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IMPLEMENTATION OF PRIMACY AND DIRECT EFFECT PRINCIPLES OF THE COMMUNITY LAW IN THE POLISH CONSTITUTIONAL SYSTEM

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The accession of Poland to the European Union will be preceded by negotiations and a conclusion of the accession agreement, which Poland is likely to conclude with its Member States. Due to a significant development of the formal and substantial standardisation of the accession agreements, it may be said that also our agreement will contain general principles, according to which, in particular: (1) Community law will be binding *ab initio* and *in toto,* unless the provisions on temporary derogation stipulate otherwise; (2) this law will use the primacy and direct effect principles, in the understanding of *acquis communautaire;* it will also be subject to procedures ensuring its uniform application (especially Article 177); (3) Community law will apply to the Accession Agreement, which will be subject to the control of the Court of Justice.[1]

The obligation of an approval of the discussed principles of the Community law must cause changes in the Polish constitutional system. Therefore, there arises the question what sort of legal and organizational changes should be introduced to make effective primacy and direct effect, and what form should they take? Amendments to Polish law should be linked to the necessity of enabling the national organs to fulfil tasks resulting from the presented implications of the primacy and direct effect principles (determined as necessary or preferable, depending whether they involve the responsibility of the state or not). Reflections concerning such changes may be ordered mainly according to the subjective criterion: 1) general remarks, 2) Parliament and Government, 3) Courts, 4) Constitutional Tribunal, 5) form of amendment.

1. General Remarks

Before explaining implications with respect to the Polish state organs, it should be clarified what type of a legal situation to adopt the primacy and direct effect principles is given by the new Constitution of 2 April 1997. When doing so, we should emphasise that the accession of Poland to the EU means being bound by treaties establishing the [*1]

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[1] Cf. Accession treaties [in:] A.G. T o t h, *The Oxford Encyclopedia of European Community Law,* vol. I, Institutional Law, Oxford 1990, p. 4-5.

European Communities and the European Union, which should be seen as international agreements in the full sense of the term. Therefore, information on the legal situation should be sought in general provisions and rules concerning the legal sources in a scope relating to international law, and in particular to international agreements (similarly to the majority of the Constitutions of the EU Member States, the Constitution makes no clear reference to the European Union and the Communities).

First, special attention should be drawn to Article 9 of the Constitution. This provision is a general principle, and states that the Republic of Poland observes the international law binding upon it. The detailed obligations stemming from this provision include, first of all, creating Polish law in compliance to international law as a whole and interpretations subject to this law.[2] Article 87 item 1 renders precise Article 9, which makes ratified international agreements one of the sources of the common binding law of the Republic of Poland. Article 91 item 1 develops the above mentioned constitutional principle and stipulates that international agreements, after their publication in *Dziennik Ustaw* [Journal of Laws], form part of the Polish legal system.[3] This provision also contains the supposition that an international agreement is ready for direct application if its implementation does not depend upon the act's publication (however, it is not quite clear what this is supposed to mean: e.g. may there exist detailed and unconditional provisions requiring to be statutory implemented? If so, this provision of the Constitution would be a regression in relation to a judgment of the Constitutional Tribunal, according to which each international rule, being sufficiently precise and unconditional, involves self-implementation[4]). Article 91 item 2 also states that an agreement ratified upon previous approval expressed in the act, colliding with other acts, prevails.

The Constitution allows for the delegation to the international organisation of the competence of state organs in some issues, and sets out a specific procedure in this respect (Article 90). Thus, it allows to enter into an integrational organisation (EC) and adopt the law it created. This is also confirmed in Article 91 item 3, which allows to give special importance to the law established by an organisation, of direct applicability by virtue of the agreement establishing this organisation. The special importance of such a law consists in ensuring its priority over acts which collide with it.

Constitutional provisions require comments in the light of their importance for the primacy and direct effect principles. Two provisions are of key importance in this con-

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[2] Cf. comments by K. W ó j t o w i c z to Article 9 [in:] *Constitutions of the Republic of Poland and Comments to the Constitution of the Republic of Poland of1997,* ed. by J. B o c, Wrocław 1998 (further as: KK), p. 3. However, this list may not be considered comprehensive.

[3] It seems that it expresses the incorporation and not the transformation of international law. See discussion in: R. S z a f a r z: "Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji" [Effectiveness of the Rules of International Law in Domestic Law in the Light of the New Constitution], *Państwo i Prawo* 1998, no. 1, p. 5; polemics by A. W y r o z u m s k a: "Effectiveness of the Rules of International Law in Domestic Law in the Light of the New Constitution", *Państwo i Prawo* 1998, no. 4, p. 79-85; comments by A. W a s i 1 k o w s k i, "Transformacja czy inkorporacja" [Transformation or Incorporation], *Państwo i Prawo* 1998, no. 4, p. 85—87; the answer to the polemics by R. S z a f a r z: *Państwo i Prawo* 1998, no. 5, p. 93-94.

[4] See J. O n i s z c z u k: *Orzecznictwo Trybunału Konstytucyjnego w latach 1986-1993* [Jurisdiction of the Constitutional Tribunal in 1986-1993], Warszawa 1993, p. 174.

text: Article 90 and Article 91. The first permits to be bound by agreements which form the grounds of the EC and the EU, and, in fact, to accept the discussed principles.[5] However, this is not formulated correctly. In particular, some doubts arise as regards the nature of what is delegated and its scope. In the first case, Article 90 stipulates that the competence of the state authority organs will be delegated in favour of an international organisation or an international organ. Pertinent literature points out that delegation may refer exclusively to the execution of competence, and not to itself, since sovereignty is indivisible. It is emphasised that the application of the term "international organ" is illegal, as is the concept of "state authority", owing to the lack of a uniform terminology of the Constitution. It is also proved to be incorrect to use the inexact expression "in relation to certain matters" in the case of a competence provision with no correlation with a negative material clause.[6]

Irrespective of the correctness of the presented opinion, it should be pointed out that Article 90 gives rise to doubts with respect to the observance of the primacy principle. It allows the organ applying the Constitution to assume that cession of the execution of sovereignty powers takes place "in relation to certain matters", but it does not explain which ones, nor does it identify the legal effects. It seems that the Polish organ (especially the Constitutional Tribunal) should be of the opinion that delegation has to be effected, or has been effected (depending upon whether the decision is made upon a preventive or repressive term), in a scope which results from the treaties to which one intends to accede or to which one has acceded. However, what will happen if such an organ, making a decision under the repressive control term, states that delegation was effected upon the violation of the material scope of the Constitution (the Constitution does not introduce an obligation of preventive control of the agreements of Article 90 before their ratification)? Nevertheless, the concept "in relation to certain matters" is so comprehensive that it offers a broad area of legal interpretation. Refusal to apply Community law would be a significant violation of the membership obligations, and would create serious legal and political problems.

Article 91 also produces problems. This provision includes ratified and promulgated agreement as part of Polish law, orders its direct application and gives priority in cases of a collision with the acts (under the condition that an approval of ratification was expressed in the act Parliament's). It also stipulates that if this results from an agreement establishing an international organisation, the law it created is of direct application and prevails when colliding with the acts.

Doubts concern the observance of both the primacy and direct effect principles. Article 91 guarantees the priority of the Community rules only in a case of a collision

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[5] It was pointed out correctly that this provision was mainly adopted with the aim to an accession to the EU. Cf. comments by K. W ó j t o w i c z to Article 90 of the Constitution, KK, p. 159.

[6] As in: J. G a 1 s t e r: "Konstytucjonalnoprawne aspekty przystąpienia Polski do Unii Europejskiej" [Constitutional and Legal Aspects of the Accession of Poland to the European Union] [in:] *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* [The Implementation of the New Constitution of the Republic of Poland], ed. by Z. W i t k o w s k i, Toruń 1998, p. 71 and 74-75. In the last case, cf. K. W ó j t o w i c z, comments on Article 90...., *op. cit.*, p. 160.

with the rules of the acts and *a maiori ad minus* of the fundamental acts of domestic law (compare Article 87). The primacy principle assumes, however, the priority of each Community rule over each national rule, also constitutional ones.[7] A further defect of the constitutional provision, which ensures priority to international rules (Community), is also the lack of an identification of sanctions in the case of contradiction.[8]

The concept of "direct application", which will concern both the establishing treaties and the law established by the organisation (items 1 and 3 of Article 91), is also unclear. At first glance, this term may be related to direct applicability, known in the Community law. However, the additional assertion in item 1 denies this by stating that if the application of the agreement depends upon issuing the act, it is not of direct application. At the same time, it leads to the conclusion that, in fact,we are dealing with a question of the direct effect of the rules of the agreement (and not the agreement itself; it is rare that the effectiveness of all agreements depends upon issuing an act). Such an understanding of direct application seems to result also from Article 8 of the Constitution, which stipulates a direct application of the provisions of the Constitution. On the other hand, item 3 Article 91 seems to confirm that a direct application, in the meaning proposed by the Polish Constitution, is tantamount to the direct applicability of the regulations of the Community law. However, Article 91 does not refer this concept to the regulations, but to overall law established by the organisation. The directives do not use direct applicability, although with difficulty and under some conditions their rules may be of direct effect. In other words, there is some confusion concerning a concept, which may affect the functioning of the discussed principles in the Polish constitutional system.

In this context, there arises the question how to solve the described problems. Of course, one may rely on a reasonable interpretation of the organs implementing the law, especially the Constitutional Tribunal. It seems, however, that except for flexibility, such conduct has no merits. Therefore, there is the need (wherever possible) for a statutory explication of doubts. Such an act should introduce an obligation of a previous control of agreements, according to which the execution of the sovereignty power is ceded in favour of the international organizations (it should be recalled that the delegation of competence in the case of integration organizations does not occur once, but is reiterated). The act should also state the effects of judgments on the contradiction of Polish law with the Community rules. It seems that this may involve both invalidity (of the judgment of the Constitutional Tribunal *in abstracto)* and ineffectiveness (of the judgment of the Constitutional Tribunal and the Courts *in concreto).* The act would also contain provisions explaining, pursuant to the Community law, the status and ef-

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[7] A sound remark by K. W ó j t o w i c z: "Skutki przystąpienia Polski do Unii Europejskiej dla sądów i Trybunału Konstytucyjnego RP" [The Effects of the Accession of Poland to the European Union for Courts and the Constitutional Tribunal of the Republic of Poland] [in:] *Wejście w życie ..... op. cit.,* p. 87 and 88. For another but mistaken view: J. G a 1 s t e r: *Constitutional and Legal Aspects..., op. cit.,* p. 67. The fact that the Community law does not stipulate how to solve, at the national level, the conflict between Community rule and Constitutional rule, does not mean it does not require a recognition of the absolute primacy of the Community rule.

[8] Correctly emphasised by J. G a 1 s t e r: *Konstytucyjnoprawne aspekty..., op. cit.,* p. 76.

fectiveness of the specific sources of the Community law in Polish law, which would undoubtedly facilitate judgments (preferable amendments).

