWS	74	26
UW	72	28
PSL	64	36
UP	55	45

Table 7. Declared participation in the referendum on the Constitution according to gender, education, place of residence and occupation (based on results of the survey conducted by Mareco/Gallup International in July 1997)

	YES %	NO %
Gender		
Women	53,5	46,5
Men	58,9	41,1
Age:		
18-19	35,8	64,2
20-29	50,8	49,2
30-39	54,8	45,2
40-49	67,8	32,2
50-59	68,0	32,0
over 60	63,0	37,0
Education		
elementary	48,9	51,1
vocational	54,6	45,4
secondary	61,8	38,2
higher	73,6	26,4
Place of residence:		
Rural area	52,5	47,5
towns with inhabitants:		
up to 20 000	62,9	37,1
from 20 000 to 50 000	52,8	47,2
from 50 000 to 200 000	57,0	43,0
from 200 000 to 500 000	62,4	37,6
over 500 000	53,3	46,7
Occupation:		
businessmen & white collars	62,8	37,2
blue collars	65,8	34,2
workers	53,2	46,8
students	40,2	59,8
housewives	48,8	51,2
pensioners	62,3	37,7
farmers	59,4	40,6
jobless	37,5	62,5

Table 8. Declared participation in the referendum of the supporters of particular political groupings (based on results of the survey conducted by Mareco/Gallup Inter-

Supporters of	Declaration of participation in referendum	
	YES (in percentage)	NO
SLD	77,5	22,5
UP	73,9	26,1
AWS	72,0	28,0
UW	66,7	33,3
PSL	60,9	39,1
KPRiE	57,9	42,1
ROP	29,4	70,6

THE CONSTITUTION OF THE REPUBLIC OF POLAND OF 2 APRIL 1997 - THE COURSE OF PARLIAMENTARY WORK FROM 1995-1997

Ryszard Chruściak*

Introduction

Between 1989 and 1991 and from 1991 to 1993, there were two unsuccessful attempts to pass a new constitution based on democratic standards. Constitutional work has been undertaken for the third time after parliamentary elections conducted in September 1993 ended successfully for the Democratic Left Alliance and the Polish Peasant Party.

In April 1994, the Constitutional Act of 1992 was amended, defining the procedure for work on a new Constitution. The amendment created the ability to initiate a constitutional draft by a group of at least 500 citizens (citizen draft).

In September 1994 the National Assembly held the first reading of seven drafts of the Constitution. These were drafts prepared by: The Constitutional Committee of the 1st term Senate, jointly by the Polish Peasant Party and Union of Labour, Confederation for Independent Poland, Union of Freedom, Democratic Left Alliance, President Wałęsa and a draft prepared by the Independent Self-Governing Trade Union "Solidarity" supported by signatures of almost one million citizens (citizen draft).

They were all sent to the Constitutional Commission as a basis to prepare a uniform draft. After initial work of six permanent subcommittees set up by the Constitutional Committee, at the turn of 1995 the first - working - uniform version was drafted. Starting in January 1995 the Constitutional Committee began systematic work to review this draft. The "technology" of the Committee's work was based on reviewing successive articles of the draft at successive sessions. The effect of discussions were motions containing amendments to a discussed article or even completely new interpretation of a discussed article. These motions were submitted to voting at the next session (most of the Committee sessions were two-day sessions). The contents of successive articles were established from the voting results.

Working in this manner the Committee completed the review of the initial January 1995 draft on 19 June 1996.*¹

* Ass. Professor of Constitutional Law at the Faculty of Political Science, Warsaw University.

¹ More on course of the works over the Constitution in the years 1989-1995, and in particular in the years 1993-1995 - see *Polish Contemporary Law* 1995, No 1-4, p. 105 and subsequent pages. Texts of the

Primary Constitutional Problems Discussed at the Constitutional Commission During Work Over Particular Sections of the Constitution's Draft (26 January 1995 -19 June 1996)

The Committee prepared the wording of articles making up a chapter concerning primary principles of the constitutional system in the period from January to April 1995.² This relatively long time for preparation in large part resulted from moving the voting deadline ahead several times in order to reach a compromise over provisions concerning relations between the state and the church.

During work over the initial articles of the draft particularly extensive discussion concerned questions such as the concept "common good", "balanced development", "social justice". This was also true for provisions concerning the supreme power, political parties, law and order, separation of powers, constitutional precedence. A proposal to add a provision that the Republic of Poland shall adhere to international law that binds it was positively accepted.

Furthermore, a wider debate concerned the provisions dealing with local and other forms of self-government, ownership, freedom of economic activity, labour as well as civil society.

Parallel to work over the first chapter, containing a catalog of supreme principles of the constitutional system, between February and April³ the Committee took up provisions contained in the second chapter, concerning citizens' freedoms, rights and duties applicable to humans and citizens.

The widest debate concerned provisions related to dignity, freedom, equality, citizenship, non-prescription of war crimes and crimes against humanity, suspending prescription in relation to crimes not prosecuted due to political causes, the right to trial.

In discussion over an article defining limitations to freedoms and rights in the event of implementation of martial law or a state of emergency, a postulate was accepted to cover the problems of conditions for implementing states of emergency in a separate chapter.

The very lively exchange of views lead to a provision wherein a person of Polish nationality can return to Poland and settle permanently.

Extensive discussion surrounded the article regulating freedom of conscience and religion, especially over the right to maintain silence in matters of religion and faith. This also refers to the provision wherein education should consider the will and maturity of a child as well as the freedom of his conscience and religion.

draft of the Constitution being subject to the first reading before the National Assembly, as well as the working drafts of January 1995 and the draft of 19 of June 1996 - see *Constitution Drafts 1993-1997*, Part 1, Wydawnictwo Sejmowe, Warszawa 1997. More on the course of works on the New Constitution - see R. Chrusciak: *Przygotowanie Konstytucji RP z dnia 2 kwietnia 1997 r. - przebieg prac parlamentarnych* [Making of the Constitution of the Republic of Poland of 2nd April 1997 - Course of Parliamentary Works], WDiNP UW, Warszawa 1997.

² Full discussion - see Constitutional Commission of the National Assembly Bulletin (hereinafter "the Bulletin") XII-XVII.

³ Bulletins XIV-XVII.

Concerning social rights, the greatest attention was devoted to the right to work, to education, to the protection of health and protection of the family and child.

As a result of the discussion, the catalog of factors preventing discrimination was drafted and expanded to include sexual orientation. An article on the equality of women and men was also added.

In the framework of debate over resources to protect freedoms and rights, considerable discussion ensued by the constitutional complaint provision as well a provision wherein certain social rights could be vindicated only within limits defined by the law. Thus, these rights cannot be enforced directly on the basis of the constitution.

In April and May 1995 the Committee worked on articles regulating the Sejm and Senate.⁴

Concerning the issue of the term of office, a proposal to introduce a separate four year term in the Senate was not accepted. Similarly, the proposal to introduce the institution of a substitute parliamentarian did not gain support. On the other hand, the postulate to accept a provision permitting a parliamentarian to agree to his criminal prosecution (repeal of immunity) has been approved.

Furthermore, an extensive catalog of positions or functions was accepted, which cannot be combined with a parliamentary mandate.

Concerning legislative procedure, the majority of the Committee agreed that subjects undertaking legislative initiative have to present information on the financial consequences that a submitted legislative draft would lead to.

The concept of urgent drafting of legislation did not lead to any controversy. To the contrary, the proposal to grant the Council of Ministers the right to issue decrees with the force of a legal act was rejected.

From the end of May until the middle of June the Commission reviewed the chapter on the Presidency of the Republic of Poland.⁵ Several extensive concepts for the institution of the presidency were presented in the discussion. As to detailed issues, the following questions led to a wider exchange of views: defining the president as a guarantor of the continuity of power, presidential election procedure, supremacy over the armed forces, justification to create a Cabinet Council.

From mid - June until the beginning of July 1995 the Committee reviewed provisions controlling the Council of Ministers and government administration.⁶ In part, the discussion concentrated around: supposed competencies, the aim of the legal act on the Council of Ministers, catalog of normative acts of the government, composition of the government and competence of the Prime Minister. Furthermore, the procedural question of creating a government and vote of no confidence were extensively discussed.

The Committee worked on provisions concerning a system of sources of law in July and August.⁷ The system of the sources of law was the key issue here. Opinions

⁴ Bulletins XVIII-XX.

⁵ Bulletins XX and XXI.

⁶ Bulletins XXI and

⁷ Bulletins XXII and

dominated that this should be a closed system. Furthermore, a wide debate concerned organic acts and procedures to ratify international agreements.

Articles dealing with problems of courts and tribunals were reviewed by the Commission from the end of August to the beginning of October.⁸ The discussion centered on questions related to the separateness of courts, court structure, status of judges, political position of the Supreme Court, two instance nature of jurisdiction. A proposal to grant courts budgetary autonomy led to a heated discussion.

Relative to the Constitutional Tribunal, extensive debate was conducted on the issue of adjudication in matters to assess the constitutionality of international agreements. A representative of the Constitutional Tribunal moved to expand the Tribunal's authority to resolve disputes between constitutional organs of the state. A compromise formula providing for final character of Tribunal decisions was also accepted. The question of universally binding interpretation of legal acts was also taken up.

The problems of state control organs and protection of law was the subject of Committee work between September and October.⁹ In relation to the Supreme Chamber of Control, the Ombudsman and the National Radio and Television Council, the proposed constitutional provisions were based on binding regulations.

Despite a different view by government representatives, the Committee acknowledged that regulation of the office of public prosecutor is not necessary in the constitution. The proposal to include the National Election Commission in the constitution was also not accepted.

The Committee debated over local and other self government provisions in the period from mid-October 1995 to the end of February 1996.¹⁰ The draft of the article defining the scope of local government authority as well as articles concerning the organizational levels of local government led to heavy debate. The existence of communities, administrative districts and voivodships was accepted.

In addition, one of the most lively discussions centered on financing local government.

In the period from the end of January to mid-May 1996 the Committee worked on provisions concerning the nation's budget and finances.¹¹ The most attention was drawn to obtaining public resources, the question of public debt, taxes, and procedure to pass the budget. Proposals providing for the setup of a general prosecutor to protect the interests of the National Treasury as well as a tripartite commission composed of employees', employers' and government representatives were rejected.

The next problem undertaken by the Committee - between February and June - concerned state of emergency.¹² The most discussed question was the catalog of freedoms and rights which could be limited during a state of emergency. The issue of how many and what kinds of states of emergency the constitution should permit was also disputed.

⁸ Bulletins XXIII-XXVI.

⁹ Bulletins XXV and XXVI.

¹⁰ Bulletins XXVII-XXX.

¹¹ Bulletins XXIX-XXXIV.

¹² Bulletins XXIX-XXX and XXXIII-XXXIV and XXXVI.

In the period between May and June¹³ the Committee reviewed a proposal to include a new chapter to the draft concerning national defense and the armed forces. The Committee was especially critical of the proposed provision, according to which the President of the Republic of Poland manages the internal and external security of the nation. The dominant view was that this infringes the political position and authority of the government as an organ managing the nation's defense policy.

In the end a new chapter was not introduced, but the draft was supplemented in part wherein the neutrality of the armed services and their being subject to civil and democratic control was provided for.

At the end of May and in the beginning of June¹⁴ the Committee also worked on provisions for procedures to change the constitution. The subject was whether the National Assembly (the Sejm and Senate together) or the Sejm and Senate deliberating separately should pass changes to the constitution, as well as the question of applying a referendum as a procedural element to change the constitution.

In mid-June¹⁵ the Committee accepted the introduction and final provisions. It was then decided that final provisions will be included in the constitution, while interim provisions in a separate constitutional legal act.

Initiative to Hold an Initial Constitutional Referendum (27 September 1995 - 21 June 1996)

In the course of a Committee session in September 1995 in the name of a group of MPs from the Union of Labour Ryszard Bugaj presented an initiative to hold an initial constitutional referendum, in which voters would respond to issues such as the structure of parliament, majority needed to reject a presidential veto, ideological neutrality of organs of public power, the manner of financing the health service, structure of local self government.

After discussion the Committee decided to set up a subcommittee which would analyze arguments in favor and against a referendum.¹⁶

In a report submitted at the beginning of December, the subcommittee came out in favor of holding a referendum. On 20 December the Committee decided to move the National Assembly to pass a resolution in the matter of holding an initial constitutional referendum. It was then decided that the Committee would be limited to problems which should be the subject of inquiry and not specific inquiries. In successive voting it was determined that the inquiries should concern: parliamentary structure, local self-government structure, presidential election procedure and State-Church relations.