2. Specific Problems of the Amendment of the Polish Legal System

Formal accession to the EU does not result in changes concerning the structure of state power. Freedom is safeguarded by the principle of the procedural and organizational autonomy of the Member States.[9] However, this does not mean that in practice the Member States do not establish different organizational units, especially administrative ones, to enable a fluent fulfilment of the membership obligations. On the other hand, accession is of key importance for the national organs to execute their competence. Here, there also arise problems with respect to ensuring the observance of the primacy and direct effect of the Community law.

a) The Sejm, the Senate and the Government of the Republic of Poland

Problems concerning the implementation of the primacy and direct effect principles in our constitutional system first refer to establishing the law. This task involves especially the cooperation of the Government, the Sejm and the Senate of the Republic of Poland. Thus, it seems reasonable to adopt a position with respect to potential overall changes towards those organs.

Let us state that, first of all, the Government and the national Parliament will be responsible for an appropriate execution of the Community law and for not undertaking actions contrary to that law. The task of the Sejm and the Senate will be, therefore, in particular, a transposition of directives by means of laws (currently, the adaptation of Polish law to the Community law). In our legal system, laws seem to be the most appropriate form for executing directives. The consistency of the transposition process should signify that initiatives are taken by the Government. In Poland, however, legislative initiative is dispersed. Apart from the Government, also the deputies, Sejm commissions, the Senate as a whole, and even citizens (Article 118 of the Constitution, Article 29 of the Sejm Rules[10]) are entitled to it. More, analysis shows that the legislative initiative is used intensely, especially by the deputies.[11] Moreover, the deputies are

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[9] Cf. C. M i k: "Polskie organy państwowe wobec perspektywy przystąpienia RP do Unii Europejskiej" [Polish State Organs with View to the Accession of the Republic of Poland to the European Union] [in:] *Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia* [Poland in the European Union. Prospects, Conditions, Opportunities and Threats], ed. by C. M i k, Toruń 1997, p. 243-245.

[10] A uniform text of the Rules with further amendments (10 April 1998) [in:] *Rules of the Sejm of the Republic of Poland*, Warszawa 1998.

[11] If we consider only the second term of the Sejm (1993-1997) then it becomes apparent that among the overall number of 819 drafts tabled to motion, the Council of Ministers was the author of only 344 acts. The deputies presented 428 drafts (359 - groups of deputies, 69 - the Sejm commissions), the Senate was the author of 20 drafts, and the President - of 27. As many as 58% of draft acts were not from the Government. What more, a significant part of the drafts not presented by the Government were passed, and are currently part of the Polish legal system. During the second term, 244 deputy drafts were passed (187 - groups of deputies, 57 - Sejm commissions), 7 drafts of the Senate and 12 Presidential drafts. The data come from an excellent comprehensive

particularly active in amending the government drafts. It does not seem that this situation will change radically in the future. Due to the above, there arises the problem of ensuring a proper execution of the Community law (transposition of directives) and preventing a passage of laws contrary to the Community law.

The situation is rather clear in the case of governmental drafts. With reference to an adaptation of law understood as drafting acts implementing the Community law, also in the future, specific ministers will deal with the implementation of the Community law. As should be expected, control of the compliance of the governmental drafts to the Community law will be entrusted to the European Integration Committee (EIC), established pursuant to Act of 2 August 1996[12] Such control, in the case of domestic regulations, is final and unquestionable.

For a long time, the situation concerning draft acts, which the European Integration Committee had evaluated only initially, remained unfavourable. The government lost control over the contents of a draft act the moment it was submitted to the Sejm. At present, this state of things changed to a certain degree due to an amendment of the Sejm Rules, to be discussed later on.

A much more serious problem involved draft acts submitted by subjects other than the government, and in particular by groups of Deputies and parliamentary committees. Such drafts were totally not subject to control as regards their compliance to Community law. Attempts were made to alter this situation by means of an amendment to the Sejm Rules (14 September 1997). As a consequence, § 2a was introduced into Article 31, according to which drafts filed by Sejm committees, the Senate or the President would have to be accompanied by a statement pertaining to the compliance, or the degree and reasons for the non-conformity of the draft to European Union law. In practice, this change did not bring about an improvement, and the provision remained a dead letter. The reasons should by sought in the fact that § 2 Article 31 did not determine clearly who has to perform control, and did not foresee an appropriate procedure nor sanctions for the non-fulfilment of the obligation defined by the Rules.

The retention and even the intensification of this unsatisfactory state of things led to a second change in the Sejm Rules, this time much more effective and serious. An amendment to the Rules (19 March 1999) decided to eject the recently added § 2 Article 31. In its place, the newly introduced § 7 asserts that the grounds of all draft acts submitted to the President of the Sejm must contain a declaration about the compliance of the draft to European Union law or the degree and reasons for non-conformity to that law, or a statement that the matter of the planned provision is not encompassed by Union law. Such a modification is by no means merely superficial, since, in contrast to

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study by D. Chrzanowski, W. Odrowąż-Sypniewski: *Analysis of Draft Acts Presented to Sejm of the Second Term, Sejm Chancellery. Office of Studies and Expertise. Department of Legal Opinions*, Report no. 129, March 1998, p. 6-8, 41-43. During the third term, this tendency continues to prevail.

[12] *Dz. U.* [Journal of Laws] no. 106, item 494. See also Ordinance of the President of the Council of Ministers of 2 October 1996 on giving statute to the office of the European Integration Committee *(Dz.U.* 1996, no. 116, item 555), and a presentation and scrutiny of the act on the EIC - C. Mik: "Polskie organy państwowe...", *op. cit.*, p. 249-252.

the heretofore situation, it makes it possible for the President of the Sejm to return the draft to the applicant, as in the case of other shortcomings, mentioned in § 2 and 3 Article 31 (§ 5 Article 31). In this manner, the procedure of sanctioning projects without "European grounds" was rendered more effective.

These were not all the changes introduced in 1999. The amendment defined a procedure for the verification of all drafts (governmental and non-governmental) from the moment of their submission to the completion of the parliamentary procedure. As regards governmental drafts, a base was created for guarding the compliance to European Union law of all eventual corrections and motions concerning such drafts. In this way, Article 39 of the Sejm Rules (on work conducted in Sejm committees after the first reading) found itself in § 3 a, which stipulated that it is obligatory to seek the opinion of the European Integration Committee concerning the compliance of the drafts to EU law. Consequently, the Committee defines the term of a presentation of its opinion, which is then enclosed in a report on the work performed by a parliamentary committee, and subsequently presented at a plenary session as part of the second reading. A similar situation takes place as regards motions filed by parliamentary minorities, also accompanied by a European Integration Committee opinion (§1 and 3 Article 40 of the Rules). The same procedure is applied in the case of a proposal of corrections or motions, made in the course of the second reading (§ 1 Article 43), and the submission of corrections by the Senate (§ 1 Article 50). The work carried out by the Committee is facilitated by the duty of informing the Committee about sessions held by Sejm commissions (§ 4 Article 78) and the obligatory participation of Committee representatives in commissions' sessions, which formulate opinions about the draft acts and their compliance to European Union law (§1 Article 79).

The verification procedure is slightly different in reference to non-governmental drafts. Here, the President of the Sejm, having received the non-governmental drafts, orders, prior to the first reading, that an opinion concerning the compliance of the draft in question with EU law (§7 Article 31) be presented by experts of the Chancellery of the Sejm. In practice, such drafts are forwarded by the Chief of the Chancellery of the Sejm upon the request of the President. On the other hand, opinions are issued by the Group for European Integration, established in the Office of Studies and Expertise (see further on). If such an opinion indicates the non-compliance of the draft to European Union law, the President submits it to the Sejm' European Integration Commission for the purpose of obtaining the latter's view. As a result, the privileges of the Commission have been expanded; now, its tasks include, i.a. opinions concerning the compliance of draft acts to European Union law. Such a Commission's opinion is passed on by the President to the applicant (§ 8 Article 3, in connection with point 7 of the appendix to the Rules: "The Commissions Scope of the Work of Sejm Commissions"). A negative opinion issued by the Commission, however, cannot block the initiation of the legislation process, and is merely a signal. Nonetheless, in the course of further procedure, the draft can be changed from the viewpoint of its compliance, especially under the impact of evaluations made by the European Integration Committee. The latter organ assumes the main burden of "care" not only concerning governmental drafts, but also their

non-governmental counterparts. In this manner, all corrections or changes proposed by the Deputies or the Senate in the course of the procedure, and affecting non-governmental drafts, can be verified also by the EIC, according to the same principles as those pertaining to governmental drafts. The encumbrance of the Committee with the fundamental duty of presenting opinions as regards eventual corrections and motions does not infringe upon the obligatory participation of the representatives of the Chancellery of the Sejm in sessions held by Sejm commissions, with the right to submit motions or remarks, i.a. on the compliance of draft acts to EU law, in the case of all drafts examined by the commissions. If the Commission does not take into consideration certain motions or remarks, then the Chancellery of the Sejm submits them to the President of the Sejm, who, in turn, can, forward them to the European Integration Committee (Article 56).

Modifications of the legislative procedure made in 1999 do not lead to the full elimination of drafts other than governmental ones, which are contradictory to EU law. However, their value is that of discouraging and preventing the applicants, or at least pointing out contradictions and enabling to remove them in the future. Moreover, the publication of negative opinions on drafts or corrections may be important during voting, by exerting pressure upon the deputies. The introduction of amendments of the Rules calls for close co-operation of the Government with the Parliament and its services.

The Sejm Chancellery also made some organisational changes. Order no. 10 of the Head of the Sejm Chancellery of 17 April 1998 amended the organisational rules of the Chancellery. In effect, two new organizational units were established: the Department of European Union at the Office of Interparliamentary Relations and the Unit for European Integration at the Office of Studies and Expertise (which, *de facto*, exists since June 1997, and currently has six members). The first unit is to provide services mainly to the Sejm European Integration Commission and a Permanent Delegation of the Sejm and the Senate for the Parliamentary Joint Commission of the Republic of Poland and the European Union (§ 29 item 3).

On the other hand, by responding to adaptation challenges and initiatives of amendments to the Sejm Rules, the European Integration Unit has to issue opinions, upon the request of Sejm organs, with respect to the compliance of the draft acts to the Community law, as well as opinions on the binding Community legal system, issue opinions and provide consultations to deputies as regards the Community law, prepare opinions, studies and material on the functioning of the EU institutions, European integration processes and those related to the accession of new countries to the Union, organize seminars concerning activities of the Unit, support other units in this respect, and cooperate with the legal services of the Parliaments of European countries and European Union institutions as regards an exchange of information on integration processes (§ 34). Obviously, an effective fulfilment of tasks by the European Integration Commission and the European Integration Unit will be possible only in close cooperation with the European Integration Committee, and especially with the Department of the Harmonisation of Law and Treaty Issues.

The activities presented above are direct and do not eliminate the source of problems. In this situation, it should be considered whether legislative initiative in the trans-

position of directives and amendments to the transposing acts should not be reserved exclusively for the Government (preferable change). However, this would require an appropriate legal regulation, e.g. in a law.

The concluding of the accession agreement will mean that in some issues Poland will delegate competence to the European Communities within a scope subject to the Community law. Such delegation will signify that regulations to be issued by the Communities will be binding also for Poland, thus withdrawing from the Polish Parliament the competence to establish law within the rage covered by those acts, unless they allow to undertake implementation action. The Government should be entitled to responsibility in this respect, abstaining from a submission of draft acts in areas restricted by the regulations.