The National Assembly debated the Committee motion to conduct a constitutional referendum on 19 January 1996. The rules of proceedings of the National Assembly

¹³ Bulletins XXXV and XXXVI.

¹⁴ Bulletins XXXV and XXXVII

¹⁵ Bulletins XXXVII.

¹⁶ Bulletins XXV p. 90 and subsequent

were amended in 1994 and established the procedure for work on the constitution. The amendment concerned the procedure for passing resolutions to hold a referendum. However, material discussion on the referendum question was never conducted. On the other hand a motion to hold a break in the session to “create proper conditions for a calm, rational discussion (...)”¹⁷ was raised and accepted.

Renewal of the National Assembly debate only took place on 21 June 1996. One of the viewpoints raised was that an initial constitutional referendum has no justification, since on 19 June 1996 the Constitutional Committee completed primary work over the draft constitution.

Voting on the motion to reject the draft resolution in the matter of the initial constitutional referendum was accepted since it obtained support of 222 members of the National Assembly. There were 131 votes against and 18 abstaining.¹⁸

Editorial Work on the Draft Constitution Completed by the Constitutional Commission on 19 June 1996 (June-September 1996)

The draft which the Committee completed on 19 June 1996 was characterized by the fact that in many cases the acceptance of particular provisions regulating similar material took a lot of months. It also happened that the Committee returned to already accepted provisions and made changes in them.

The draft was supplemented by new provisions. In the course of work some provisions were accepted under the simultaneous presumption that its particular wording will have to be the subject of further work, especially of an editorial and legislative nature.

Taking the above factors into consideration as well as the presumption accepted from the outset of the need to conduct final editorial work, a group of experts was appointed to deal with detailed analysis of the editorial correctness of the draft. A language expert was part of this group.

The material work of the expert group was based on systematic analysis of the entire draft. After ongoing discussion on every article and in the case of more extensive articles, over every passage - conclusions and comments were drawn up taking the form of proposed amendments, additions or changes of another nature.

The scope of the proposed changes and additions submitted by the group of experts was very significant and covered a significant majority of articles from the draft of 19 June 1996. Among others, experts proposed editorial changes to particular provisions, changes to the location of provisions and articles. The scope of proposals intending to unify terminology and concepts was very significant. Errors and inconsistencies were

¹⁷ Stenographic Report from the 2 seating of the National Assembly of 19 June 1996, Part I, p. 24.

¹⁸ Stenographic Report from the 2 seating of the National Assembly of 19 June 1996, Part II, p. 36.

also indicated. In addition the need to make changes and material additions were also pointed out.

General issues and provisions to be entered into the constitution resulting from the work of the experts were submitted to the editorial subcommittee. The subcommittee approved the clear majority of comments and proposed changes submitted by the expert group. Furthermore, in the course of editorial subcommittee sessions, proposed changes and additions which exceeded the proposals submitted by the group of experts were brought up.

The effect of the subcommittee work was a report containing the draft of the Constitution of the Republic of Poland bearing the date 27 August 1996. This draft - together with auxiliary material illustrating the scope of changes in comparison with became the draft dated 19 June 1996 - became the subject of Constitutional Committee sessions, starting in the middle of September 1996.

Work to Prepare the Committee Report Containing the Draft of the Polish Constitution in the Form of a Uniform Text (17 September 1996-16 January 1997)¹⁹

On 17 September 1996 the Committee started to review the report of the editorial subcommittee. New editing to most articles was accepted, comprised of chapter I, which was given the title: the "Republic". The proposed changes in the articles concerning State-Church relations caused the greatest disputes. Furthermore, the resolution of the Committee from 1995 was repealed, wherein the constitution will not have a preamble.

The articles comprising chapter II "Human and civic freedoms, rights and duties" were reviewed next. The provision enumerating under which criteria discrimination is prohibited caused considerable debate. One of these criteria was sexual orientation, which was criticized, especially by representatives of the Catholic Church. Finally the Committee decided to delete this specification entirely. Thus, a general prohibition against discrimination remains.

Articles concerning the right to education, right to health care, rights of the family and child as well as resources to protect freedoms and rights were reviewed.

In mid-October a newly edited version of chapter II "Sources of law" was accepted. The problem of a closed or open system of sources of law came up in the discussion again.

Next the Committee reviewed chapter IV "The Sejm and the Senate". The most serious disputes and controversies centered on provisions defining who and how the validity of elections are determined by as well as on provisions concerning parliamentary immunity.

¹⁹ Bulletins XXXIX-XLII.

Furthermore, an institution of a referendum was introduced. In addition, a change was made according to which repeated passage of a legal act by the Sejm - after the President refuses to sign - requires a $\frac{2}{3}$ majority, while the earlier form required an absolute majority.

In the course of reviewing chapter V "The President of the Republic of Poland" extensive discussion concerned in part the Cabinet Council, constitutionalization of the Chancellery of the President, legal acts of the President and catalog of acts not requiring countersigning by the government.

Discrepancy of viewpoints and disputes were also disclosed in the course of work over chapter VI on the Council of Ministers and government administration. In part this concerned the following questions: supposed competence of the government, composition of the government, manner of defining the scope of activity of a minister, constructive vote of no confidence. The proposed provision according to which it would be possible to combine the question of confidence for the government with particular piece of legislation was not accepted.

In the course of reviewing the chapter containing provisions concerning local self-government - against the background of the article concerning local councils - this again led to a dispute between proponents and opponents of creating a second level of local self-government - administrative district. The accepted edited version maintained the administrative district.

In the course of editing chapter VIII "Courts and Tribunals" the largest controversies were brought about by the question of universally binding interpretation of legal acts performed by the Constitutional Tribunal. In light of this, a difference of opinion surfaced between the Constitutional Tribunal and the Supreme Court. Ultimately the Committee supported arguments indicating the non-justification of maintaining the universally binding interpretation of legal acts by the Constitutional Tribunal which led to deletion of the article concerning this question.

At the end of November the Committee accepted editorial changes, in part in chapters concerning state control organs and protection of law, public finances, states of emergency, constitutional changes and final provisions.

At the beginning of December 1996, the Committee accepted a preamble based on a modified proposal submitted by MP T. Mazowiecki. This meant the end of reviewing the report of the editorial subcommittee. Thus, a condition arose to hold final voting on the constitution draft. Nonetheless voting was never held, since a group of Committee members - the Polish Peasant Party and the Union of Labour parliamentarians - proposed amendments, claiming that their support for the draft constitution depends on them. In this situation - facing a possible crisis - it was decided that the remaining parliamentary groups also have the right to submit amendments.

The proposed amendments submitted by the parliamentary factions groups became the subject of Committee debate between 14-16 January 1997.²⁰ In the period preceding the session there were political consultations by the Democratic Left Alliance,

²⁰ Bulletins XLIII.

Polish Peasant Party, Union of Freedom and Union of Labour parliamentarians, which resulted in working out a compromise permitting the filing of agreed amendments.

As a result of voting on the draft, among other things the wording on the administrative district as the binding level of local self-government, was exchanged for decentralization of public authority. Chapter I was expanded by an article stating that the family farm is the basis of the nation's agricultural system as well as provisions on the Polish language as the official language.

New wording was added in chapter II concerning policy intending for full, productive employment, access to publicly financed primary health care, policy enhancing that housing needs are met.

The majority necessary to pass a legal act after the president refuses to sign it - was lowered from $\frac{2}{3}$ to $\frac{3}{5}$.

Furthermore, the procedure to create a government was limited to three versions. In addition, a two year period was introduced in which decisions by the Constitutional Tribunal on the constitutionality of legal acts passed before the Constitution takes effect, will not be final.

In other parts of the session Senator P. Andrzejewski presented 19 proposed amendments based on replacement of a certain provision of the draft prepared by the Committee, with a corresponding provision of the citizen draft. In part, the amendments concerned natural law, transferring competencies of public power to an international organization, political parties, State-Church relations, right to life, protection of the family, freedom of conscience and religion, tripartite commission, responsibility of the government., competence of the Supreme Court, procedure for appointing the Constitutional Tribunal as well as interim provisions.

These motions were rejected, though several amendments that resembled the provisions of the citizen draft were accepted. In part this concerned the prohibition against actions by political parties with a totalitarian program, requirement to be faithful to the Republic as well as protection of the family.

The Committee also accepted new interim and final provisions concerning issues such as: the duty of the government to prepare - within 2 years - necessary legislation to adapt the legal order to the constitution and provisions concerning the expiration of constitutional terms for organs of public power.

After completion of work on the draft and hearing statements by representatives of parliamentary groups, final voting on the motion to accept the Committee report on drafts sent by the National Assembly, containing a Constitutional draft in a uniform text has been accomplished. 45 members of the Committee supported the motion, two were opposed and one abstained.

This meant that after more than three years of work, the Constitutional Committee had completed its primary task to prepare a draft of the constitution and submit it to the National Assembly.

Passing the Constitution of the Republic of Poland in the Second Reading on 22 March 1997 (24 February - 22 March 1997)

The passage of the report containing the draft of the Constitution of the Republic of Poland in the form of a uniform text²¹ allowed for calling a National Assembly to review the Committee report in the second reading.

The National Assembly started the debate on 24 February.²² After MP M. Mazurkiewicz gave the Committee report and presented the course of work and primary conflicting problems, MPs had the opportunity to speak.

In general the Democratic Left Alliance, Polish Peasant Party, Union for Freedom and Union of Labour MPs supported the Constitutional draft, while maintaining reservations and critical comments to certain provisions.

Representatives of right wing groups came out against the draft, charging that it was a cutoff from values that make up the legacy of generations, the lack of “*invocatio Dei*,” that it advocated almost unlimited freedom of man, lack of protection of life from conception to natural death, weakness of the constitutional position of the family and ability to transfer certain competencies of public authority to international organizations.

As a representative of adherents of the citizen draft, M. Krzaklewski spoke on 25 February. He alleged that the draft of the Constitutional Commission was a continuation of “the round table” settlements which was expressed in the lack of separation from Polish People’s Republic and animosity towards “*invocatio Dei*” as well as Catholic constitutional postulates. He added that the defect of the draft is its failure to consider certain solutions from the citizen draft: a defined model of the market economy, protection of the family, a majority system in elections to the Sejm, strong position of the Senate, institution of the National Treasury as a separate economic entity.

Furthermore, M. Krzaklewski supported the idea of submitting two drafts to a referendum: the draft of the Constitutional Commission and citizen draft.

After statements by representatives of smaller Senate factions and Parliamentary groups, some 200 individual members of the National Assembly had the opportunity to comment, with 120 making nearly 500 amendments to the draft. The amendments most often concerned the preamble, freedom of religion and State-Church relations, right to education. Several amendments were made to provisions related to the governing public finances, as well as the system of the sources of law, and especially to provisions concerning the relation between internal and international law.

The amendments raised during the second reading between 24-28 February, after being listed and ordered, became the subject of work of the Constitutional Committee, whose task was to accept by voting the recommendations of particular amendments for the National Assembly.

²¹ Printed Document of the National Assembly No 14 and Constitution Drafts 1993-1997, Part II, p. 198.

²² Stenographic Report from the 3 seating of the National Assembly of 24,25,26,27 and 28 of February 1997, Part I p. 24.

The Committee reviewed amendments raised at the National Assembly between 7-14 March 1997.²³

A more extensive exchange of views was caused by amendments concerning natural law, the ability to transfer competencies of public organs to international organizations, political parties. Amendments providing for additional provisions defining the basis of the economic system led to a heated discussion. In effect the Committee proposed accepting a compromise amendment wherein the basis of the economic system is a social market economy based on freedom of economic activity, private ownership as well as solidarity, dialogue and cooperation between social partners.

Amendments concerning: health care, employment of juveniles, right to education, citizenship, complaints based on the constitution, international agreements ratified after prior approval expressed in a legal act, prohibition of connecting a parliamentary mandate with performance of other functions, immunity and referenda led to a more extensive debate.

Amendments concerning government decrees with the authority of a legal act, constitutionalization of the office of public prosecutor as well as interpretation of legal acts did not obtain a positive opinion by the Committee.