The effects of accession to the European Union with respect to establishing Polish law (obligation to implement directives, prohibition to overlap or cover the areas under regulation, obligation to ensure protection equivalent to nation-wide legal protection), as well as establishing provisions of the Community law, in which the Government of the Republic of Poland would participate, should encourage the Government and the Sejm and the Senate to enter into closer cooperation. Such cooperation should cover, in particular, an obligation of the Government to submit to the Parliament, in a term appropriate for the adoption of a position, all information on draft acts of the Community law, which would lead to a transfer of the execution of the sovereignty powers, amendments to the legislation or financial burdens to the state budgets (in practice acts of I and III pillar). Such information should not only cover the draft document itself, but also its justification, appointment of the Minister responsible, and the date of the eventual adoption of the act by the EC. In this context, the position of the Sejm Commission for European Integration Issues should be also strengthened on a statutory basis, so that the Government might not approve the Community act (it would be obliged to impose a requirement of the previous parliamentary debate in the Council of the European Union) without a positive opinion by this Commission. The changes described here would require the creation of appropriate legal provisions (preferable changes).

b) Courts

A significant role in the process of executing and safeguarding the observance of Community law in Poland will be played by the courts in the understanding proposed by Article 175 of the Constitution. The first task to be accomplished in order to fulfil this obligation effectively is to grant competence in this respect (all Polish courts should have such a right). Courts should be able to apply the Community law in full. This law, as we know, covers treaties, including, in particular, founding treaties, regulations, directives, and decisions. Therefore, there arises the doubt whether Article 178 item 1 of the Constitution will not hamper their application, which stipulates that they are only subject to the Constitution and laws. It may happen that in a restrictive and one-sided interpretation they will refuse to apply, e.g. regulations or directives which were not transposed with reference to their direct effect; this, in turn, may become the reason

why Poland will be responsible for violating the Community law. Such a doubt acquires importance in view of the necessity to ensure priority to the Community law. Therefore, one should consider whether it would be desirable to reformulate Article 178 so that the courts become subject only to the Constitution, and apply the law binding in the Republic of Poland (preferable change).

The application and safeguarding of the observance of the Community law by the courts will also require a number of changes linked to a prejudicial questions to the Court of Justice, the possibility to use provisional measures, the necessity to ensure an interpretation in line with the Community law, and to ensure the execution of sentences and decisions of the Community organs containing financial obligations. Especially with respect to the first issue amendments should be introduced in the Penal, Civil and Administrative Codes (as well as other acts, according to which the deciding organs exist under the concept of a court in the understanding of the Court of Justice). Such an amendment should give the courts the opportunity (and impose an obligation in the case of courts of last instance) to apply for the preliminary ruling of the Court of Justice, if the further proceedings are impossible without a prior explication of the effectiveness of the Community rule or its importance (taking into account the conditions of applying for preliminary rulings developed in the jurisdiction of the Court of Justice). Courts should also have a possibility to cancel proceedings until the sentence of the Court of Justice is obtained. The procedure of the prescription of claims for the period of prejudicial proceedings should be also suspended, and the claims themselves ensured. The decision on submitting the preliminary question should be determined as an exclusive area of the court; however, it might be appealed to the court of the higher instance, since the parties would incur expenses of witnesses, experts, representatives of the parties and the national court. The national courts should clearly be bound by the judgment of the Court of Justice.[13] Due to a relatively small familiarity with foreign rules, it seems that such changes are deemed necessary.

The right to apply the provisional measures by the courts, that is suspending the application *ad casum* of each rule of Polish law (also of the act - once more the problem concerns Article 178 item 1 of the Constitution), should be related to the submitting of the legal question. When the court wavers whether the rule of the act, which does not execute the Community law, but is contradictory, may be omitted, it should suspend its application and submit prejudicial question to the Court of Justice. If the provision executing the Community rule or the Community provision is involved, the courts should be able to suspend their application exclusively after the fulfilment of obligations, referred to in the previous part of the study. The appropriate powers should be included in the proceedings codes (necessary changes).

The effectiveness of the Community law may be ensured if national provisions in the areas covered by the Community law (in particular the directives) are interpreted

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[13] Cf. N. P ó ł t o r a k: "Zmiany w postępowaniu przed sądami polskimi jako konsekwencja przystąpienia Polski do Unii Europejskiej" [Changes in Proceedings before the Polish Courts in Consequence of Accession of Poland to the European Union] [in:] *Polska w Linii Europejskiej..., op. cit.*, p. 270-275.

according to the rules of this law. Due to this fact, it might seem reasonable to set a provision, which would impose the obligation of compliant interpretation (also compliance to the judgments of the Court of Justice); such a provision, however, should also denote limits of compliant interpretation established by the Court of Justice, and referred to in the previous part of the study. It is also possible to leave this issue to the practice of the Polish courts (preferable change, even merely possible).

Finally, it is important to introduce to the Civil Code provisions which would ensure the execution of the judgments of the Court of Justice and the Court of first instance, as well as decisions of the Council and Commission containing financial obligations of private persons. It appears that even today Article 777 of the Civil Procedure Code allows to recognise that those acts will potentially be executive titles (they are "other judgments, agreements or acts, which are subject to execution in the way of judicial execution"). However, one needs to establish a provision of the acts, by virtue of which they will be subject to judicial execution. On the other hand, a necessary change involves the procedure of granting the clause of effectiveness, and reviewing the authenticity of the execution titles, to which reference is made (exclusively, a revision of authenticity; also compare Article 784 of the Civil Procedure Code in the context of the possibility of considering the Court of Justice as a special court). Such changes should be deemed necessary.

Due to establishing the principle of the responsibility of the state for damages suffered as a result of violating the rights of individuals by the state, irrespective of the direct effect of the act, it is necessary to introduce provisions which would allow the courts to decide on such damages and establish appropriate compensation. Apparently, appropriate material decisions should be placed in independent legal acts (those determining the principle and conditions of the responsibility stated in the jurisdiction of the Court of Justice: this would extend in a specific way to Article 77 of the Constitution, which guarantees a right to compensation for any harm as a result of the illegal action of the public authority organ, provisions of the Civil Code which do not seem appropriate in this respect - see also Article 416 and following of the Civil Code). On the other hand, the Civil Procedure Code should be applied in the proceedings. Possibly, the group of courts which are to decide on the compensation should be limited (necessary change).

From the point of view of an effective application of the Community law in full, it is also desirable to publish all acts of the Community law and jurisdiction of the Community Courts, before accession of Poland to the EU, so as to make them commonly available (preferable change). On the other hand, it seems necessary to publish separately the Community acts and jurisdiction after accession, since they will have to be published in Polish. Nonetheless, it is important to do one's best in order to make them commonly available.

c) Constitutional Tribunal

Pursuant to the Constitution, the Constitutional Tribunal is entitled to examine the compliance, among others, of international agreements to the Constitution (Article 188 s. 1).

A right to examine the compliance of international agreements to the Constitution is especially important due to the accession to the Union and subsequent amendments to the primary law (primary law treaties). With respect to such agreements, the Constitutional Tribunal should prepare a position that would ensure the protection of the identity of the Polish Constitution.[14] In the face of a lack of clear constitutional provisions, which constitute a "core" of the Constitution, such issues will have to be decided by the Constitutional Tribunal itself. At the same time, it should be reminded that only preventive, not repressive, control will only be allowed from the point of view of the Community law.

Article 188 s. 2 and 3 makes the ratified international agreements a model of controlling acts and other legal rules. In the first case, only agreements ratified with the previous approval of the Parliament, expressed in the law, constitute it.[15] Due to accession to the EU, one should be aware of the fact that sometimes the EC conclude agreements with third entities (countries from outside EU, other international organizations) independently, that is, without the participation of the Member States. This occurs under the exclusive competence of the Communities (e.g. the common trade policy - Article 113 of the Treaty). Such agreements will also be an evaluation model for Polish law.

In view of the observance of primacy and direct effect principles, it is just as important to exclude the possibility that the Constitutional Tribunal examines the importance of the acts of Community law, as well as questions of the courts with respect to the compliance of normative acts with the ratified international agreements, with reference to the agreements of primary Community law, as well as with the Constitution in relation to the Community regulations or directives (Article 188, 193 of the Constitution). Such competence, on an exclusivity basis, is entrusted to the Court of Justice (Article 173, 177 of the Treaty). An appropriate regulation should be contained in the act on the Constitutional Tribunal (necessary change).

Some problems also arise as regards the right of the Constitutional Tribunal to decide on the constitutional claim (Article 188 item 5 in relation to Article 79 of the Constitution). It is specially important to resolve whether the constitutional claim will be allowed[16] in the case of a necessity to examine the compliance to the Constitution of a normative act in the form of a Community regulation or other Community act. Such doubt grows when the judgment passed on the basis of the normative act was issued after having obtained the preliminary ruling of the Court of Justice.[17] It seems that the possibility to submit a claim should be excluded, since the Court of Justice may not usurp the examination of the compliance of the Community law to the Constitution.

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[14] A different approach by J. G a 1 s t e r: *Konstytucyjnoprawne aspekty..., op. cit.,* p. 70-71, who claims that it is not necessary, since the principle of statehood is a sufficient warranty. However, the author is not completely consistent, and he states at the same time that Article 90 should include a negative material clause, that is, determine execution; the pertinent competence may not be delegated.

[15] In his scrutiny, J. G a 1 s t e r concludes that it may have a destructive impact upon the development and implementation of the Constitution *(ibid.*, p. 76).

[16] According to Article 79, it may be submitted with respect to compliance to the Constitution of the law or other normative act, on the basis of which the court or the public administration organ finally decided on constitutional freedoms, rights and obligations.

[17] K. W ó j t o w i c z; *Skutki przystąpienia Polski..., op. cit.,* p. 89.

Due to the above, an appropriate amendment should be made in the act on the Constitutional Tribunal (necessary change).

3. Problem of the Way of Introducing Amendments to Polish Law

It seems that for an effective execution of the Community law it is not only relevant that some provisions of the Polish law will be subjected to amendments; the way in which they will be made is equally significant. Modifications may be introduced through a number of specific amendments of Polish acts. However, this task may be achieved also in a more system-like way, that is, by means of an act on the legal effects of Poland's accession to the EU, which should be passed together with the ratification of the Treaty on Accession (direct effect and primacy principles only function after accession).

Such an act might be of a triple character. Its contents, simplified to some extent, would be as follows. In the first part, the act might contain general principles and fundamental provisions. They should include provisions developing the provisions of the Constitution. Therefore, they should state that the European Community law forms part of the Polish legal system (the status of specific sources of the Community law should be specified). Then, they should stipulate that directly applicable acts of the law of the Communities (regulations) are of direct applicability, without a need for their publication in *Dziennik Ustaw* [Journal of Laws]. An additional provision should declare that in the event of a contradiction previous or subsequent of the Polish legal rule with a rule of the Community law of direct effect, the latter should apply.

The first part should also contain provisions on the obligation of all public organs to execute an effective Community law and its safeguarding under the terms used in Polish law. There must also be place for provisions on responsibility for compensation on the part of the Treasury of State or organs of regional self-governments, due to a violation of the Community law towards persons. This part should also enumerate provisions allowing a person to appeal to the organs of legal protection and Polish courts, to decide in cases of a violation of the Community law.