In addition, amendments concerning the right to life were reviewed. After a long discussion the Committee proposed acceptance of an amendment in the following wording: "Human life is protected by law".

On the last date of working on amendments - 14 March - the Committee reviewed amendments concerning freedom of conscience and religion as well as amendments referring to provisions on state control organs and protection of law, public finances, states of emergency, constitutional changes as well as interim and final provisions. Problems discussed earlier again resurfaced, such as the scope of control by the Supreme Chamber of Control over local self-government, the Ombudsman for the Rights of Children, defining the permissible level of public debt.

There was an extensive debate over amendments concerning interim and final provisions. These especially concerned the question of acknowledging international agreements ratified on the basis of constitutional provisions binding at the time of ratification, for agreements ratified after prior approval expressed in a legal act as well as the question of presenting the Sejm with a list of international agreements containing provisions that are non-conformed to the Constitution.

Finally, amendments concerning the preamble were reviewed. The Committee proposed accepting the proposal of T. Mazowiecki as well as other similar amendments.

As to withdrawing some amendments in an additional report of the Committee²⁴, it was proposed that 113 out of 362 amendments should be accepted.

The additional report of the Commission became the subject of debate by the National Assembly on 21 March.²⁵

²³ Bulletins XLIV-XLIV

²⁴ Printed Document of the National Assembly No 14-A and Constitution Drafts 1993-1997 Part II p. 263.

²⁵ Stenographic Report from the 3 seating of the National Assembly of 21 and 22 of March 1997, Part II.

After MP M. Markiewicz gave a short presentation of the Committee report, voting was initiated. The first two votes concerned the most far reaching motions. These were motions by minorities to accept the draft Constitution of the Constitutional Committee of the 1st term of the Senate and the citizen draft. Both motions were rejected by a clear majority. Then, more than 320 issues were voted upon, since some of the amendments were withdrawn. As a result of the votes, almost 100 amendments and two minority motions were accepted. Five new articles were added, with the accepted changes concerning the preamble and more than seventy articles.²⁶

Then on 22 March, voting was held to accept the entire draft of the Constitution of the Republic of Poland in the wording proposed by the Committee together with the accepted amendments.

497 members of the National Assembly participated in the vote. A $\frac{2}{3}$ majority equated to 332. 461 members of the National Assembly voted to accept the draft in its entirety, 31 members were opposed, with 5 abstaining from voting. This meant that the Polish Constitution was passed in the second reading by the required $\frac{2}{3}$ majority.²⁷

Adoption of the Constitution of the Republic of Poland in the Third Reading on 2 April 1997 (23 March - 2 April 1997)

According to the Constitutional Act on the procedure to prepare and pass the Constitution of the Republic of Poland, the Marshal of the Sejm, as chairman of the National Assembly, sends the Constitution to the President, after its adoption in a second reading, who can propose changes to the text within 60 days.

On 24 March the President A. Kwasniewski sent back his proposed changes, which concerned 41 articles of the Constitution. These changes became the subject of work by the Constitutional Committee on 26 March.²⁸

The task of the Committee was to express opinion on the proposed changes in the form of recommendation to accept or reject them by the National Assembly.

In the course of reviewing the proposed Presidential changes, a wide exchange of viewpoints was brought about by the wording concerning the armed forces, State-Church relations, proposal to add a provision wherein freedoms and rights contained in the Constitution should not be interpreted in a manner that limits the human rights set forth in the Universal Declaration of Human Rights and other norms of international law, scope of parliamentary immunity, prohibition of connecting a parliamentary mandate with the performance of other functions, appointments to the highest military positions, appointments to the highest positions in the courts system and to the Constitutional Tribunal, responsibility of the government and members of government as well as limitations in imposing taxes and public levies.

²⁶ List of introduced amendments - see: Information, *Przegląd Sejmowy* 3(20)/97 p. 170 and subsequent pages.

²⁷ See - Constitution Drafts - 1993-1997, Part II, p. 315.

²⁸ Bulletin XLVI - This was the last meeting of the Commission.

Ultimately, the Commission proposed accepting most of the proposed changes, among which several were contained in the report²⁹ in the form of authentic amendments raised by the Presidential representatives influenced by arguments presented by members of the Committee.

The Committee report with the Presidential changes was reviewed by the National Assembly in the third reading on 2 April 1997.³⁰

As with the second reading, the Democratic Left Alliance, Polish Peasant Party, Union for Freedom and Union of Labour MPs supported the changes proposed by the President to an even larger degree. Representatives of the right wing groups were even more critical.

Among the proposed changes of a greater meaning, proposals referring to the Universal Declaration of Human Rights, introducing a more restrictive scope of parliamentary immunity, deleting the provision permitting a vote of no confidence for particular ministers were rejected. Also rejected was the proposal according to which the President could either accept dismissal of the government or dissolve the Sejm in the event of refusing the government a vote of confidence, as well as the proposal not to accept the final character of decisions of the Constitutional Tribunal.

Then the motion to accept in full the Constitution of the Republic of Poland together with accepted proposed changes raised by the President was subjected to a vote.

497 members of the National Assembly participated in the vote. A $\frac{2}{3}$ majority equated to 332. 451 National Assembly members voted to pass the Constitution, 40 were opposed, with 6 abstaining. This meant that the National Assembly adopted the Constitution of the Republic of Poland in a third reading by the required $\frac{2}{3}$ majority of votes.

Constitutional Referendum and Confirming Its Validity by the Supreme Court (25 May -15 July)

Undoubtedly, efforts to hold a constitutional referendum as soon as possible³¹ prompted the President to issue a decree to hold a referendum on the very day of the passing of the Constitution, namely the 2nd of April, setting the referendum date for the 25th of May.

The campaign preceding the referendum was characterized in part by very determined statements by opponents to the new Constitution. Some of them expanded a catastrophic vision of what would take place after the Constitution from the 2nd of April 1997 takes effect.

²⁹ Printed Document of the National Assembly No 17 and Constitution Drafts 1993-1997, Part II, p. 372

³⁰ Stenographic Report from the 4 seating of the National Assembly of 2 of April 1997.

³¹ It was often indicated in the statements and comments that the intention was to make a referendum before the visit of the Pope, J. Paul II in Poland which was announced for beginning of June.

Despite the very intensive political campaign as well as the clear polarization of positions, voting turnout has not been very high. 42,86% submitted valid voting cards, or 12 137 136 persons voted from among 28 319 650 persons entitled to vote.

Thus, the majority participating in the voting required by the Constitutional Act equated to 6 068 569. To the question: "Are you in favor of accepting the Constitution of the Republic of Poland passed by the National Assembly on the 2nd of April 1997?" 6 396 641 voters answered yes, or 328.072 more than the required minimum. 5 570 493 persons voted against the new Constitution.

433 protests were raised against the validity of the Constitutional referendum. After reviewing them, in a resolution dated 15 July 1997 the Supreme Court confirmed the validity of the Constitutional referendum conducted on 25 May 1997.³²

Signing, Publishing and Taking Effect of the Constitution of the Republic of Poland of the 2nd April 1997 (16 July - 17 October 1997)

The President of the Republic of Poland, A. Kwasniewski signed the new Constitution on 16 July 1997 during a ceremony in the Presidential Palace. The Constitution was published on the same date in *Dziennik Ustaw* [Journal of Laws] no. 78.

The Constitution of the Republic of Poland dated the 2nd of April 1997 took effect three months after being published, on 17 October 1997. On this date the Constitutional Act dated 17 October 1992 (so called "Small Constitution") and Constitutional Regulations from 1952 maintained by virtue thereof ceased to be in force.

³² Bulletin XLVI.

ACTES LÉGISLATIFS * LEGISLATIVE ACTS

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THE CONSTITUTION OF THE REPUBLIC OF POLAND

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Warsaw 1997

Having regard for the existence and future of our Homeland,
Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate,
We, the Polish Nation - all citizens of the Republic,
Both those who believe in God as the source of truth, justice, good and beauty,
As well as those not sharing such faith but respecting those universal values as arising from other sources,
Equal in rights and obligations towards the common good - Poland,
Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values,
Recalling the best traditions of the First and the Second Republic,
Obliged to bequeath to future generations all that is valuable from our over one, thousand years' heritage,
Bound in community with our compatriots dispersed throughout the world,
Aware of the need for cooperation with all countries for the good of the Human Family,
Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland,
Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies,
Recognizing our responsibility before God or our own consciences,
Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities.
We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland.

* The Institute of Legal Studies of the Polish Academy of Sciences and the Editor of the present issue wish to express thanks to the Chancellery of the Parliament (Department of Studies and Expertises) for permission to use for publication the English translation of the Constitution of the Republic of Poland, elaborated within the Chancellery.

Chapter**I****THE REPUBLIC****Article 1**

The Republic of Poland shall be the common good of all its citizens.

Article 2

The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.

Article 3

The Republic of Poland shall be a unitary State.

Article 4

1. Supreme power in the Republic of Poland shall be vested in the Nation.
2. The Nation shall exercise such power directly or through their representatives.

Article 5

The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.

Article 6

1. The Republic of Poland shall provide conditions for the people's equal access to cultural goods which are the source of the Nation's identity, continuity and development.
2. The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage.

Article 7

The organs of public authority shall function on the basis of, and within the limits of, the law.

Article 8

1. The Constitution shall be the supreme law of the Republic of Poland.
2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

Article 9

The Republic of Poland shall respect international law binding upon it.

Article 10

1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.
2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Article 11

1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the

equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.

2. The financing of political parties shall be open to public inspection.

Article 12

The Republic of Poland shall ensure freedom for the creation and functioning of trade unions, socio-occupational organizations of farmers, societies, citizens' movements, other voluntary associations and foundations.

Article 13

Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden.

Article 14

The Republic of Poland shall ensure freedom of the press and other means of social communication.

Article 15

1. The territorial system of the Republic of Poland shall ensure the decentralization of public power.
2. The basic territorial division of the State shall be determined by statute, allowing for the social, economic and cultural ties which ensure to the territorial units the capacity to perform their public duties.

Article 16

1. The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.
2. Local self-government shall participate in the exercise of public power. The substantial part of public duties which local self-government is empowered to discharge by statute shall be done in its own name and under its own responsibility.

Article 17

1. By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.
2. Other forms of self-government shall also be created by means of statute. Such self-governments shall not infringe the freedom to practice a profession nor limit the freedom to undertake economic activity.

Article 18

Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.

Article 19

The Republic of Poland shall take special care of veterans of the struggle for independence, particularly war invalids.

Article 20

A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.

Article 21

1. The Republic of Poland shall protect ownership and the right of succession.
2. Expropriation may be allowed solely for public purposes and for just compensation.

Article 22

Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.

Article 23

The basis of the agricultural system of the State shall be the family farm. This principle shall not infringe the provisions of Articles 21 and 22.

Article 24

Work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work.

Article 25

1. Churches and other religious organizations shall have equal rights.
2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.
3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good.
4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.
5. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their appropriate representatives and the Council of Ministers.

Article 26

1. The Armed Forces of the Republic of Poland shall safeguard the independence and territorial integrity of the State, and shall ensure the security and inviolability of its borders.
2. The Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic control.

Article 27

Polish shall be the official language in the Republic of Poland. This provision shall not infringe upon national minority rights resulting from ratified international agreements.

Article 28

1. The image of a crowned white eagle upon a red field shall be the coat-of-arms of the Republic of Poland.
2. White and red shall be the colours of the Republic of Poland.

3. “Dąbrowski’s Mazurka” shall be the national anthem of the Republic of Poland.
4. The coat-of-arms, colours and national anthem of the Republic of Poland shall be subject to legal protection.
5. Details concerning the coat-of-arms, colours and national anthem shall be specified by statute.

Article 29

Warsaw shall be the capital of the Republic of Poland.

Chapter II

THE FREEDOMS, RIGHTS AND OBLIGATIONS OF PERSONS AND CITIZENS

GENERAL PRINCIPLES

Article 30

The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Article 31

1. Freedom of the person shall receive legal protection.
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.
3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Article 32

1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Article 33

1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.
2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

Article 34

1. Polish citizenship shall be acquired by birth to parents being Polish citizens. Other methods of acquiring Polish citizenship shall be specified by statute.
2. A Polish citizen shall not lose Polish citizenship except by renunciation thereof.

Article 35

1. The Republic of Poland shall ensure Polish citizens belonging to national or ethnic minorities the freedom to maintain and develop their own language, to maintain customs and traditions, and to develop their own culture.
2. National and ethnic minorities shall have the right to establish educational and cultural institutions, institutions designed to protect religious identity, as well as to participate in the resolution of matters connected with their cultural identity.