The second part should contain the issues discussed above, concerning the statutory regulation of the relations between the Government and the Parliament in the European integration process. Finally, the third part should contain provisions which would amend rules binding in the detailed issues, discussed under specific modifications.

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ADJUSTING POLISH LAW TO THE REQUIREMENTS OF THE EUROPE AGREEMENT

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1. The Europe Agreement[1] imposes an obligation of the approximation of Polish law to that of the Communities (Article 68 of the Agreement). The fulfilment of this obligation is one of the conditions for Poland's economic integration with the European Union (EU).

The adjustment of Polish legislation to the standards of the European Union results from the assumption that the objectives of the Agreement are not only to remove barriers hindering the efficient functioning of the free trade area, but, first of all, to create circumstances enabling Poland to become a member of the European Union. This primary objective of the Europe Agreement demanded difficult negotiations, and was finally expressed in the last statement of the preamble.[2]

The obligation to approximate laws is aimed, first of all, at an elimination of hindrances in the sphere of Poland's economic integration with the EU. The harmonisation of legislation facilitates the movement of goods, services, and capital. It creates also a compatible legal infrastructure in the areas of competition, protection of intellectual property, rights of employees and consumers, and environmental protection. Similarly to the majority of the provisions of the association agreement, the regulations concerning the adjustment of our legislation to the legal standards of the EU constitute a clear reflection of the provisions of the Treaty of Rome, setting up the EEC, which in Article 3 provides that the approximation of the laws of member states should take place "to the extent necessary for the functioning of the Common Market".

The following article is intended, on the one hand, as a concise analysis of the essence of the obligations concerning the harmonisation of our laws, accepted by Poland in the

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[1] The Europe Agreement establishing an association between the Republic of Poland, on the one hand, and the European Communities and their member states, on the other hand, *Dz.U.* [Journal of Laws] no. 11/1994, item 38.

[2] The conclusion of the preamble is as follows: "Recognising the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective, have agreed as follows..." Although the above-quoted statement was formulated as a unilateral expectation of one party of the Agreement (i. e. the Republic of Poland), our aspirations to full membership were accepted at subsequent "summits" of member states of the European Union in Copenhagen (1994) and Essen (1995). In 1991, I took part in the negotiations of the Agreement. The opinions expressed in the article present exclusively my own views.

Europe Agreement; on the other hand, it is conceived as an attempt to assess the legislative priorities, pace, and instruments of the realisation of the above-mentioned obligations by the Government, the Parliament, and courts of the Republic of Poland.

Apart from a few fields, such as intellectual property or the obligation of a quick limiting of legal instruments and the strategic sectors of the economy, including some services (e.g. banking, insurance, or legal services), the liberalisation of our economic law is in the interest of both parties of the Europe Agreement. Furthermore, the global balance of advantages and burdens accompanying the modernisation of our laws is undoubtedly positive - even though the Agreement provides economic subjects of the stronger contracting party with long-lasting unilateral advantages in certain strategically important sectors of the economy, e.g. by means of a radical strengthening of the position of foreign holders of intellectual property rights or the opening of Polish financial and other markets dominated by companies from the European Communities (EC), while it refuses to observe the rules of free competition in the trade of agricultural products, the work force movement, and in labor intensive services.[3]

The considerable costs of the adjustment of our laws to the requirements of the Europe Agreement are compensated with "interest" by the advantages of opening access to the market of the EC, an increased inflow of capital, and the advantages associated with forcing a pro-competitive behaviour on Polish economic subjects. The expenditure on legislative transformation, however, should be minimised by accelerating the processes of changing law wherever those "investments" promise the highest gains. Simultaneously, the interpretational discretion in the Agreement should be used to account for the slowing down of harmonisation or preserving our legal solutions, when justified by the socioeconomic considerations and not only by the convenience of the entrepreneurs, who would like to prolong the artificial isolation of our market from foreign competition.

2. *The obligation of the approximation of legal regulations.* The Europe Agreement, in principle, does not oblige Poland to accept the law of the Communities as a whole. Both Article 68 and Article 69 of the Treaty use the term "approximation of laws". The approximation of regulations means reaching such a harmonisation of legal institutions which provides the fulfilment of the primary objectives of the Agreement in the sphere of economic integration. The Europe Agreement provides Poland with a higher level of legislative autonomy than in the case of the Member states of the European Union, even in areas regulated by the directives and regulations of EC organs, which do not allow distinct provisions in national legislation. As long as Poland is not a member of the EU, neither regulations nor directives constitute the source of Polish law, but only play a role of patterns (models) of legal solutions, with which we

[3] For more information cf. S. S o ł t y s i ń s k i: "Układ o stowarzyszeniu między Polską a Wspólnotami Europejskimi" [Agreement on Association between Poland and the European Communities], *Państwo i Prawo* 1992, no. 6, p. 4 and following. Departures from the principles of free trade and the uniform market, provided for in the Agreement, concern only those fields where the weaker party has, or potentially can have a comparative advantage (agriculture, steel, coal, and textile industries, labour-intensive services, etc.).

should harmonise our legislation.[4] Therefore, the recommendations included in resolution No. 16 of the Council of Ministers of 29 March 1994, obliging ministers and central agencies of state administration to examine drafts "with respect to their compatibility to laws of the European Union"[5] are inaccurate.

The flexibility of the harmonisation process is used only to a very limited extent. The pace of legislative integration is set rather by such factors as preferences of the ministry responsible for the preparation of a draft, external lobbying, the availability of funds necessary for a particular legislative venture, etc.

The example to follow for reformed Polish law is "Community legislation" (Article 68 of the Agreement). The legal system of the EC consists primarily of three establishing treaties[6] which, together with subsequent annexes and protocols, were combined into the Single European Act. The Single Act, documents concerning the accession of new member states, and other international agreements, in which the EC are the contracting parties, constitute the so-called primary source of law of the EU. Organs of the Communities issue laws in the form of regulations, directives, and decisions.[7] In its broader meaning, the legal system of the EC includes also recommendations and opinions of the European Council and the European Commission. Even though it is disputable whether they can be treated as *sensu stricte* sources of law, the two organs exert significant influence upon the final content of the regulations of the Community. The same refers to the judgements of the Court of Justice and the Court of the first instance, which cannot be denied real influence on the shape of the legal system in the EC. The whole of the legal body of the Communities is described with the term *acquis communautaire.* The Europe Agreement, therefore, obliges Poland to approximate (harmonise)[8] our legislation with the laws of the EC.

The Europe Agreement does not set any concrete deadline for the adjustment of Polish legislation to the legal standards of the EC. This would be impossible, considering the fact that the objective we pursue is changing continuously. Poland is obliged to follow the evolving legal system of the European "fifteen". The obligation included in the Agree-

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[4] It is accurately emphasised that Poland is not obliged to copy directives of the Communities. See L. Z a 1 e w s k i: *Komentarz do Układu Europejskiego* [Commentary to the Europe Agreement], ed. by C. B a n a s i ń s k i, J. W o j c i e c h o w s k i, Warszawa 1994, p. 191. The *White Paper* published by the European Commission in 1995 also indicates that, contrary to the accession to the Union, the integration of the associated countries does not assume the necessity to accept *acquis communautaire* as a whole, *"White Paper" Preparation of the Associated Countries of Central and Eastern Europe for Integration onto the Internal Market of the Union* (Com 1995), 163 final, *Executive Summary,* p. 1.

[5] Cf. § 1 and 4 of the resolution of the Council of Ministers concerning additional requirements for the proceedings with the governmental bill drafts with respect to the necessity of fulfilling the criterion of compatibility to the law of the EU (not published).

[6] The Treaty of Rome and treaties establishing the European Coal and Steel and European Atomic Energy Communities.

[7] For more information see A. W o j c i e c h o w s k i: "Instytucje Wspólnot Europejskich" [Institutions of European Communities], *Więź,* May 1995, p. 69 and following.

[8] I use the terms "approximation" and "harmonisation" interchangeably, but some authors try to distinguish the two notions, see T. P a j o r: *Komentarz do Układu Europejskiego..., op. cil.,* p. 196.

ment requires using the best endeavours, but does not mention any results.[9] The latter statement, however, should not be demobilizing. A slow pace of harmonisation makes impossible both quick accession to the Union and taking advantage of the "transplantation" of legislative solutions that were usually verified in practice.

Assertions that Poland preserves independence in setting the pace, order, and the necessary range of adjustment should be treated with caution.[10] The Agreement includes quite numerous provisions determining the schedule of the adjusting measures. They usually concern such areas whose amendment brings more advantages to member states of the EC than to Polish entities. It refers, among others, to amendments of customs law, the schedule of the opening of Polish investment and service markets, restrictions on public aid, introduction of a high level of intellectual property protection, free movement of capital and transfer of any profits coming therefrom, etc.[11]

It is difficult, however, to find in the Agreement any concrete schedules of changes of the *acquis communautaire* that would remove the restrictions imposed on Polish goods and services or on free movement of workers in all fields where Poland has, or potentially can have a comparative advantage (e.g. the trade of agricultural products, transport services, the movement of workers, and even of employees of Polish companies which supposedly enjoy full freedom of supplying services into the territory of EC Member states).[12]

The pace and direction of the process of the approximation of Polish legislation is, to a large extent, determined by the Association Council - an organ created by the Europe Agreement for controlling the observance of this international agreement. The decisions made by this organ must be unanimous, but, of course, the distribution of power is asymmetrical. Thus, for instance, acting under pressure from EU Member states, at the beginning of 1996, Poland committed itself to make respective amendments in its legislation that enabled recognising EU certificates of safety and marks of quality on the goods imported to Poland from the territory of the Union, unaccompanied by any corresponding concessions concerning Polish certificates in EU countries.[13] The result of such a distribution of power is that, unlike the EC, an

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[9] Art. 68 reads: "Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation".

[10] Such an assertion can be found, among others, [in:] *Program działań dostosowujących polski system prawny do wymagań Układu Europejskiego,* [Programme of Activities Adapting the Polish Legal System to the Demands of the Europe Agreement], Warszawa 1993, p. 4.

[11] Cf. e.g. articles 9-12, 60, 61, 63 section 3, 65, 66 section 2, 67 section 2 of the Agreement.

[12] The apparent asymmetry of rights and obligations between the parties to the Agreement to the advantage of Member states is indicated by some Western economists. Cf. e.g. A. W i n t e r s: *The Association Process. Making It Work in Europe,* Brussels 1992, conference materials, p. 3 and 10. I mention the above fact from the perspective of an Euro-realist who, while trying not to question the doubtless advantages which result from the Europe Agreement, wants to point out the real balance of this international agreement (for more information cf. S. S o ł t y s i ń s k i, *op. cit.).*

[13] More or less at the same time the EC forced Slovakia to abolish import duty on commodities from the Communities. Poland will also have to abolish regulations prohibiting the import of second-hand cars without devices preventing the emission of toxic exhaust fumes, since - according to the EC - this would be an act of a discrimination of vehicles originating from EU countries, considering that there is no prohibition in Poland to register such cars bought on Polish territory.

associated country has much more limited chances for inflicting changes on the *acquis communautaire* which imposes restrictions on the access of Polish goods to the territory of the Communities. Nevertheless, due to the lack of organised lobbying and poor preparation of justified postulates by Polish economic circles, we hardly enjoy the opportunity of putting forward motions to the Association Council, that could help, even if only to a limited extent, to accelerate the abolishing of non-tariff restrictions of free trade present in EC legislation.