Article 36

A Polish citizen shall, during a stay abroad, have the right to protection by the Polish State.

Article 37

1. Anyone, being under the authority of the Polish State, shall enjoy the freedoms and rights ensured by the Constitution.
2. Exemptions from this principle with respect to foreigners shall be specified by statute.

PERSONAL FREEDOMS AND RIGHTS

Article 38

The Republic of Poland shall ensure the legal protection of the life of every human being.

Article 39

No one shall be subjected to scientific experimentation, including medical experimentation, without his voluntary consent.

Article 40

No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.

Article 41

1. Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute.
2. Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty.
3. Every detained person shall be informed, immediately and in a manner comprehensible to him,¹ of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within forty-eight hours of the time of being given over to the court's disposal.
4. Anyone deprived of liberty shall be treated in a humane manner.
5. Anyone who has been unlawfully deprived of liberty shall have a right to compensation.

¹ Whenever the male term is used in this text, it should be understood to refer also to the female - unless the context requires otherwise. This note is not part of the text of the Constitution

Article 42

1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.
2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.
3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

Article 43

There shall be no statute of limitation regarding war crimes and crimes against humanity.

Article 44

The statute of limitation regarding actions connected with offences committed by, or by order of, public officials and which have not been prosecuted for political reasons, shall be extended for the period during which such reasons existed.

Article 45

1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.
2. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly.

Article 46

Property may be forfeited only in cases specified by statute, and only by virtue of a final judgment of a court.

Article 47

Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

Article 48

1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions.
2. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.

Article 49

The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute.

Article 50

The inviolability of the home shall be ensured. Any search of a home, premises or vehicles may be made only in cases and in a manner specified by statute.

Article 51

1. No one may be obliged, except on the basis of statute, to disclose information concerning his person.
2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.
3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.
4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.
5. Principles and procedures for collection of and access to information shall be specified by statute.

Article 52

1. Freedom of movement as well as the choice of place of residence and sojourn within the territory of the Republic of Poland shall be ensured to everyone.
2. Everyone may freely leave the territory of the Republic of Poland.
3. The freedoms specified in paras. 1 and 2 above may be subject to limitations specified by statute.
4. A Polish citizen may not be expelled from the country nor forbidden to return to it.
5. Anyone whose Polish origin has been confirmed in accordance with statute may settle permanently in Poland.

Article 53

1. Freedom of faith and religion shall be ensured to everyone.
2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.
3. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.
4. The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed thereby.
5. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others.
6. No one shall be compelled to participate or not participate in religious practices.
7. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief.

Article 54

1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.
2. Preventive censorship of the means of social communication and the licensing of the press shall be forbidden. Statutes may require the receipt of a permit for the operation of a radio or television station.

Article 55

1. The extradition of a Polish citizen shall be forbidden.
2. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.
3. The courts shall adjudicate on the admissibility of extradition.

Article 56

1. Foreigners shall have a right of asylum in the Republic of Poland in accordance with principles specified by statute.
2. Foreigners who, in the Republic of Poland, seek protection from oppression, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party.

POLITICAL FREEDOMS AND RIGHTS

Article 57

The freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.

Article 58

1. The freedom of association shall be guaranteed to everyone.
2. Associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited. The courts shall adjudicate whether to permit an association to register or to prohibit an association from such activities.
3. Statutes shall specify types of associations requiring court registration, a procedure for such registration and the forms of supervision of such associations.

Article 59

1. The freedom of association in trade unions, socio-occupational organizations of farmers, and in employers' organizations shall be ensured.
2. Trade unions and employers and their organizations shall have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements.
3. Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields.
4. The scope of freedom of association in trade unions and in employers' organizations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party.

Article 60

Polish citizens enjoying full public rights shall have a right of access to the public functions based on the principle of equality.

Article 61

1. A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional or-

gans and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.

2. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.
3. Limitations upon the rights referred to in paras. 1 and 2 above, may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.
4. The procedure for the provision of information, referred to in paras. 1 and 2 above shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure.

Article 62

1. If, no later than on the day of vote, he has attained 18 years of age, Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local self-government.
2. Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote.

Article 63

Everyone shall have the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person - with his consent - to organs of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by statute.

ECONOMIC, SOCIAL AND CULTURAL FREEDOMS AND RIGHTS

Article 64

1. Everyone shall have the right to ownership, other property rights and the right of succession.
2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.
3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

Article 65

1. Everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work. Exceptions shall be specified by statute.
2. An obligation to work may be imposed only by statute.
3. The permanent employment of children under 16 years of age shall be forbidden. The types and nature of admissible employments shall be specified by statute.
4. A minimum level of remuneration for work, or the manner of setting its levels shall be specified by statute.
5. Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention.

Article 66

1. Everyone shall have the right to safe and hygienic conditions of work. The methods of implementing this right and the obligations of employers shall be specified by statute.
2. An employee shall have the right to statutorily specified days free from work as well as annual paid holidays; the maximum permissible hours of work shall be specified by statute.

Article 67

1. A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.
2. A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute.

Article 68

1. Everyone shall have the right to have his health protected.
2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.
3. Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.
4. Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.
5. Public authorities shall support the development of physical culture, particularly amongst children and young persons.

Article 69

Public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication.

Article 70

1. Everyone shall have the right to education. Education to 18 years of age shall be compulsory. The manner of fulfilment of schooling obligations shall be specified by statute.
2. Education in public schools shall be without payment. Statutes may allow for payments for certain services provided by public institutions of higher education.
3. Parents shall have the right to choose schools other than public for their children. Citizens and institutions shall have the right to establish primary and secondary schools and institutions of higher education and educational development institutions. The conditions for establishing and operating non-public schools, the participation of public authorities in their financing, as well as the principles of educational supervision of such schools and educational development institutions, shall be specified by statute.
4. Public authorities shall ensure universal and equal access to education for citizens. To this end, they shall establish and support systems for individual financial and organizational assistance to pupils and students. The conditions for providing of such assistance shall be specified by statute.
5. The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute.

Article 71

1. The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances - particularly

those with many children or a single parent - shall have the right to special assistance from public authorities.

2. A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.

Article 72

1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.
2. A child deprived of parental care shall have the right to care and assistance provided by public authorities.
3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.
4. The competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute.

Article 73

The freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the freedom to teach and to enjoy the products of culture, shall be ensured to everyone.

Article 74

1. Public authorities shall pursue policies ensuring the ecological security of current and future generations.
2. Protection of the environment shall be the duty of public authorities.
3. Everyone shall have the right to be informed of the quality of the environment and its protection.
4. Public authorities shall support the activities of citizens to protect and improve the quality of the environment.

Article 75

1. Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combatting homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.
2. Protection of the rights of tenants shall be established by statute.

Article 76

Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute.

MEANS FOR THE DEFENCE OF FREEDOMS AND RIGHTS

Article 77

1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.
2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

Article 78

Each party shall have the right to appeal against judgments and decisions made at first stage. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

Article 79

1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.
2. The provisions of para. 1 above shall not relate to the rights specified in Article 56.

Article 80

In accordance with principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority.

Article 81

The rights specified in Article 65, paras. 4 and 5, Article 66, Article 69, Article 71 and Articles 74-76, may be asserted subject to limitations specified by statute.

OBLIGATIONS

Article 82

Loyalty to the Republic of Poland, as well as concern for the common good, shall be the duty of every Polish citizen.

Article 83

Everyone shall observe the law of the Republic of Poland.

Article 84

Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute.

Article 85

1. It shall be the duty of every Polish citizen to defend the Homeland.
2. The nature of substitute service shall be specified by statute.
3. Any citizen whose religious convictions or moral principles do not allow him to perform military service may be obliged to perform substitute service in accordance with principles specified by statute.

Article 86

Everyone shall care for the quality of the environment and shall be held responsible for causing its degradation. The principles of such responsibility shall be specified by statute.

Chapter III

SOURCES OF LAW

Article 87

1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.
2. Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

Article 88

1. The condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof.
2. The principles of and procedures for promulgation of normative acts shall be specified by statute.
3. International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.

Article 89

1. Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute - if such agreement concerns:
 - 1) peace, alliances, political or military treaties;
 - 2) freedoms, rights or obligations of citizens, as specified in the Constitution;
 - 3) the Republic of Poland's membership in an international organization;
 - 4) considerable financial responsibilities imposed on the State;
 - 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.
2. The President of the Council of Ministers (the Prime Minister) shall inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute.
3. The principles of and procedures for the conclusion and renunciation of international agreements shall be specified by statute.

Article 90

1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.
2. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.
4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Article 91

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

Article 92

1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.
2. An organ authorized to issue a regulation shall not delegate its competence, referred to in para. 1 above, to another organ.

Article 93

1. Resolutions of the Council of Ministers and orders of the Prime Minister shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such act.
2. Orders shall only be issued on the basis of statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects.
3. Resolutions and orders shall be subject to scrutiny regarding their compliance with universally binding law.

Article 94

On the basis of and within limits specified by statute, organs of local self-government and territorial organs of government administration shall enact local legal enactments applicable to their territorially defined areas of operation. The principles of and procedures for enacting local legal enactments shall be specified by statute.

Chapter IV

THE SEJM AND THE SENATE

Article 95

1. Legislative power in the Republic of Poland shall be exercised by the Sejm and the Senate.
2. The Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes.

ELECTIONS AND THE TERM OF OFFICE

Article 96

1. The Sejm shall be composed of 460 Deputies.

2. Elections to the Sejm shall be universal, equal, direct and proportional and shall be conducted by secret ballot.

Article 97

1. The Senate shall be composed of 100 Senators.
2. Elections to the Senate shall be universal, direct and shall be conducted by secret ballot.

Article 98

1. The Sejm and the Senate shall be chosen each for a 4-year term of office. The term of office of the Sejm and Senate shall begin on the day on which the Sejm assembles for its first sitting and shall continue until the day preceding the assembly of the Sejm of the succeeding term of office.
2. Elections to the Sejm and the Senate shall be ordered by the President of the Republic no later than 90 days before the expiry of the 4 year period beginning with the commencement of the Sejm's and Senate's term of office, and he shall order such elections to be held on a non-working day which shall be within the 30 day period before the expiry of the 4 year period beginning from the commencement of the Sejm's and Senate's term of office.
3. The Sejm may shorten its term of office by a resolution passed by a majority of at least two-thirds of the votes of the statutory number of Deputies. Any shortening of the term of office of the Sejm shall simultaneously mean a shortening of the term of office of the Senate. The provisions of para. 5 above shall apply as appropriate.
4. The President of the Republic, after seeking the opinion of the Marshal of the Sejm and the Marshal of the Senate, may, in those instances specified in the Constitution, order shortening of the Sejm's term of office. Whenever the term of office of the Sejm has been so shortened, then the term of office of the Senate shall also be shortened.
5. The President of the Republic, when ordering the shortening of the Sejm's term of office, shall simultaneously order elections to the Sejm and the Senate, and shall order them to be held on a day falling no later than within the 45 day period from the day of the official announcement of Presidential order on the shortening of the Sejm's term of office, the President of the Republic shall summon the first sitting of the newly elected Sejm no later than the 15th day after the day on which the elections were held.
6. In the event of shortening of the Sejm's term of office, the provisions of para. 1 above shall apply as appropriate.

Article 99

1. Every citizen having the right to vote, who, no later than on the day of the elections, has attained the age of 21 years, shall be eligible to be elected to the Sejm.
2. Every citizen having the right to vote, who, no later than on the day of the elections, has attained the age of 30 years, shall be eligible to be elected to the Senate.

Article 100

1. Candidates for Deputies and Senators may be nominated by political parties or voters.
2. No one may stand for election to the Sejm and the Senate at the same time.
3. The principles of and procedures for the nomination of candidates and the conduct of the elections, as well as the requirements for validity of the elections, shall be specified by statute.

Article 101

1. The Supreme Court shall adjudicate upon the validity of the elections to the Sejm and the Senate.

2. A voter shall have the right to submit a complaint to the Supreme Court against the validity of the elections in accordance with principles specified by statute.

DEPUTIES AND SENATORS

Article 102

No one may be a Deputy and Senator at the same time.