The model to which Polish legislation should approximate is not only the *acquis communautaire*, i.e. the legal system created by EU organs, but also typical legal standards which are in force in EU Member states. This refers especially to spheres which are not regulated by the uniform law of the EU, but those where a significant standardisation of national regulations took place in the EU (e.g. civil procedure).

Many fields of law, in particular tax law, civil law, criminal law, and administrative law were less affected by the processes of harmonisation. Nonetheless, the process of approximation has been taking place for a long time also within those fields. The obligation to harmonise the legislation of the member states of the European Union follows from Articles 100-102 of the Single European Act.[14] The latter contains a postulate of the harmonisation of substantive law, including regulations based on common law.[15] In view of the fact that Articles 68-69 of the Europe Agreement are based on the principles of the Single European Act, the analysed notion of the "approximation of legislation" should be understood similarly to the current interpretation of Article 100 of the above-mentioned act.

It is also worth taking note of the phenomenon of delaying the harmonisation of rules on competition resulting from actions of major foreign investors, who exert pressure - often successfully - upon the governments of countries associated with the EU to obtain special privileges. Such a practice violates the principle of an equal treatment of economic subjects. The European Commission brings to the attention of associated countries the fact that yielding to such pressure, which consists in granting generous government guarantees and other long-lasting investment privileges, is against the provisions of association agreements.[16]

3. *Priority fields in the harmonisation process.* Article 69 of the Europe Agreement contains a list of priority fields subject to the obligation of harmonisation.[17] The above enumeration is not exhaustive. Literature on the subject emphasises that the creation of legislative priorities within the fields enumerated in article 69 of the Agreement, and

[14] For more information see T. K o t: "Harmonizacja prawa w Unii Europejskiej" [The Harmonisation of Law in the European Union], *Kwartalnik Prawa Prywatnego* 1995, vol. 4, p. 544 and following.

[15] D. V i g n e s [in:] J. M e g r e t, J. L o u i s, D. V i g n e s, M. W a 1 b r o e c k: *Le droit de Communauté Economique Européenne,* Brussels 1983, p. 154-155.

[16] The Commission provides an example of the pressure and privileges obtained by telecommunication companies. *White Paper*, section 4.21, *op. cit.* (footnote 4).

[17] "The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment".

those not included in the list should serve, first of all, facilitating the economic integration of Poland in the EC. The interpretation of Article 100 of the Single European Act, whose *ratio legis* consists in enabling the creation and functioning of the common market, is similar. However, considering the fact that the Association Agreement is also devoted to political, scientific, and cultural co-operation, it should be assumed that the obligation of the harmonisation of our legislation extends to all fields of the legal system, if it is required for the realisation of the objectives of this international agreement. Therefore, while not diminishing the priority role of the harmonisation of economic law, one should also opt for the adjustment of criminal and administrative law or acts on primary, secondary and higher education and scientific research, since such an obligation ensues frequently from specific regulations or objectives of the Europe Agreement.[18]

The thesis concerning the necessity of the harmonisation of fields other than economic law was accepted in its broadest sense by EU member states, though with considerable reluctance. It is often emphasised that the harmonisation of selected fields (e.g. criminal and tax law) took place without any help of regulations or directives.[19] However, one could suppose that outside the field of economic law or the fields regulated by directives and regulations issued by EC organs, harmonisation might be less thorough, calculated only for the purpose of "compatibility", and not designed for in-depth adjustment of legislation.

It is worth noticing that, in principle, neither the Europe Agreement nor the Single European Act regulate the obligation of the adjustment of legal procedures.[20] The lack of international obligations in the law of procedure should not lead to giving up attempts to harmonise all fields where approximation is good for accelerating the process of integration or improving Polish rules of procedure.

The programmes for adjusting the Polish legal system to the requirements of the Europe Agreement created so far do not take into account in a sufficient way priorities resulting from a thoroughly considered legislative policy, which would aim at supporting the interests of Polish economic subjects facing increased competition on the part of foreign companies acting in the emergent common market. We do not take full advantage of the possibility of "transplanting" such legal solutions, present in EC legislation and in the national legal systems of member states, which contribute to the development of transfrontier trade and investment as well as to facilitating the pursuit of economic activity and, simultaneously, reduce the negative impact of abusing the dominant position of partners who are economically stronger or take advantage of the lack of experience on the

[18] Cf. e.g. art. 85 of the Agreement on preventing "money laundering", art. 87 (social security) or art. 90 (harmonisation of European information and the audiovisual media policy).

[19] Cf. M. B i g a y: "L'application des réglements communautaires en droit pénal français", *Revue Trimestrielle de Droit Européen,* 1971, vol. 1, p. 14 and following.

[20] Cf. D. V i g n e s, *op. cit.,* p. 533. Cf. also T. K o t, *op. cit.,* p. 553. However, see art. 66 section 1 of the Agreement which obliges Poland to provide the holders of intellectual property rights with "comparable means of enforcing such rights", which includes both substantive rights and procedural remedies, as well as guarantees their pursuit before a court. This regulation constitutes one of the numerous examples of special privileges granted to holders of intellectual property rights.

part of Polish economic subjects and consumers. The shortcoming of our adjusting programmes is their passive character, which consists primarily in the realisation of the expectations of the opposite party, expressed in the Europe Agreement. Thus, for example, "The Programme for Adjusting the Polish Legal System to the Requirements of the Europe Agreement", adopted by the Council of Ministers on 26 January 1994, provided that the range of highest priority legislative changes should include in particular: customs law, financial services, rules on economic relations, industrial law, intellectual property, protection of the environment, and issues connected with standardisation (the above list constitutes largely a repetition of article 69 of the Agreement). Simultaneously, the said programme did not include any specific bill drafts justified by the special interest of Poland as an associated country. However, it must be emphasised that the specific content of the programme did include some bill drafts, which, though not numerous, were extremely important, and whose passage was prompted, first of all, by the domestic necessity to modernise our legal infrastructure. One should mention the Accountancy Act the Goods and Services Tax Act (VAT) and the Public Procurement Act, passed by the Parliament in the following years.[21]

An example of a completely new act, extremely up-to-date as far as the present shape of the capital market is concerned, is the Law on Public Trading in Securities and Trust Funds.[22] Even though neither the law on public trading in securities nor legislation concerning trust funds are enumerated in the list of priorities defined in article 69 of the Agreement, both fields required prompt regulation due to the risks for inexperienced investors and companies that lurk in the spontaneously developing stock exchange and public trading in securities. Despite the fact that it was amended in 1994, this pioneer act is still not free from technical shortcomings, which urgently need further amending.[23]

The negative results of a lack of balance in economic potential between Polish and foreign economic subjects in the reality of a rapid opening of our market, can be diminished by "transplanting" numerous legal solutions of the EU. A lack of balance between contracting parties is evident very often in agreements concerning the transfer of technology. In this case, Polish subjects usually appear in the role of licensees and franchisees, as well as in transnational distribution contracts, in which they act as representatives, dealers, or exclusive licensees. Foreign licensors, franchisors, and exporters make the most of the lack of respective regulations in Polish law by imposing on Polish subjects numerous obligations which are illegal in the EC and their Member states. As a matter of fact, it is possible to apply for help in the Anti-Monopoly Office, but until respective regulations modelled on regulations of the European Commission have been issued, only few Polish companies will be able to afford to benefit from the anti-monopoly proceedings, and prove that the requirements imposed on them by a contract of distribution or franchise

[21] The Goods and Services Tax Act, the Accountancy Act of 29 September 1994, *Dz.U.* no. 121, item 591; the Public Procurements Act of 10 June 1994, *Dz.U.* no. 76, item 344.

[22] Act of 22 March 1991, unified text: *Dz,.U.* 1994, No. 58, item 139.

[23] Cf. A. W i ś n i e w s k i: *Prawo o spółkach. Spółka akcyjna* [The Law on Companies. The Joint Stock Company], Warszawa 1993, p. 152 and following.

agreement constitute monopolistic practices. As a minimum proposal I suggest that the Anti-Monopoly Office should immediately issue interpretations which would take into account the regulations of the European Commission concerning contracts of distribution,[24] exclusive purchase contracts,[25] and franchise agreements.[26] Similar explanations concerning licence agreements, issued by the Anti-Monopoly Office in 1993, slowly help "civilising" the practice of licence agreements. Nevertheless, following the model of EC legislation, respective regulations should be issued in the near future, since the legal status of the guidelines of the Office, which are not sources of law, is unclear and many lawyers do not even realise their existence, owing to the fact that publications of the Anti-Monopoly Office are not easily available.

In the majority of EU member states, distributors are protected not only by antitrust legislation, but also by civil law. A typical instrument of protection is granting compensation to a distributor in the case a legal relation was terminated, accompanied by the right of statutory claim for compensation for providing the exporter (supplier) with clients in case the contract of distribution expired. Such legal solutions have been in force for a long time, for example, in France, Belgium, and the Netherlands. The analysed problem should be regulated in the Civil Code, which urgently requires amending in this field, or in a separate act. Nevertheless, the work on amending the civil code, conducted so far, has been advancing very slowly, and the existing programme of changes is criticised as an accidental set of proposals which omits many important issues, especially in the field of economic relations.[27]

One of the most urgent legislative problems, important from the perspective of the national interest of an associated country, is either abolition or a significant change of the statutory joint property of husband and wife (Article 31 of the Family and Guardian Code). This problem could be solved by following the example of Germany or Scandinavian countries. The model of statutory joint property, currently in force, evokes implications which are difficult to accept even when only one of the spouses pursuits economic activity. Thus, for example, the requirement to obtain consent of the spouse, who does not participate in civil law partnerships or commercial law companies, for any act exceeding ordinary management performed by the spouse-partner (e.g. voting on payment of profits or transfer of possession of shares) can be reconciled neither with the principles of safety of commerce (especially in the case of trading in securities) nor with efficient exercise of the rights of a shareholder of a commercial law company.[28]

The ''transplantation" of legal solutions of the EU into our legislation is sometimes premature or poorly considered. One should approach draft regulations and draft directives of the EU with particular caution, since many of them never come into force, and

[24] Regulation no. 1983/83, *Dz.U.* 1983, no. L 173/1.

[25] Regulation no. 1983/83, *Dz.U.* 1983, no. L 173/5.

[26] Regulation no. 4087/88 of 30 November 1988, *Dz,U.* 1988, no. L 359/46.

[27] Cf. A. Mączyński, K. Zawada: "Zamierzona nowelizacja kodeksu cywilnego" [Intended Amendment of the Civil Code], *KPP* no. 3, 1995, p. 417 and following.