Article 103

1. The mandate of a Deputy shall not be held jointly with the office of the President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the Commissioner for Children's Rights or their deputies, a member of the Council for Monetary Policy, a member of the National Council of Radio Broadcasting and Television, ambassador, or with employment in the Chancellery of the Sejm, Chancellery of the Senate, Chancellery of the President of the Republic, or with employment in government administration. This prohibition shall not apply to members of the Council of Ministers and secretaries of state in government administration.
2. No judge, public prosecutor, officer of the civil service, soldier on active military service or functionary of the police or of the services of State protection shall exercise the mandate of a Deputy.
3. Other instances prohibiting the holding of a mandate of a Deputy or prohibiting the exercise of a mandate jointly with other public functions may be specified by statute.

Article 104

1. Deputies shall be representatives of the Nation. They shall not be bound by any instructions of the electorate.
2. Deputies, before the commencement of the exercise of the mandate, shall take the following oath in the presence of the Sejm:
"I do solemnly swear to perform my duties to the Nation diligently and conscientiously, to safeguard the sovereignty and interests of the State, to do all within my power for the prosperity of the Homeland and the well-being of its citizens, and to observe the Constitution and other laws of the Republic of Poland."

The oath may also be taken with the additional sentence "So help me, God."

3. A refusal to take the oath shall be deemed to be a renunciation of the mandate.

Article 105

1. A Deputy shall not be held accountable for his activity performed within the scope of a Deputy's mandate during the term thereof nor after its completion. Regarding such activities, a Deputy can only be held accountable before the Sejm and, in a case where he has infringed the rights of third parties, he may only be proceeded against before a court with the consent of the Sejm.
2. From the day of announcement of the results of the elections until the day of the expiry of his mandate, a Deputy shall not be subjected to criminal accountability without the consent of the Sejm.
3. Criminal proceedings instituted against a person before the day of his election as Deputy, shall be suspended at the request of the Sejm until the time of expiry of the mandate. In such instance, the statute of limitation with respect to criminal proceedings shall be extended for the equivalent time.

4. A Deputy may consent to be brought to criminal accountability. In such instance, the provisions of paras. 2 and 3 shall not apply.
5. A Deputy shall be neither detained nor arrested without the consent of the Sejm, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. Any such detention shall be immediately communicated to the Marshal of the Sejm, who may order an immediate release of the Deputy.
6. Detailed principles of and procedures for bringing Deputies to criminal accountability shall be specified by statute.

Article 106

Conditions appropriate to the effective discharge of their duties by the Deputies as well as for defence of their rights resulting from the exercise of their mandate shall be specified by statute.

Article 107

1. Deputies shall not be permitted, to the extent specified by statute, to perform any business activity involving any benefit derived from the property of the State Treasury or local self-government or to acquire such property.
2. In respect of any breach of the prohibition specified in para. 1 above, a Deputy shall, by resolution of the Sejm adopted on a motion of the Marshal of the Sejm, be brought to accountability before the Tribunal of State which shall adjudicate upon forfeiture of the mandate.

Article 108

The provisions of Articles 103-107 shall apply, as appropriate, to Senators.

ORGANIZATION AND FUNCTIONING

Article 109

1. The Sejm and the Senate shall debate in the course of sittings.
2. The first sitting of the Sejm and Senate shall be summoned by the President of the Republic to be held on a day within 30 days following the day of the elections, except for instances specified in Article 98, paras. 3 and 5.

Article 110

1. The Sejm shall elect from amongst its members a Marshal of the Sejm and Vice-Marshals.
2. The Marshal of the Sejm shall preside over the debates of the Sejm, safeguard the rights of the Sejm as well as represent the Sejm in external matters.
3. The Sejm shall appoint standing committees and may also appoint special committees.

Article 111

1. The Sejm may appoint an investigative committee to examine a particular matter.
2. The procedures for work by an investigative committee shall be specified by statute.

Article 112

The internal organization and conduct of work of the Sejm and the procedure for appointment and operation of its organs as well as the manner of performance of obligations, both constitutional and statutory, by State organs in relation to the Sejm, shall be specified in the rules of procedure adopted by the Sejm.

Article 113

Sittings of the Sejm shall be open to the public. The Sejm may resolve, by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies, to hold a debate in secret.

Article 114

1. In instances specified in the Constitution, the Sejm and the Senate sitting in joint session, shall act as the National Assembly, with the Marshal of the Sejm presiding or, in his absence, the Marshal of the Senate.
2. The National Assembly shall adopt its own rules of procedure.

Article 115

1. The Prime Minister and other members of the Council of Ministers shall furnish answers to interpellations and Deputies' questions within 21 days.
2. The Prime Minister and other members of the Council of Ministers shall furnish answers to matters raised in the course of each sitting of the Sejm.

Article 116

1. The Sejm shall declare, in the name of the Republic of Poland, a state of war and the conclusion of peace.
2. The Sejm may adopt a resolution on a state of war only in the event of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreements. If the Sejm cannot assemble for a sitting, the President of the Republic may declare a state of war.

Article 117

The principles for deployment of the Armed Forces beyond the borders of the Republic of Poland shall be specified by a ratified international agreement or by statute. The principles for the presence of foreign troops on the territory of the Republic of Poland and the principles for their movement within that territory shall be specified by ratified agreements or statutes.

Article 118

1. The right to introduce legislation shall belong to Deputies, to the Senate, to the President of the Republic and to the Council of Ministers.
2. The right to introduce legislation shall also belong to a group of at least 100,000 citizens having the right to vote in elections to the Sejm. The procedure in such matter shall be specified by statute.
3. Sponsors, when introducing a bill to the Sejm, shall indicate the financial consequences of its implementation.

Article 119

1. The Sejm shall consider bills in the course of three readings.
2. The right to introduce amendments to a bill in the course of its consideration by the Sejm shall belong to its sponsor, Deputies and the Council of Ministers.
3. The Marshal of the Sejm may refuse to put to a vote any amendment which has not previously been submitted to a committee.
4. The sponsor may withdraw a bill in the course of legislative proceedings in the Sejm until the conclusion of its second reading.

Article 120

The Sejm shall pass bills by a simple majority vote, in the presence of at least half of the statutory number of Deputies, unless the Constitution provides for another majority. The same procedure shall be applied by the Sejm in adoption of resolutions, unless a statute or a resolution of the Sejm provide otherwise.

Article 121

1. A bill passed by the Sejm shall be submitted to the Senate by the Marshal of the Sejm.
2. The Senate, within 30 days of submission of a bill, may adopt it without amendment, adopt amendments or resolve upon its complete rejection. If, within 30 days following the submission of the bill, the Senate fails to adopt an appropriate resolution, the bill shall be considered adopted according to the wording submitted by the Sejm.
3. A resolution of the Senate rejecting a bill, or an amendment proposed in the Senate's resolution, shall be considered accepted unless the Sejm rejects it by an absolute majority vote in the presence of at least half of the statutory number of Deputies.

Article 122

1. After the completion of the procedure specified in Article 121, the Marshal of the Sejm shall submit an adopted bill to the President of the Republic for signature.
2. The President of the Republic shall sign a bill within 21 days of its submission and shall order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).
3. The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President of the Republic shall not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution.
4. The President of the Republic shall refuse to sign a bill which the Constitutional Tribunal has judged not to be in conformity to the Constitution. If, however, the non-conformity to the Constitution relates to particular provisions of the bill, and the Tribunal has not judged that they are inseparably connected with the whole bill, then, the President of the Republic, after seeking the opinion of the Marshal of the Sejm, shall sign the bill with the omission of those provisions considered as being in non-conformity to the Constitution or shall return the bill to the Sejm for the purpose of removing the non-conformity.
5. If the President of the Republic has not made reference to the Constitutional Tribunal in accordance with para. 3, he may refer the bill, with reasons given, to the Sejm for its reconsideration. If the said bill is repassed by the Sejm by a three-fifths majority vote in the presence of at least half of the statutory number of Deputies, then, the President of the Republic shall sign it within 7 days and shall order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*). If the said bill has been repassed by the Sejm, the President of the Republic shall have no right to refer it to the Constitutional Tribunal in accordance with the procedure prescribed in para. 3.
6. Any such reference by the President of the Republic to the Constitutional Tribunal for an adjudication upon the conformity of a statute to the Constitution, or any application for reconsideration of a bill, shall suspend the period of time allowed for its signature, specified in para. 2, above.

Article 123

1. The Council of Ministers may classify a bill adopted by itself as urgent, with the exception of tax bills, bills governing elections to the Presidency of the Republic of Poland, to the Sejm, to the Senate and to organs of local self-government, bills governing the structure and jurisdiction of public authorities, and also drafts of law codes.

2. The rules of procedure of the Sejm and the rules of procedure of the Senate shall define the modifications in the legislative procedure when a bill has been classified as urgent.
3. In the legislative procedure in relation to a bill classified as urgent, the time period for its consideration by the Senate shall be 14 days and the period for its signature by the President of the Republic shall be 7 days.

Article 124

The provisions of Article 110, Article 112, Article 113 and Article 120 shall apply, as appropriate, to the Senate.

REFERENDUM

Article 125

1. A nationwide referendum may be held in respect of matters of particular importance to the State.
2. The right to order a nationwide referendum shall be vested in the Sejm, to be taken by an absolute majority of votes in the presence of at least half of the statutory number of Deputies, or in the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators.
3. A result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it.
4. The validity of a nationwide referendum and the referendum referred to in Article 235, para. 6, shall be determined by the Supreme Court.
5. The principles of and procedures for the holding of a referendum shall be specified by statute.

Chapter V

THE PRESIDENT OF THE REPUBLIC OF POLAND

Article 126

1. The President of the Republic of Poland shall be the supreme representative of the Republic of Poland and the guarantor of the continuity of State authority.
2. The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory.
3. The President shall exercise his duties within the scope of and in accordance with the principles specified in the Constitution and statutes.

Article 127

1. The President of the Republic shall be elected by the Nation, in universal, equal and direct elections, conducted by secret ballot.
2. The President of the Republic shall be elected for a 5-year term of office and may be re-elected only for one more term.
3. Only a Polish citizen who, no later than the day of the elections, has attained 35 years of age and has a full electoral franchise in elections to the Sejm, may be elected President of

the Republic. Any such candidature shall be supported by the signatures of at least 100,000 citizens having the right to vote in elections to the Sejm.

4. A candidate who has received more than half of the valid votes shall be considered elected President of the Republic. If none of the candidates has received the required majority of votes, then a repeat ballot shall be held on the 14th day after the first vote.
5. The two candidates who have received the largest number of votes in the first ballot shall participate in a repeat ballot. If one of the two such candidates withdraws his consent to candidacy, forfeits his electoral rights or duties, he shall be replaced in the repeat ballot by the candidate who received the next highest consecutive number of votes in the first ballot. In such case, the date of the repeat ballot shall be extended by a further 14 days.
6. The candidate who receives the higher number of votes in the repeat ballot shall be elected President of the Republic.
7. The principles of and procedure for nominating candidates and conducting the elections, as well as the requirements for validity of the election of the President of the Republic, shall be specified by statute.

Article 128

1. The term of office of the President of the Republic shall commence on the date of his assuming such office.
2. The election of the President of the Republic shall be ordered by the Marshal of the Sejm to be held on a day no sooner than 100 days and no later than 75 days before expiry of the term of office of the serving President of the Republic, and in the event of the office of President of the Republic falling vacant - no later than the 14th day thereafter, specifying the date of the election which shall be on a non-working day and within a period of 60 days of the day of ordering the election.

Article 129

1. The Supreme Court shall adjudicate upon the validity of the election of the President of the Republic.
2. A voter shall have the right to submit a complaint to the Supreme Court concerning the validity of the election of the President of the Republic in accordance with principles specified by statute.
3. In the event of the election of the President of the Republic being judged invalid, a new election shall be held in accordance with the principles prescribed in Article 128, para. 2 in relation to a vacancy in the office of President of the Republic.

Article 130

The President of the Republic shall assume office upon taking the following oath in the presence of the National Assembly:

“Assuming, by the will of the Nation, the office of President of the Republic of Poland, I do solemnly swear to be faithful to the provisions of the Constitution; I pledge that I shall steadfastly safeguard the dignity of the Nation, the independence and security of the State, and also that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation.”

The oath may also be taken with the additional sentence “So help me, God.”

Article 131

1. If the President of the Republic is temporarily unable to discharge the duties of his office, he shall communicate this fact to the Marshal of the Sejm, who shall temporarily assume the duties of the President of the Republic. If the President of the Republic is not in a position to inform the Marshal of the Sejm of his incapacity to discharge the duties of the

office, then the Constitutional Tribunal shall, on request of the Marshal of the Sejm, determine whether or not there exists an impediment to the exercise of the office by the President of the Republic. If the Constitutional Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic.

2. The Marshal of the Sejm shall, until the time of election of a new President of the Republic, temporarily discharge the duties of the President of the Republic in the following instances:
 - 1) the death of the President of the Republic;
 - 2) the President's resignation from office;
 - 3) judicial declaration of the invalidity of the election to the Presidency or other reasons for not assuming office following the election;
 - 4) a declaration by the National Assembly of the President's permanent incapacity to exercise his duties due to the state of his health; such declaration shall require a resolution adopted by a majority vote of at least two-thirds of the statutory number of members of the National Assembly;
 - 5) dismissal of the President of the Republic from office by a judgment of the Tribunal of State.
3. If the Marshal of the Sejm is unable to discharge the duties of the President of the Republic, such duties shall be discharged by the Marshal of the Senate.
4. A person discharging the duties of the President of the Republic shall not shorten the term of office of the Sejm.

Article 132

The President of the Republic shall hold no other offices nor discharge any public functions, with the exception of those connected with the duties of his office.

Article 133

1. The President of the Republic, as representative of the State in foreign affairs, shall:
 - 1) ratify and renounce international agreements, and shall notify the Sejm and the Senate thereof;
 - 2) appoint and recall the plenipotentiary representatives of the Republic of Poland to other states and to international organizations;
 - 3) receive the Letters of Credence and recall of diplomatic representatives of other states and international organizations accredited to him.
2. The President of the Republic, before ratifying an international agreement may refer it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution.
3. The President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy.

Article 134

1. The President of the Republic shall be the Supreme Commander of the Armed Forces of the Republic of Poland.
2. The President of the Republic, in times of peace, shall exercise command over the Armed Forces through the Minister of National Defence.
3. The President of the Republic shall appoint, for a specified period of time, the Chief of the General Staff and commanders of branches of the Armed Forces. The duration of their term of office, the procedure for and terms of their dismissal before the end thereof, shall be specified by statute.

4. The President of the Republic, for a period of war, shall appoint the Commander-in-Chief of the Armed Forces on request of the Prime Minister. He may dismiss the Commander-in-Chief of the Armed Forces in accordance with the same procedure. The authority of the Commander-in-Chief of the Armed Forces, as well as the principle of his subordination to the constitutional organs of the Republic of Poland, shall be specified by statute.
5. The President of the Republic, on request of the Minister of National Defence, shall confer military ranks as specified by statute.
6. The authority of the President of the Republic, regarding his supreme command of the Armed Forces, shall be specified in detail by statute.

Article 135

The advisory organ to the President of the Republic regarding internal and external security of the State shall be the National Security Council.

Article 136

In the event of a direct external threat to the State, the President of the Republic shall, on request of the Prime Minister, order a general or partial mobilization and deployment of the Armed Forces in defence of the Republic of Poland.

Article 137

The President of the Republic shall grant Polish citizenship and shall give consent for renunciation of Polish citizenship.

Article 138

The President of the Republic shall confer orders and decorations.

Article 139

The President of the Republic shall have the power of pardon. The power of pardon may not be extended to individuals convicted by the Tribunal of State.

Article 140

The President of the Republic may deliver a Message to the Sejm, to the Senate or to the National Assembly. Such Message shall not be a subject of debate.

Article 141

1. The President of the Republic may, regarding particular matters, convene the Cabinet Council. The Cabinet Council shall be composed of the Council of Ministers whose debates shall be presided over by the President of the Republic.
2. The Cabinet Council shall not possess the competence of the Council of Ministers.

Article 142

1. The President of the Republic shall issue regulations and executive orders in accordance with the principles specified in Articles 92 and 93.
2. The President of the Republic shall issue decisions within the scope of discharge of his other authorities.

Article 143

The Presidential Chancellery shall be the organ of assistance to the President of the Republic. The President of the Republic shall establish the statute of the Presidential Chancellery and shall appoint and dismiss its Chief.

Article 144

1. The President of the Republic, exercising his constitutional and statutory authority, shall issue Official Acts.
2. Official Acts of the President shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefor to the Sejm.
3. The provisions of para. 2 above shall not relate to:
 - 1) proclaiming elections to the Sejm and to the Senate;
 - 2) summoning the first sitting of a newly elected Sejm and Senate;
 - 3) shortening of the term of office of the Sejm in the instances specified in the Constitution;
 - 4) introducing legislation;
 - 5) proclaiming the holding of a nationwide referendum;
 - 6) signing or refusing to sign a bill;
 - 7) ordering the promulgation of a statute or an international agreement in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*);
 - 8) delivering a Message to the Sejm, to the Senate or to the National Assembly;
 - 9) making a referral to the Constitutional Tribunal;
 - 10) requesting the Supreme Chamber of Control to carry out an audit;
 - 11) nominating and appointing the Prime Minister;
 - 12) accepting resignation of the Council of Ministers and obliging it to temporarily continue with its duties;
 - 13) applying to the Sejm to bring a member of the Council of Ministers to responsibility before the Tribunal of State;
 - 14) dismissing a minister in whom the Sejm has passed a vote of no confidence;
 - 15) convening the Cabinet Council;
 - 16) conferring orders and decorations;
 - 17) appointing judges;
 - 18) exercising the power of pardon;
 - 19) granting Polish citizenship and giving consent for renunciation of Polish citizenship;
 - 20) appointing the First President of the Supreme Court;
 - 21) appointing the President and Vice-President of the Constitutional Tribunal;
 - 22) appointing the President of the Chief Administrative Court;
 - 23) appointing the presidents of the Supreme Court and vice-presidents of the Chief Administrative Court;
 - 24) requesting the Sejm to appoint the President of the National Bank of Poland;
 - 25) appointing the members of the Council for Monetary Policy;
 - 26) appointing and dismissing members of the National Security Council;
 - 27) appointing members of the National Council of Radio Broadcasting and Television;
 - 28) establishing the statute of the Presidential Chancellery and appointing or dismissing the Chief of the Presidential Chancellery;
 - 29) issuing orders in accordance with the principles specified in Article 93;
 - 30) resigning from the office of President of the Republic.

Article 145

1. The President of the Republic may be held accountable before the Tribunal of State for an infringement of the Constitution or statute, or for commission of an offence.
2. Bringing an indictment against the President of the Republic shall be done by resolution of the National Assembly passed by a majority of at least two-thirds of the statutory number of members of the National Assembly, on the motion of at least 140 members of the Assembly.
3. On the day on which an indictment, to be heard before the Tribunal of State, is brought against the President of the Republic, he shall be suspended from discharging all functions of his office. The provisions of Article 131 shall apply as appropriate.

Chapter VI

THE COUNCIL OF MINISTERS AND GOVERNMENT ADMINISTRATION

Article 146

1. The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland.
2. The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local self-government.
3. The Council of Ministers shall manage the government administration.
4. To the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, shall:
 - 1) ensure the implementation of statutes;
 - 2) issue regulations;
 - 3) coordinate and supervise the work of organs of State administration;
 - 4) protect the interests of the State Treasury;
 - 5) adopt a draft State Budget;
 - 6) supervise the implementation of the State Budget and pass a resolution on the closing of the State's accounts and report on the implementation of the Budget;
 - 7) ensure the internal security of the State and public order;
 - 8) ensure the external security of the State;
 - 9) exercise general control in the field of relations with other States and international organizations;
 - 10) conclude international agreements requiring ratification as well as accept and renounce other international agreements;
 - 11) exercise general control in the field of national defence and annually specify the number of citizens who are required to perform active military service;
 - 12) determine the organization and the manner of its own work.

Article 147

1. The Council of Ministers shall be composed of the President of the Council of Ministers (Prime Minister) and ministers.
2. Vice-presidents of the Council of Ministers (Deputy Prime Ministers) may also be appointed within the Council of Ministers.

3. The Prime Minister and Deputy Prime Ministers may also discharge the functions of a minister.
4. The presidents of committees specified in statutes may also be appointed to membership in the Council of Ministers.

Article 148

1. The Prime Minister shall:
 - 1) represent the Council of Ministers;
 - 2) manage the work of the Council of Ministers;
 - 3) issue regulations;
 - 4) ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation;
 - 5) coordinate and control the work of members of the Council of Ministers;
 - 6) exercise, within the limits and by the means specified in the Constitution and statute, supervision of local self-government;
 - 7) be the official superior of employees of the government administration.

Article 149

1. Ministers shall direct a particular branch of government administration or perform tasks allocated to them by the Prime Minister. The scope of activity of a minister directing a branch of government administration shall be specified by statute.
2. A minister directing a branch of government administration shall issue regulations. The Council of Ministers, on the request of the Prime Minister, may repeal a regulation or order of a minister.
3. The provisions applicable to a minister directing a branch of government administration shall apply, as appropriate, to presidents of the committees referred to in Article 147, para. 4.

Article 150

A member of the Council of Ministers shall not perform any activity inconsistent with his public duties.

Article 151

The Prime Minister, Deputy Prime Ministers and ministers shall take the following oath in the presence of the President of the Republic:

“Assuming this office of Prime Minister (Deputy Prime Minister, minister) I do solemnly swear to be faithful to the provisions of the Constitution and other laws of the Republic of Poland, and that the good of the Homeland and the prosperity of its citizens shall forever remain my supreme obligation.”

The oath may also be taken with the additional sentence “So help me, God.”

Article 152

1. The voivode shall be the representative of the Council of Ministers in a voivodeship.
2. The procedure for appointment and dismissal, as well as the scope of activity, of a voivode shall be specified by statute.

Article 153

1. A corps of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations.
2. The Prime Minister shall be the superior of such corps of civil servants.

Article 154

1. The President of the Republic shall nominate a Prime Minister who shall propose the composition of a Council of Ministers. The President of the Republic shall, within 14 days of the first sitting of the Sejm or acceptance of the resignation of the previous Council of Ministers, appoint a Prime Minister together with other members of a Council of Ministers and accept the oaths of office of members of such newly appointed Council of Ministers.
2. The Prime Minister shall, within 14 days following the day of his appointment by the President of the Republic, submit a programme of activity of the Council of Ministers to the Sejm, together with a motion requiring a vote of confidence. The Sejm shall pass such vote of confidence by an absolute majority of votes in the presence of at least half of the statutory number of Deputies.
3. In the event that a Council of Ministers has not been appointed pursuant to para.1 above or has failed to obtain a vote of confidence in accordance with para. 2 above, the Sejm, within 14 days of the end of the time periods specified in paras 1 and 2, shall choose a Prime Minister as well as members of the Council of Ministers as proposed by him, by an absolute majority of votes in the presence of at least half of the statutory number of Deputies. The President of the Republic shall appoint the Council of Ministers so chosen and accept the oaths of office of its members.

Article 155

1. In the event that a Council of Ministers has not been appointed pursuant to the provisions of Article 154, para. 3, the President of the Republic shall, within a period of 14 days, appoint a Prime Minister and, on his application, other members of the Council of Ministers. The Sejm, within 14 days following the appointment of the Council of Ministers by the President of the Republic, shall hold, in the presence of at least half of the statutory number of Deputies, a vote of confidence thereto.
2. In the event that a vote of confidence has not been granted to the Council of Ministers pursuant to para. 1, the President of the Republic shall shorten the term of office of the Sejm and order elections to be held.

Article 156

1. The members of the Council of Ministers shall be accountable to the Tribunal of State for an infringement of the Constitution or statutes, as well as for the commission of an offence connected with the duties of his office.
2. On the motion of the President of the Republic or at least 115 Deputies, resolution to bring a member of the Council of Ministers to account before the Tribunal of State shall be passed by the Sejm by a majority of three-fifths of the statutory number of Deputies.

Article 157

1. The members of the Council of Ministers shall be collectively responsible to the Sejm for the activities of the Council of Ministers.
2. The members of the Council of Ministers shall be individually responsible to the Sejm for those matters falling within their competence or assigned to them by the Prime Minister.