[28] For more information see S. Sołtysiński, *op. cit.*, note 33, infra, vol. 2, pp. 33 and following. The opinion presented above was shared by the majority of members of the Council on Legislation during the sitting of 14 December 1995.

there have already been examples of copying legislative solutions caused by "Euro-enthusiasm" or the "childish illness of Europeanism". One of the symptoms of this "illness" was the introduction of Article 87 of that act into the Law on Public Trading in Securities and Trust Funds. It imposes an extremely difficult and expensive obligation on the strategic investors of companies listed on the stock exchange, once they have acquired more than 33 per cent of the vote at the general assembly of shareholders. Such an entity is obliged to make a public offer to all other shareholders to pay for their shares the highest price that it paid for the shares in its possession during the previous 12 months, or if there is no such price, to bid the average price from the period of 30 days before the call to register the sale of shares.[29] The analysed regulation evoked particular controversies concerning the fact that its verbal interpretation allows for the assumption that it applies also to investors exceeding the 33-percent threshold of the vote as a result of fulfilling an investment obligation imposed on them by the State Treasury in the contract of the sale of the shares of a privatised company (e.g. when an entity which bought from the State Treasury 30% of shares takes hold of an additional block of shares, participating in increasing the company's equity capital). Such an interpretation would hinder the processes of privatisation. Recently, by employing guidelines of a functional and system-based interpretation, the Polish Securities Commission passed a resolution ruling out the possibility of applying this regulation to strategic investors whenever they take hold of the new shares of a company fulfilling their investment obligations towards the State Treasury, undertaken in the process of the privatisation of state-owned companies.

The above-described example illustrates well the results of a poorly considered and premature adoption of a draft directive of the European Commission, which, as a result of criticism on the part of Member states, was thoroughly changed in the course of a several years' debate. At the beginning of 1996, the Commission gave EU Member states a completely free hand to choose means for the protection of minority shareholders or to give up specifying a compulsory threshold of shares, whose exceeding incites shareholders to sell their shares at an attractive price in order to give them an opportunity to leave a company taken over by a new entity.[30]

4. *Methods of the harmonisation of Polish legislation with the legal system of the EC.* The adjustment of Polish law to the standards of the EU is primarily conducted by means of legislative interventions. Simultaneously, we observe an interesting process of a "pro-European" interpretation of Polish provisions in force, carried out by par-

[29] This regulation discourages many strategic investors to invest in the company by subscribing for new shares. Disregarding the fact that the threshold set by this article is definitely too low, the analysed regulation does not take into account many situations when penalisation of a strategic investor is unjustified (e.g. when the 33-percent threshold is exceeded independently of the will of the holder of a large block of shares, for example, due to the redemption of a proportion of shares, inheriting, the loss of voting privileges by other shareholders, etc.).

[30] Cf. European Commission Proposal for a 13th European Parliament and Council Directive on Company Concerning Takeover Bids (1989, changed in 1990 and 1996). Source: COM (95) 655 final, Brussels, 7 February 1996.

ticular courts, and even - though rather seldom - by administrative authorities. The latter instrument of harmonisation was approved by the legal doctrine.[31] The interpretation of the regulations of Polish law, compatible with the law of the EC, constitutes the cheapest and, at the same time, the fastest means of adjusting our legislation to models existing in Western Europe.

Such a direction of a functional interpretation, which serves the realisation of the objective of integration, should be regarded as one of the quidelines of the so-called dynamic interpretation of business law regulations, especially in fields enumerated in article 69 of the Agreement.[32]

A "pro-European" interpretation of provisions in force can be applied in those cases when a regulation of a given problem contains ambiguities or interpretational margins and, simultaneously, there are no significant socioeconomic reasons to realise different objectives or values protected by the Polish legal system. However, there could also appear situations with serious arguments for choosing other social, political, and economic priorities instead of the ones adopted in the legal system of the EU.

It is possible to apply a pro-European interpretation of legal norms both in such cases when Polish law adopted those solutions of the Communities that underwent judicial interpretation, and in such fields which are rooted in prewar Polish legislation, modelled on regulations of the future founder-states of the EEC (e.g. on German and French legislation). Such fields of our legislation include, first of all, civil law, commercial law, and the law of civil procedure (e.g. the Civil Code, the Polish Commercial Code, the Code of Civil Procedure, the Bankruptcy Act, and private international law). In many cases, the practice of using the output of the German judicature or the directives of the ECC in the process of an interpretation of, for example, company law, allows to accomplish necessary harmonisation, and compensates for more than fifty years of a standstill in this field of law in Poland.[33] The method of taking into account arguments of a comparative nature - based on the legislation of the Communities - is frequently used by the Anti-Monopoly Court.[34]

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[31] See S. Sołtysiński [in:] S. Sołtysiński, A. Szajkowski, J. Szwaja: *Komentarz do kodeksu handlowego* [Commentary to the Commercial Code], vol. 1, Warszawa 1994; M. Safjan: "Prawo Wspólnot Europejskich a prawo polskie" [The Law of European Communities and Polish Law] [in:] *Prawo Spółek* [Company Law], Warszawa 1996, p. 2.

[32] M. Safjan, *op. cit.*\ T. Skoczny: *Przeciwdziałanie praktykom monopolistycznym w świetle orzecznictwa* [Counteracting Monopolistic Practices in the Light of Jurisdiction], Warszawa 1994, p. 179 and following.

[33] Cf. S. Sołtysiński, *op. cit.*, vol. 2, p. 100-101, 128, 146; See also The resolution of the Supreme Court of 7 April 1993, III CZP 23/93, *OSNCP* 1993, item 172. Judging the implications of potential invalidity of articles of a joint stock company and the deed of the formation of a limited liability company in view of the commercial and civil codes, the Supreme Court took into account the regulation of art. 11 of the First Directive of the Council of the European Communities dated 9 March 1968 concerning companies.

[34] This court referred directly to the sources of antitrust law of the Communities in several decisions, e.g. defining the notion of "relevant market", determining permissible limits of franchising agreements, substantiating the noxiousness of chain transactions, etc. The above decisions are quoted by T. Skoczny, *op. cit.*, p. 180-181.

Among administrative authorities that actively respond to the idea of adjusting our law to the *acquis communautaire* by means of a pro-European interpretation, one should mention the Anti-Monopoly Office (AMO).[35] Attempts to harmonise law by means of a pro-European interpretation of domestic legislation can be traced also in selected decisions of the Polish Securities Commission and the Patent Office. An example of a restrictive interpretation which does not take into account the necessity to harmonise our law is, for example, the interpretation of article 11 of the Law on Corporate Income Tax[36] that dominates in the practice of revenue offices. According to many of them, expenses on joint research and development, training, etc. paid by two or more economic actors (entities) domiciled in various countries, can be classified as the costs of obtaining income only when incurred in the territory of Poland. Such an interpretation is not justified even in view of the directives of a verbal interpretation of tax law, and constitutes an obstruction for the participation of Polish companies in transborder co-operative ventures. As a matter of fact, the above issue is not regulated by the law of the EU; almost in all member states of the EU, there are appropriate precedents or provisions in force, which encourage participating in research and development ventures run by capital groups or companies with no capital links.[37]

The *White Paper of the European Commission* (1995), devoted to the problems of adjusting the legal systems of associated countries to the standards of the EC, indicates the necessity of a comprehensive harmonisation of the priority fields of legislation.[38] The above proposal is based on the assumption that a fragmentary adoption of selected regulations in a particular field of law will bring about neither desirable synergic effects nor compatibility of the legal infrastructure of associated countries with the legislation of the EU. An example of the incomprehension of the analysed postulate is the well-prepared draft of the intellectual property code in which, contrary to the stance of the Council on Legislation and the doctrine, the Patent Office did not provide for the institution of the so-called extraterritorial exhaustion of intellectual property rights.

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[35] Thus, e.g. in the case of *Niku vs. Sony* (1995) the AMO conditioned its consent for a settlement between the organiser of a selective distribution network (Sony Poland) and the independent wholesaler of imported Sony products by the abolition by Sony Poland of the ban on parallel import of its products from the EU as well as the removal of all non-quality requirement intended solely for providing customers with appropriate service. The criteria of legal appraisal of selective distribution systems set by the Communities were applied by the AMO also when it discontinued proceedings instituted upon a motion of the Access and Digicom companies against Centertel (1996). The applicants accused Centertel of attempting to monopolise the market of cellular telephones sale and of practices on the part of the organiser of the distribution network that make it difficult for them to sell their telephones by the intermediation of the Centertel network. The AMO approved the settlement, which guarantees access to the Centertel distribution network on nondiscriminating terms not only to the applicants, but also to other sellers of cellular telephones. The criteria of legal appraisal of selective distribution systems applied by the AMO are based on case law of the EC and, in particular, on the rulings in the Metro I, Metro II, and Grundig cases.

[36] *Dz.U.* no. 106, item 482 with subsequent amendments.

[37] The above-described problem is the subject of litigation between an economic subject with foreign shareholdings, a member of a European capital group, that might soon find its way to the High Administrative Court, which makes it impossible for the Polish company to participate on equal rights in the profits derived from international co-operation.

[38] *White Paper*, *op. cit.*, sections 2.3-2.4; see footnote 4.

The sense of this institution consists in the fact that the holders of patents, patterns protection rights, or registered trademarks right cannot force a ban on the import of a product protected by exclusive right once the product has been brought into circulation, e.g. once the sale of a patented device or appliance with a registered trademark has occured. The above concept assumes that a monopoly concerning a particular object is exhausted at the moment of the first transaction, performed by the right-holder in the territory of any country with which Poland has signed a free trade agreement. The introduction of this institution would enable Poland to import state-of-the-art products of best quality from the cheapest source within the territories of the EC, the EFTA, and the CEFTA. Despite the fact that it has been long since the case law of the EC adopted a stance maintaining that without freedom of parallel import, which ensues from the ex-territorial exhaustion of intellectual property rights, the uniform, highly integrated European market cannot function; the draft of the intellectual property code does provide for an ex-territorial exhausting of the right, justifying this with the necessity of obtaining consent from our commercial partners.[39]

What remains unsettled is the problem of choosing legislative techniques which would be the best for the objectives of harmonisation. Currently, the adjustment of our law is conducted by means of amending provisions in force or passing new regulations. The schedule expressed in Articles 44 and 45 of the Agreement - declaring an increasing pace of introducing the principle of freedom of establishment and providing services, which means the abolition of all kinds of discrimination of Community companies and nationals in the remaining fields of industry, commerce, and services - will probably impose the passing of a new type of acts that will remove, for example, the requirement of Polish citizenship for eligibility to pursue certain economic activities. Such restrictions exist in more than 20 acts; therefore, it seems worth considering the preparation of appropriate acts that would repeal "wholesale" most of the provisions which discriminate nationals and undertakings of the EC. Another solution would be the unambiguous settlement of the controversial problem of the "self-execution" of those selected provisions of the Agreement which do not require being incorporated into domestic law.[40]

An important factor in the approximation of legal systems is the reciprocal recognition of certificates, diplomas, marks of quality, etc., since those institutions might hinder the movement of goods, services, and the work force. However, reciprocal

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[39] The above-mentioned view is groundless. Neither the Europe Agreement nor any other international agreements restrict the powers of Poland in this sphere. Cf. footnote [in:] T. Cotter: *Current and Future Issues Related to the TRIPS Agreement: A European Perspective*, ANN. AIPPJ (1995), p. 83 and following, as well as a comment by the same author on p. 61.