Article 158

1. The Sejm shall pass a vote of no confidence by a majority of votes of the statutory number of Deputies, on a motion moved by at least 46 Deputies and which shall specify the name of a candidate for Prime Minister. If such a resolution has been passed by the Sejm, the President of the Republic shall accept the resignation of the Council of Ministers and appoint a new Prime Minister as chosen by the Sejm, and, on his application, the other members of the Council of Ministers and accept their oath of office.

2. A motion to pass a resolution referred to in para. 1 above, may be put to a vote no sooner than 7 days after it has been submitted. A subsequent motion of a like kind may be submitted no sooner than after the end of 3 months from the day the previous motion was submitted. A subsequent motion may be submitted before the end of 3 months if such motion is submitted by at least 115 Deputies.

Article 159

1. The Sejm may pass a vote of no confidence in an individual minister. A motion to pass such a vote of no confidence may be submitted by at least 69 Deputies. The provisions of Article 158, para. 2 shall apply as appropriate.
2. The President of the Republic shall recall a minister in whom a vote of no confidence has been passed by the Sejm by a majority of votes of the statutory number of Deputies.

Article 160

The Prime Minister may submit to the Sejm a motion requiring a vote of confidence in the Council of Ministers. A vote of confidence in the Council of Ministers shall be granted by a majority of votes in the presence of at least half of the statutory number of Deputies.

Article 161

The President of the Republic, on request of the Prime Minister, shall effect changes in the composition of the Council of Ministers.

Article 162

1. The Prime Minister shall submit the resignation of the Council of Ministers at the first sitting of a newly elected Sejm.
2. The Prime Minister shall also submit the resignation of the Council of Ministers in the following instances:
 - 1) when a vote of confidence in the Council of Ministers has not been passed by the Sejm;
 - 2) when a vote of no confidence has been passed against the Council of Ministers;
 - 3) when the Prime Minister himself has resigned from office.
3. The President of the Republic, when accepting the resignation of the Council of Ministers, shall oblige it to continue with its duties until a new Council of Ministers is appointed.
4. The President of the Republic may, in the case referred to in para. 2, subpara. 3 above, refuse to accept the resignation of the Council of Ministers.

Chapter VII

LOCAL SELF-GOVERNMENT

Article 163

Local self-government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities.

Article 164

1. The commune (*gmina*) shall be the basic unit of local self-government.
2. Other units of regional and/or local self-government shall be specified by statute.
3. The commune shall perform all tasks of local self-government not reserved to other units of local self-government.

Article 165

1. Units of local self-government shall possess legal personality. They shall have rights of ownership and other property rights.
2. The self-governing nature of units of local self-government shall be protected by the courts.

Article 166

1. Public duties aimed at satisfying the needs of a self-governing community shall be performed by units of local self-government as their direct responsibility.
2. If the fundamental needs of the State shall so require, a statute may instruct units of local self-government to perform other public duties. The mode of transfer and manner of performance of the duties so allocated shall be specified by statute.
3. The administrative courts shall settle jurisdictional disputes between units of local self-government and units of government administration.

Article 167

1. Units of local self-government shall be assured public funds adequate for the performance of the duties assigned to them.
2. The revenues of units of local self-government shall consist of their own revenues as well as general subsidies and specific grants from the State Budget.
3. The sources of revenues for units of local self-government shall be specified by statute.
4. Alterations to the scope of duties and authorities of units of local self-government shall be made in conjunction with appropriate alterations to their share of public revenues.

Article 168

To the extent established by statute, units of local self-government shall have the right to set the level of local taxes and charges.

Article 169

1. Units of local self-government shall perform their duties through constitutive and executive organs.
2. Elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot. The principles and procedures for submitting candidates and for the conduct of elections, as well as the requirements for the validity of elections, shall be specified by statute.
3. The principles and procedures for the election and dismissal of executive organs of units of local self-government shall be specified by statute.
4. The internal organizational structure of units of local self-government shall be specified, within statutory limits, by their constitutive organs.

Article 170

Members of a self-governing community may decide, by means of a referendum, matters concerning their community, including the dismissal of an organ of local self-government established by direct election. The principles of and procedures for conducting a local referendum shall be specified by statute.

Article 171

1. The legality of actions by a local self-government shall be subject to review.
2. The organs exercising review over the activity of units of local self-government shall be: the Prime Minister and voivodes and regarding financial matters - regional audit chambers.

3. On a motion of the Prime Minister, the Sejm may dissolve a constitutive organ of local self-government if it has flagrantly violated the Constitution or a statute.

Article 172

1. Units of local self-government shall have the right to associate.
2. A unit of local self-government shall have the right to join international associations of local and regional communities as well as cooperate with local and regional communities of other states.
3. The principles governing the exercise of the rights referred to in paras. 1 and 2 above by units of local self-government shall be specified by statute.

Chapter VIII

COURTS AND TRIBUNALS

Article 173

The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

Article 174

The courts and tribunals shall pronounce judgments in the name of the Republic of Poland.

Article 175

1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.
2. Extraordinary courts or summary procedures may be established only during a time of war.

Article 176

1. Court proceedings shall have at least two stages.
2. The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute.

Article 177

The common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts.

Article 178

1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.
2. Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.
3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

Article 179

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

Article 180

1. Judges shall not be removable.
2. Recall of a judge from office, suspension from office, removal to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.
3. A judge may be retired as a result of illness or infirmity which prevents him discharging the duties of his office. The procedure for doing so, as well as for appealing against such decision, shall be specified by statute.
4. A statute shall establish an age limit beyond which a judge shall proceed to retirement.
5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration.

Article 181

A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

Article 182

A statute shall specify the scope of participation by the citizenry in the administration of justice.

Article 183

1. The Supreme Court shall exercise supervision over common and military courts regarding judgments.
2. The Supreme Court shall also perform other activities specified in the Constitution and statutes.
3. The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Article 184

The Chief Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to statute of resolutions of organs of local self-government and normative acts of territorial organs of government administration.

Article 185

The President of the Chief Administrative Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Chief Administrative Court.

Article 186

1. The National Council of the Judiciary shall safeguard the independence of courts and judges.
2. The National Council of the Judiciary may make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.

Article 187

1. The National Council of the Judiciary shall be composed as follows:
 - 1) the First President of the Supreme Court, the Minister of Justice, the President of the Chief Administrative Court and an individual appointed by the President of the Republic;
 - 2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
 - 3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.
2. The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons.
3. The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.
4. The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

THE CONSTITUTIONAL TRIBUNAL

Article 188

The Constitutional Tribunal shall adjudicate regarding the following matters:

- 1) the conformity of statutes and international agreements to the Constitution;
- 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute,
- 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
- 4) the conformity to the Constitution of the purposes or activities of political parties;
- 5) complaints concerning constitutional infringements, as specified in Article 79, para. 1.

Article 189

The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State.

Article 190

1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.
2. Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*.
3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.
5. Judgments of the Constitutional Tribunal shall be made by a majority of votes.

Article 191

1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:
 - 1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights;
 - 2) the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
 - 3) the constitutive organs of units of local self-government;
 - 4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
 - 5) churches and religious organizations;
 - 6) the subjects referred to in Article 79 to the extent specified therein.
2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

Article 192

The following persons may make application to the Constitutional Tribunal in respect of matters specified in Article 189: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control.

Article 193

Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

Article 194

1. The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.
2. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

Article 195

1. Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.
2. Judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties.

3. Judges of the Constitutional Tribunal, during their term of office, shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges.

Article 196

A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The President of the Constitutional Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained.

Article 197

The organization of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute.

THE TRIBUNAL OF STATE

Article 198

1. For violations of the Constitution or of a statute committed by them within their office or within its scope, the following persons shall be constitutionally accountable to the Tribunal of State: the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces
2. Deputies and Senators shall also be constitutionally accountable to the Tribunal of State to extent specified in Article 107.
3. The types of punishment which the Tribunal of State may impose shall be specified by statute.

Article 199

1. The Tribunal of State shall be composed of a chairperson, two deputy chairpersons and 16 members chosen by the Sejm for the current term of office of the Sejm from amongst those who are not Deputies or Senators. The deputy chairpersons of the Tribunal and at least one half of the members of the Tribunal shall possess the qualifications required to hold the office of judge.
2. The First President of the Supreme Court shall be chairperson of the Tribunal of State.
3. The members of the Tribunal of State, within the exercise of their office as judges of the Tribunal, shall be independent and subject only to the Constitution and statutes.

Article 200

A member of the Tribunal of State shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Tribunal of State. A member of the Tribunal of State shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The chairperson of the Tribunal of State shall be notified forthwith of any such detention and may order an immediate release of the person detained.

Article 201

The organization of the Tribunal of State, as well as the mode of proceedings before it, shall be specified by statute.

Chapter IX

ORGANS OF STATE CONTROL AND FOR DEFENCE OF RIGHTS

THE SUPREME CHAMBER OF CONTROL

Article 202

1. The Supreme Chamber of Control shall be the chief organ of state audit.
2. The Supreme Chamber of Control shall be subordinate to the Sejm.
3. The Supreme Chamber of Control shall act in accordance with the principles of collegiality.

Article 203

1. The Supreme Chamber of Control shall audit the activity of the organs of government administration, the National Bank of Poland, state legal persons and other State organizational units regarding the legality, economic prudence, efficacy and diligence.
2. The Supreme Chamber of Control may audit the activity of the organs of local self-government, communal legal persons and other communal organizational units regarding the legality, economic prudence and diligence.
3. The Supreme Chamber of Control may also audit, regarding the legality and economic prudence, the activity of other organizational units and economic subjects, to the extent to which they utilize State or communal property or resources or satisfy financial obligations to the State.

Article 204

1. The Supreme Chamber of Control shall present to the Sejm:
 - 1) an analysis of the implementation of the State Budget and the purposes of monetary policy;
 - 2) an opinion concerning the vote to accept the accounts for the preceding fiscal year presented by the Council of Ministers;
 - 3) information on the results of audits, conclusions and submissions specified by statute.
2. The Supreme Chamber of Control shall present an annual report on its activities to the Sejm.

Article 205

1. The President of the Supreme Chamber of Control shall be appointed by the Sejm, with the consent of the Senate, for a period of 6 years, which may be extended for one more period only.
2. The President of the Supreme Chamber of Control shall not hold any other post, except for a professorship in an institute of higher education, nor perform any other professional activities.
3. The President of the Supreme Chamber of Control shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.

Article 206

The President of the Supreme Chamber of Control shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Sejm. The President of the Supreme

Chamber of Control shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The Marshal of the Sejm shall be notified forthwith of such detention and may order an immediate release of the person detained.

Article 207

The organization and mode of work of the Supreme Chamber of Control shall be specified by statute.

THE COMMISSIONER FOR CITIZENS' RIGHTS

Article 208

1. The Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts.
2. The scope and mode of work of the Commissioner for Citizens' Rights shall be specified by statute.

Article 209

1. The Commissioner for Citizens' Rights shall be appointed by the Sejm, with the consent of the Senate, for a period of 5 years.
2. The Commissioner for Citizens' Rights shall not hold any other post, except for a professorship in an institute of higher education, nor perform any other professional activities.
3. The Commissioner for Citizens' Rights shall not belong to a political party, a trade union or perform other public activities incompatible with the dignity of his office.

Article 210

The Commissioner for Citizens' Rights shall be independent in his activities, independent of other State organs and shall be accountable only to the Sejm in accordance with principles specified by statute.

Article 211

The Commissioner for Citizens' Rights shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Sejm. The Commissioner for Citizens' Rights shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The Marshal of the Sejm shall be notified forthwith of any such detention and may order an immediate release of the person detained.

Article 212

The Commissioner for Citizens' Rights shall annually inform the Sejm and the Senate about his activities and report on the degree of respect accorded to the freedoms and rights of persons and citizens.

THE NATIONAL OF RADIO BROADCASTING AND TELEVISION

COUNCIL

Article 213

1. The National Council of Radio Broadcasting and Television shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television.

2. The National Council of Radio Broadcasting and Television shall issue regulations and, in individual cases, adopt resolutions.

Article 214

1. The members of the National Council of Radio Broadcasting and Television shall be appointed by the Sejm, the Senate and the President of the Republic.
2. A member of the National Council of Radio Broadcasting and Television shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function.

Article 215

The principles for and mode of work of the National Council of Radio Broadcasting and Television, its organization and detailed principles for appointing its members, shall be specified by statute.