[40] See K. Skubiszewski: "Wzajemny stosunek i związki między prawem międzynarodowym i prawem krajowym" [The Mutual Relation and Links between International Law and Domestic Law], *RPEiS* 1986, no. 1, p. 4 and following; E. Skrzydło-Tefelska, R. Skubisz: "Skuteczność wewnętrzna prawa międzynarodowego. Układ Europejski a wybrane kwestie spółek z udziałem zagranicznym" [The Domestic Effectiveness of International Law. The Europe Agreement and Selected Questions Concerning Companies with Foreign Shareholdings], *Rejent* 1994, no. 10, p. 43-44.

recognition of professional qualifications, certificates, and other documents also requires prior legislative changes.

5. *The organisation of the process of harmonisation.* The organ responsible for the co-ordination of the process is the governmental Committee for European Integration. Its President appointed for this purpose a group of legal experts and commissioned it to prepare a long-term programme of the harmonisation of Polish law with the legislation of the EU. The group singled out 25 legislative fields, whose adjustment is crucial to our future membership in the EU. The efforts made so far by the Committee for European Integration deserve recognition. It was on its initiative that the Commentary to the Europe Agreement (1994) and the Report on the realisation of the programme of adjusting Polish economy and legal system to the requirements of the Europe Agreement in 1994 were devised. Simultaneously, work on another *White Paper* conceived by experts of the Committee has reached its final stage. The paper contains a list of specific legislative tasks connected with the introduction into Polish legislation of all biding directives and regulations issued by the European Council and the European Commission. Comprehensive studies on the legislation of the EC are conducted, among others, by the Ministry of Justice other ministries and the Anti-Monopoly Office.[41]

On the strength of resolution No. 16 of the Council of Ministers of 28 March 1994 (not published), an obligation was introduced to examine legislative acts as regards their compatibility to the law of the European Union (§ 1). Ministries and central authorities of the state administration (§ 3) are responsible for the fulfilment of this obligation. A final opinion should be drawn up by the Committee for European Integrationd. The described solution was necessary, and helps to accelerate harmonisation and to eliminate bill drafts contradictory to obligations deriving from the Europe Agreement.

A still unsolved problem, however, involves pronouncing opinions on drafts of laws initiated by MPs or the President. It seems worth postulating the creation of a single strong centre for the co-ordination of main legislative undertakings that should act on the basis of powers conferred by law. It is also worth considering whether a single centre should take care of rebuilding our law, whose responsibility would be to examine the compatibility of legislation to the requirement of the approximation of our legal system to the *acquis communautaire.* Finally, it should be considered in this context whether to create an institution with powers similar to the ones of the prewar Codification Commission.

The shortcomings of the current situation are the dispersion of funds for legislative activity, the fact that many problems are solved from the narrow perspective of one government department or central authority, as well as the slowness and poor results of procedures for interdepartmental arrangements. Despite the creation of ministerial cen~

[41] Thus, e.g. the Institute of the Administration of Justice issued in the series *Prawo Wspólnot Europejskich a prawo polskie* [The Law of European Communities and Polish Law] a study entitled: *Prawo Spółek* [Company Law] (1996), ed. by M. S a f j a n; the Anti-Monopoly Office patronised the preparation of a multi-volume analysis concerning the antitrust legislation of the EEC, ed. by Prof. Skoczny.

tres, whose purpose is to supervise the compatibility of Government bills with the *acquis communautaire*, numerous drafts are submitted to the parliament contrary to particular provisions of the Europe Agreement, which has been indicated in literature.[42] Meanwhile, a government bill draft still assumes, for example, that no foreign subject can set up companies or open branches. Such restrictions with regard to selected investors from the EC should have been abolished already when the Agreement became effective.

In spite of the above-described difficulties that result largely from the lack of funds for legislative activity, the process of the harmonisation of Polish legislation with the legal system of the EU has considerably advanced in many fields, gathered increasing momentum, and become a significant factor in modernising new law in economic area.

[42] Thus, e.g. reviewers commissioned by the Parliament indicated that in spite of the appropriate *imprimatur* of compliance to the law of the EC, selected provisions of the act on amending the Act on Companies with Foreign Shareholdings are in conflict with the provisions of Articles 44 and 45 of the Agreement, which determine a precise schedule of granting Community persons the right to set up companies and acquire real estate in Poland on terms no less favourable than accorded to Polish companies. Cf. E. Skrzydło-Tefelska, R. Skubisz: *Skuteczność wewnętrzna..., op. cit.*, p. 43; S. Sołtysiński, *op. cit.*, p. 188 and following.

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THE LAW IN A SOCIETY OF THE PERIOD OF SYSTEMIC CHANGE

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1. Contemporary science unanimously confirms the thesis that the law has become an instrument of social change. This common belief, despite being based on observations of twentieth-century legislative practice,[1] can lead to easy generalisations. In this field, our century has seen four - diametrically different - types of experiences: the evolutionary modernisation of the capitalist system towards social market economy and democratic society; the formation of totalitarian and monocentric systems; the commencement of economic and social progress in civilizationally underdeveloped countries and, finally, the beginning of the process of systemic transformation in post-communist systems.

Each of those experiences took place in different conditions, which determined both the properties and aims of the law and the properties of the society in which they occurred. Consequently, the knowledge obtained therefrom is, by its nature, untranslatable and, for the same reason, fragmentary. Literature on this subject is dominated by analytic studies of particular types of experiences relating rather to partial changes or changes of an innovative nature than to total, systemic changes. The integrating factor of all those analyses has been the question: to what extent can the law independently influence social changes?[2] This question is complemented by the reflection, extensively discussed in socio-legal literature, about long-term consequences - for the law and the society - of actions as a result of which the law becomes the main instrument of change. This is, however, too wide a problem to be treated in our article. We will limit ourselves to the observation that such practice significantly strengthens the relationship - characteristic for legal sciences, as R. Cotterrell writes - between knowledge and authority, but at the same time provokes critical reflection and induces to seek new ideas concerning the formula of the social utility of the law.[3]

Together with conceptions promoting a new image of law as an instrument of social change, theories of active society were developed, opening the way towards a reflection on the nature of the relationship between legal and social systems. To

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[1] See R. C o t t e r r e l l: *The Sociology of Law*, London 1984, p. 48.

[2] See *ibid*., p. 49-72.

[3] R. C o t t e r r e l l: "Prawo i socjologia" [Law and Sociology], *Colloquia Communia* 1989, no. 1, p. 232-252.

a great extent, those theories were introduced into Polish literature by G. Skąpska.[4] The theories of active society opened the way towards rejecting conceptions of autopocictic systems, where both law and society were perceived as autonomous beings, capable of intra-systemic controlling.

The extensive theoretical basis for the development of theories of active society consisted of: humanistic orientation in sociology, sociology of knowledge and a sociological conception of the social creation of the world. According to those twentieth-century sociological trends, it is the individual and socially created groups that bring about real social changes. Such completion of the theoretical conceptions of active society ascribes new social utility to the law, as an important instrument of the stimulation of social changes. The mutually creative coexistence of the law and the society has become a fundamental principle of knowledge and practice.

As a result, one is compelled to state that present knowledge has defined more precisely the meaning of the thesis about the law as an instrument of social change, and has enabled us to formulate the statement that no social change can occur without the participation of the society. As in the case of any statement of a high level of generality, there is a tendency to see such participation of the society in the introduced change in an uniformizing way. In practice, this usually means a certain anticipation of mechanisms of action of a developed democratic society in post-communist societies, which are only beginning to shape as democratic ones. In this approach, an immature society becomes a real barrier to systemic changes; moreover, such society becomes a scapegoat bearing responsibility for the lack of success of the reforms introduced by the political system.

2. The process of a transformation of state organisation in our country, being closely linked with the political aspirations to enter into European structures, results in the problems of legal reforms acquiring paramount importance in scientific analyses. As a consequence, analyses concerning the conditioning of an effective legal change by the features and properties of the society are considered to be much less important. This tendency can be read clearly in literature on this subject, where, in spite of the rapidly growing number of publications concerning legal reforms and modifications, there are still very few publications dealing with social expectations as to the law in the period of systemic change.

This situation is objectively conditioned mainly by obligations resulting from the ratification of the Europe Agreement (S. Sołtysiński refers to them as "following the evolving legal order of the Fifteen"[5]) and has some negative consequences for study processes and practice.

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[4] G. Skąpska: "Prawo i społeczeństwo. Teorie systemowe w socjologii a koncepcje społeczeństwa aktywnego" [The Law and the Society. Systemie Theories in Sociology and the Conceptions of Active Society] [in:] *Prawo* w *zmieniającym się społeczeństwie* [The Law in Changing Society], Kraków 1992; *idem: Prawo a dynamika społecznych przemian* [The Law and the Dynamics of Social Transformations], Kraków 1992.

[5] S. Sołtysiński: "Dostosowywanie prawa polskiego do wymagań Układu Europejskiego" [Adjusting Polish Law to the Requirements of the Europe Agreement], *Państwo i Prawo* 1996, no. 4-5, p. 33.

In this context, it must be borne in mind that the permanent process of adjusting our law to the European Community standards may lead to a situation where reforming the law becomes an objective in itself, and not an objective serving the shaping of an active society, without which there can be no private market economy or democratic order.

Another inevitable consequence of such an orientation must be the domination of technocratic rationality over the rationality of individuals and the rationality of group actions. Social consequences of the domination of technocratic rationality in developed democratic societies were thoroughly analysed by J. Habermas.[6] From those analyses we may draw a conclusion that although "law as the controlling medium" assaults and destroys the symbolic sphere of social reality, it creates, at the same time, a particular sense of order and safety guaranteed by structures of the state. Thus, we can say that in societies which have established social structure and a political scene, the positive and negative consequences of "law as the controlling medium" are, to a certain extent, balanced.

The same phenomenon is going to function differently in a post-communist society, with its unstable social structure and cultural system and changing political scene. In such an arrangement, technocratic rationality - due to various competing political options - easily becomes a conflictogenous factor, provoking different social disturbances. One of its manifestations is the formation in social consciousness of the feeling that social order is missing, which leads to increasing criticism of the law by the society, to a lack of confidence in its regulative power, and, consequently, to lowering the prestige of law. The low prestige of law - inherited from real socialism - is further stimulated by the process of systemic change.

Systemic transformation of a post-communist society is, thus, burdened with both experiences of the previous system and social perception of the normative disorder, which always accompanies radical systemic changes. The awareness that such a burden does exist may become a factor correcting the practices of state structures. However, in reality it does not. To prove the aptness of this thesis it is enough to look at the customs in our public life and at the changes occurring in our legal system and legal practice.

Works on reforming the law, undertaken in order to make it an instrument of systemic change, head in two directions. The first is to bring back to the law such instruments of the functioning of the market, forgotten in the previous system, as commercial law, exchange law or banking law. The second is the harmonisation of Polish law with European standards. This field of activity poses particular difficulties, both as regards legislation and the pro-European functional interpretation. Analysing those difficulties, S. Soltysinski concludes that: "Union patterns are sometimes transplanted to oui legislation prematurely and without proper reflection".[7]

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[6] J. H a b e r m a s: *Theorie das kommunikativen Handelns*, Frankfurt a/M 1981, *idem:* "Law as Medium and Law as Institution" [in:] *Dilemmas of Law in the Welfare State*, Berlin-New York 1985.