Chapter

X

PUBLIC FINANCES

Article 216

1. Financial resources devoted to public purposes shall be collected and disposed of in the manner specified by statute.
2. The acquisition, disposal and encumbrance of property, stocks or shares, issue of securities by the State Treasury, the National Bank of Poland or other State legal persons shall be done in accordance with principles and by procedures specified by statute.
3. Any monopoly shall be established by means of statute.
4. The contracting of loans as well as granting guarantees and financial sureties by the State shall be done in accordance with principles and by procedures specified by statute.
5. It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute.

Article 217

The imposition of taxes, as well as other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute.

Article 218

The organization of the State Treasury and the manner of management of the assets of the State Treasury shall be specified by statute.

Article 219

1. The Sejm shall adopt the State budget for a fiscal year by means of a Budget [*ustawa budżetowa* - budgetary statute].
2. The principles of and procedure for preparation of a draft State Budget, the level of its detail and the requirements for a draft State Budget, as well as the principles of and procedure for implementation of the Budget, shall be specified by statute.

3. In exceptional cases, the revenues and expenditures of the State for a period shorter than one year may be specified in an interim budget. The provisions relating to a draft State Budget shall apply, as appropriate, to a draft interim budget.
4. If a State Budget or an interim budget have not come into force on the day of commencement of a fiscal year, the Council of Ministers shall manage State finances pursuant to the draft Budget.

Article 220

1. The increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the Sejm of a budget deficit exceeding the level provided in the draft Budget.
2. The Budget shall not provide for covering a budget deficit by way of contracting credit obligations to the State's central bank.

Article 221

The right to introduce legislation concerning a Budget, an interim budget, amendments to the Budget, a statute on the contracting of public debt, as well as a statute granting financial guarantees by the State, shall belong exclusively to the Council of Ministers.

Article 222

The Council of Ministers shall submit to the Sejm a draft Budget for the next year no later than 3 months before the commencement of the fiscal year. In exceptional instances, the draft may be submitted later.

Article 223

The Senate may, within the 20 days following receipt of the Budget, adopt amendments thereto.

Article 224

1. The President of the Republic shall sign the Budget or interim Budget submitted to him by the Marshal of the Sejm within 7 days of receipt thereof, and order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*). The provisions of Article 122, para. 5 shall not apply to the Budget or any interim budget.
2. If the President of the Republic has made reference to the Constitutional Tribunal for an adjudication upon the conformity to the Constitution of the Budget or interim budget before signing it, the Tribunal shall adjudicate such matter no later than within a period of 2 months from the day of submission of such reference to the Tribunal.

Article 225

If, after 4 months from the day of submission of a draft Budget to the Sejm, it has not been adopted or presented to the President of the Republic for signature, the President of the Republic may, within the following of 14 days, order the shortening of the Sejm's term of office.

Article 226

1. The Council of Ministers, within the 5-month period following the end of the fiscal year, shall present to the Sejm a report on the implementation of the Budget together with information on the condition of the State debt.
2. Within 90 days following receipt of the report, the Sejm shall consider the report presented to it, and, after seeking the opinion of the Supreme Chamber of Control, shall pass a resolution on whether to grant or refuse to grant approval of the financial accounts submitted by the Council of Ministers.

Article 227

1. The central bank of the State shall be the National Bank of Poland. It shall have the exclusive right to issue money as well as to formulate and implement monetary policy. The National Bank of Poland shall be responsible for the value of Polish currency.
2. The organs of the National Bank of Poland shall be: the President of the National Bank of Poland, the Council for Monetary Policy as well as the Board of the National Bank of Poland.
3. The Sejm, on request of the President of the Republic, shall appoint the President of the National Bank of Poland for a period of 6 years.
4. The President of the National Bank of Poland shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.
5. The Council for Monetary Policy shall be composed of the President of the National Bank of Poland, who shall preside over it, as well as persons distinguished by their knowledge of financial matters - appointed, in equal numbers, by the President of the Republic, the Sejm and the Senate for a period of 6 years.
6. The Council for Monetary Policy shall annually formulate the aims of monetary policy and present them to the Sejm at the same time as the submission of the Council of Ministers' draft Budget. Within 5 months following the end of the fiscal year, the Council for Monetary Policy shall submit to the Sejm a report on the achievement of the purposes of monetary policy.
7. The organization and principles of activity of the National Bank of Poland, as well as detailed principles for the appointment and dismissal of its organs, shall be specified by statute.

Chapter XI

EXTRAORDINARY MEASURES

Article 228

1. In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster.
2. Extraordinary measures may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicized.
3. The principles for activity by organs of public authority as well as the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary measures shall be established by statute.
4. A statute may specify the principles, scope and manner of compensating for loss of property resulting from limitation of the freedoms and rights of persons and citizens during a period requiring introduction of extraordinary measures.
5. Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.
6. During a period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local self-governments, the Act on Elections to the Presidency, as well as statutes on extraordinary measures.

7. During a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination, the term of office of the Sejm may not be shortened, nor may a nationwide referendum, nor elections to the Sejm, Senate, organs of local self-government nor elections for the Presidency be held, and the term of office of such organs shall be appropriately prolonged. Elections to organs of local self-government shall be possible only in those places where the extraordinary measures have not been introduced.

Article 229

In the case of external threats to the State, acts of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreement, the President of the Republic may, on request of the Council of Ministers, declare a state of martial law in a part of or upon the whole territory of the State.

Article 230

1. In the case of threats to the constitutional order of the State, to security of the citizenry or public order, the President of the Republic may, on request of the Council of Ministers, introduce for a definite period no longer than 90 days, a state of emergency in a part of or upon the whole territory of the State.
2. Extension of a state of emergency may be made once only for a period no longer than 60 days and with the consent of the Sejm.

Article 231

The President of the Republic shall submit the regulation on the introduction of martial law or a state of emergency to the Sejm within 48 hours of signing such regulation. The Sejm shall immediately consider the regulation of the President. The Sejm, by an absolute majority of votes taken in the presence of at least half the statutory number of Deputies, may annul the regulation of the President.

Article 232

In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a definite period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State. An extension of a state of natural disaster may be made with the consent of the Sejm.

Article 233

1. The statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41, para. 4 (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children).
2. Limitation of the freedoms and rights of persons and citizens only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited.
3. The statute specifying the scope of limitations of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in Article 22 (freedom of economic activity), Article 41, paras. 1, 3 and 5 (personal freedom), Article 50 (inviolability of the home), Article 52, para. 1 (freedom of movement and sojourn on the territory of the Republic of Poland), Article 59, para. 3 (the right to strike), Article 64 (the right of ownership), Article 65, para. 1 (freedom to work), Article 66, para. 1 (the right to safe and hygienic conditions of work) as well as Article 66, para. 2 (the right to rest).

Article 234

1. Whenever, during a period of martial law, the Sejm is unable to assemble for a sitting, the President of the Republic shall, on application of the Council of Ministers, and within the scope and limits specified in Article 228, paras. 3-5, issue regulations having the force of statute. Such regulations must be approved by the Sejm at its next sitting.
2. The regulations, referred to in para.1 above shall have the character of universally binding law.

Chapter XII

AMENDING THE CONSTITUTION

Article 235

1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.
2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.
3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.
4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.
5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.
6. If a bill to amend the Constitution relates to the provisions of Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.
7. After conclusion of the procedures specified in paras 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).

Chapter XIII

FINAL AND TRANSITIONAL PROVISIONS

Article 236

1. Within a period of 2 years from the day on which the Constitution comes into force, the Council of Ministers shall present to the Sejm such bills as are necessary for the implementation of the Constitution.
2. Statutes bringing Article 176 para. 1 into effect, to the extent relevant to proceedings before administrative courts, shall be adopted before the end of 5 years from the day on which the Constitution comes into force. The provisions relating to extraordinary review of

judgments by the Chief Administrative Court shall remain in effect until the entry into force of such statutes.

Article 237

1. Within the 4-year period following the coming into force of this Constitution, cases of misdemeanours shall be heard and determined by the Boards for Adjudication of Misdemeanours attached to district courts, but the punishment of arrest may be imposed only by a court.
2. Appeals from a judgment of a Board shall be considered by a court.

Article 238

1. The term of office of constitutional organs of public power and the individuals composing them, whether elected or appointed before the coming into force of the Constitution, shall end with the completion of the period specified in provisions valid before the day on which the Constitution comes into force.
2. In the event that provisions valid prior to the entry into force of the Constitution do not specify any such term of office, and from the election or appointment there has expired a period longer than that specified in the Constitution, the constitutional term of office of organs of public power or individuals composing them shall end one year after the day on which the Constitution comes into force.
3. If provisions valid before the entry into force of the Constitution do not specify any such term of office, and from the day of election or appointment there has expired a period shorter than that specified in the Constitution, the time for which such organs or individuals shall serve in accordance with existing provisions shall be included in the term of office specified in the Constitution.

Article 239

1. Within 2 years of the day on which the Constitution comes into force a judgment of the Constitutional Tribunal of the non-conformity to the Constitution of statutes adopted before its coming into force shall not be final and shall be required to be considered by the Sejm which may reject the judgment of the Constitutional Tribunal by a two-third majority vote in the presence of at least half of the statutory number of Deputies. The foregoing provision shall not concern judgments issued in response to questions of law submitted to the Constitutional Tribunal.
2. Proceedings in cases to formulate a universally binding interpretation of statutes by the Constitutional Tribunal instituted before the coming into force of the Constitution, shall be discontinued.
3. On the day on which the Constitution comes into force, resolutions of the Constitutional Tribunal on interpretation of statutes shall lose their universally binding force, but final judgments of the courts and other final decisions made by organs of public authority whilst taking into account the meaning of provisions as decided by the Constitutional Tribunal by way of universally binding interpretation of statutes, shall remain in force.

Article 240

Within one year of the day on which the Constitution comes into force, the Budget may allow for the covering of the budget deficit by contracting debt in the central bank of the State.

Article 241

1. International agreements, previously ratified by the Republic of Poland upon the basis of constitutional provisions valid at the time of their ratification and promulgated in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), shall be considered as agreements ratified with prior consent granted by statute, and shall be subject to the provisions

of Article 91 of the Constitution if their connection with the categories of matters mentioned in Article 89, para. 1 of the Constitution derives from the terms of an international agreement.

2. The Council of Ministers shall, within 2 years of the coming into force of the Constitution, present to the Sejm a list of international agreements containing provisions not in conformity to the Constitution.
3. Senators, elected before the day on which the Constitution comes into force, who have not attained 30 years of age, shall maintain their seats until the end of the term of office for which they were elected.
4. Joint holding of the mandate of a Deputy or Senator with a function or employment forbidden by Article 103, shall result in the expiry of the mandate after one month from the day on which the Constitution comes into force, unless the Deputy or Senator resigns from such function or such employment ceases.
5. Cases subject to legislative procedure or under consideration by the Constitutional Tribunal or the Tribunal of State, and which have been commenced before the coming into force of the Constitution, shall be conducted in accordance with the constitutional provisions valid on the day of the commencement thereof.
6. Within 2 years of the coming into force of the Constitution, the Council of Ministers shall identify which resolutions of the Council of Ministers and orders of ministers or other organs of government administration adopted or issued prior to the day on which the Constitution comes into force require, pursuant to the conditions specified in Article 87, para. 1 and Article 92 of the Constitution, are to be replaced by regulations issued upon the basis of statutes to be drafted and submitted, at the appropriate time, to the Sejm by the Council of Ministers. At the same time, the Council of Ministers shall submit to the Sejm a bill specifying those normative acts issued by the government administration before the day on which the Constitution comes into force which shall become resolutions or orders within the meaning of Article 93 of the Constitution.
7. Enactments of local law as well as provisions issued by communes shall become enactments of local law within the meaning of Article 87, para. 2 of the Constitution.

Article 242

The following are hereby repealed:

- 1) the Constitutional Act of 17th October 1992, on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government (*Dziennik Ustaw* of 1992 No. 84, item 426; of 1995 No. 38, item 184, No. 150, item 729 as well as of 1996 No. 106, item 488);
- 2) the Constitutional Act of 23rd April 1992 on the Procedure for Preparing and Enacting a Constitution for the Republic of Poland (*Dziennik Ustaw* of 1992 No. 67, item 336; and of 1994 No. 61, item 251).

Article 243

The Constitution of the Republic of Poland shall come into force on the expiry of the 3-month period following the day of its promulgation.

The President
of the Republic of Poland
Aleksander Kwasniewski