[7] S. S o ł t y s i ń s k i, *op. cit.*, p. 38.

The recommended far-reaching actions, intended to modernise the existing legal system, inevitably cause such a system to be unclear, incoherent and unfinished. At the cognitive level, we can discuss whether such a condition of the law meets the fundamental requirements of a system. From the point of view of social behaviour it undoubtedly causes significant perturbations as regards, for example, legal consequences of the undertaken actions, which may, in turn, result in a feeling of insecurity.

Similar effects can be brought about by the non-cumulativity of the systemic changes which are being introduced. In our country, this is manifested in such phenomena as the irregularity of privatisation reforms (which suddenly stop or gain momentum) and a lack of normative decisions concerning the reform of local self-government - both those phenomena are connected with the principle of depoliticising the economy and decentralising the authority, a basic one in the context of systemic change; the temporariness of legal solutions, usually justified by economic and fiscal needs, as well as the inefficiency of institutions applying the law; the inconsistency of actions relating to the rights acquired by individuals; attempts to restrict human and citizens' rights (tapping telephone conversations, surveillance, passport restrictions); making use of the law in political games.

3. The conducted analyses lead to the conclusion that the transformation of a post-communist society is a particular kind of a natural social experiment, where the process of the autonomisation of the society coexists with the controlling action of the law, with all its imperfections.

In the light of the conceptions analysed above, there arises the fundamental question: to what extent is such a controlling action of the law accepted by the society, and to what extent does it meet the requirement of the providing the society with an opportunity to participate in systemic transformations.

The importance of those questions is even greater if we remember that, within just fifty years, Polish society underwent two systemic transformations, diametrically different from the viewpoint of axiology, which not only caused fatigue of the social material, but also evoked resentment connected with creating a new order. In this context, one should also be aware of the danger of the re-appearance of the habits, developed in times of real socialism, of contra-system activity or passive adaptation. Contra-system activity had two basic forms: a political opposition fighting for certain systemic axiology - even when the issue in question was so-called "socialism with a human face" - and actions undertaken in everyday life, modifying or breaking the existing law in force. This kind of a social creation of law was a particular method for defending oneself from the expansion of official law, created by a state that was gaining less and less authorisation from the society. According to such actions, the society defined illegal actions, rejecting asymmetrical control administered solely by the state political apparatus and demanding democratic social control over actions judged as illegal. The problems presented above enable us to conclude that Polish society in times of real socialism was, to a great extent, an active society, albeit its actions were directed against the system. Beyond any doubt, this kind of activity is not the right one for social participation in systemic changes.

The cognitive orientation presented above is evidently in opposition to the conceptions - frequently promoted in western literature - of post-communist society as "an anti-system" or "institutional and social vacuum".[8] Those conceptions are complemented by an evaluation of economic transformations effected in Poland as "political capitalism",[9] which suggests that it was designed, organized and implemented by a reformatory elite.

This evaluation is in contradiction to obvious facts of the active participation of Polish society in creating a market economy. Such social activity occurred even in conditions of real socialism, initially as quasi-market relationships, and later in a purely market form. Thanks to commercial tourism, developed on a large scale, and to profit-gaining work abroad, private capital was accumulated, remaining, in great part, beyond state control. The opposite process occurred as well: under state control, a conversion made by the nomenclature consisted in turning political resources into economic ones. W. Wasilewski writes: "The communist nomenclature managed to privatise itself, while controlling spontaneous and formalised processes of privatisation, dominated the emerging private sector and entered into the post-communist system as an economically privileged group".[10] The above mentioned forms of economic activity, which occurred at the end of the period of real socialism in Poland, considerably weaken accusations - formulated in particular on the grounds of liberal conceptions - of creating a market economy *ex nihilo*.[11] The lack of a middle class in the social structure left by the communist system is not, in itself, a sufficient argument to justify the thesis that the transformations, discussed above, occurred solely as a result of legislative actions undertaken by subsequent political groups which modernised the existing system. The process of marketizing and privatising the economy in Poland began with spontaneous and organized actions of various social groups, and was much ahead of legislative work.

4. The theoretical problems and realities outlined above, concerning the law and the society in the period of systemic change, evoke the question: what kind of law do the Poles need in the process of the formation of a new reality? The said question has been formulated by the members of a Scientific and Research Team operating in the Institute of Sociology of Law at the Faculty of Law and Administration at the University of Warsaw.[12]

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[8] D. S t a r k: "Od systemowej tożsamości do organizacyjnej różnorodności. Przyczynek do analizy zmiany społecznej w Europie Wschodniej" [From Systemie Sameness to Organizational Diversity. A Contribution to the Analysis of Social Change in Eastern Europe], *Studia Sociologiczne* 1992, no. 3-4.

[9] C. O f f e: "Kapitalizm jako projekt demokratyczny? Teoria demokracji w obliczu potrójnego przejścia w Europie Środkowo-Wschodniej" [Capitalism as a Democratic Project? Theory of Democracy in Confrontation with Triple Transition in Central and Eastern Europe], *Studia Socjologiczne* 1992, no. 3-4.

[10] J, W a s i l e w s k i: "Formowanie się nowej elity. Jak wiele nomenklatury pozostało?" [Formation of a New Elite. How Much Nomenclature Remained?] [in:] *Ludzie i instytucje. Stawanie się ładu społecznego* [People and Institutions. The Making of Social Order], Lublin 1995, vol. I, p. 410.

[11] J. S z a c k i: *Liberalizm po komunizmie* [Liberalism after Communism], Warszawa 1994.

[12] The members of the team, headed by A. Turska, are: Z, Cywiński, A. Kojder, T. Kozlowski, E. Łojko, W. Staśkiewicz, and M. Tyszka.

The question: what kind of law is needed by the society has a long tradition in the sociology of law; however, its meaning is ambiguous. Different answers were given, depending on the theoretical conceptions on whose grounds the question was formulated.

In the trend of the sociology of law, which studies the relationships between the law and the society, the answers indicated social factors of effective legal regulation and, consequently, processes of gaining social authorisation by the law in force. In this approach, the society is not an autonomous subject, but rather one that corrects the content of official law.

On the grounds of functionally oriented sociology, the same question was treated as aimless, since in this approach every society has such a law which it needs.

The systemic transformation in our country gives us a unique chance of ascribing new meanings to this question, meanings fundamentally different as to the cognitive nature of the provided answers. The society, as a co-originator of systemic change, is treated as an autonomous being. Having adopted this research intention, it was necessary to reject the classical analytical categories of the sociology of law, such as the intuitive law of the society, its sense of law, awareness of law or attitudes towards the law. Those commonly accepted research categories are an inadequate instrument for examining the perceptions of, and expectations as regards the law in the circumstances of systemic transformation. Such categories focus attention either on conditions fixed in the past, or on conditions pertaining to the distant future, instead of focusing it on the reality of an emerging new system.

Embarking on this survey project, we assumed that the answer to the question: what kind of law do the Poles need, requires an empirical identification of what an average Pole expects from the law, and of the needs of various social and professional groups. Such a conception of the survey made it possible to establish the content of the social perception of the existing law in force, and expectations as regards the law, connected with individual and group activity in the circumstances of systemic change.

The initial assumptions influenced the conception of a choice of survey samples and the content of individual survey instruments. The survey was conducted on a representative nation-wide sample of 1 000 respondents and three sub-populations: business-people, journalists and deputies (equal samples of 150 respondents each). The basic questionnaire was addressed to the nation-wide sample. The questionnaires for sub-populations contained a set of complementary questions that concerned expectations as regards the law, resulting from social and professional roles. In this set, we focused on the question whether the existing law in force made it easier or more difficult to function in a given role. The survey was conducted from 1994 to 1996.[13]

The conception of the survey presented above assumed that the society undergoes sudden differentiation in the first phase of systemic transformation. In public awareness, an overall manifestation of differentiation is the division into beneficiaries of the introduced change and those who bear its costs. We took this socially realized aspect of

[13] In these analyses we are not going to present empirical data obtained from the questionnaire addressed to deputies, to be found in the statistical study.

differentiation into consideration as one of the factors conditioning both innovative potentials of various social groups and expectations as regards the law. The survey took account of such phenomena connected with the formation of a new social stratification as: the establishment of capital groups and a new middle class, and the process of re-defining the hitherto existing social and professional roles, whose vital consequence was moving up and down the social ladder. By way of example, we can mention the promotion of journalists as a so-called "fourth" power and the degradation of the working class - particularly that of big industry - measured in losing the previous economic, ideological and symbolic position.

Our survey assumed the ongoing structurogenic processes to be important factors conditioning the emergence of a greatly diversified world of values and interests, understood as objectives of activity. The research problem was, therefore, an attempt to answer the question how those objectives determine needs and expectations as regards the law as an instrument of systemic change.

4.1. The survey confirmed that the society expected the law to be an instrument in the hands of an individual striving to achieve his objectives determined by his social and professional roles, and an instrument used by the state in order to establish social order. As far as those two questions are concerned, the law in force received highly critical evaluations from the surveyed populations, although there were some enclaves of positive evaluations of the law as an instrument of introducing systemic changes, such as freedom of economic activity, freedom of speech or, broadly speaking, growing respect for human and citizens' rights.

In the findings we could ascertain the existence of areas of common needs as regards the law, so universal that it was possible to treat them as *communis opinio.* They included: the belief that the fundamental aim of the law is combating criminality and preventing it; disapproval of using the law with bad intentions, particularly by people in power and by the political elite; opting for such a model of the Constitution as to guarantee common availability of constitutional complaint; a highly critical evaluation of the efficiency of the law and a similar evaluation of the individual's influence on what is happening in the country. Those opinions were shared by 70 to 90 per cent of the surveyed populations.

The outlined area of *communis opinio* justifies the conclusion that in social consciousness the law has not lost the position of an important instrument of creating social order and safety. However, its present condition and methods of using it fall drastically short of the expectations of Polish society. One can even ascertain that the existing legal order is perceived as in a state of confusion, and evokes a sense of insecurity.

Comparative analysis of the distribution of the answers of the surveyed populations enables us to establish the possible relations between the type of adaptation to the introduced systemic changes and the nature of expectations as regards the law. Having identified two types of adaptation: active and passive, we will be able to look for such relations in further, deeper analyses. However, even at the stage of comparative analysis, we could establish visible differences between the type of adaptation and the disposition for ethos or pragmatic expectations as regards the law.

By comparing the answers of respondents from the nation-wide sample and those of business-people to the question: whose interests should be protected by the law in the first place, we established that an average Pole points out the sick, the poor, the unemployed or not very resourceful people twice as often as a businessperson. Yet, in both cases, the prevailing opinion is that the law should protect the interests of all citizens equally. A similar tendency can be observed as regards choosing such objectives of the law as teaching kindness and respect in interpersonal relationships. More that twice as many average Poles as business-people choose this objective from among other options. Another important finding is that in the hierarchy of the main objectives of the law, teaching kindness and respect in interpersonal relationships ranks third among the choices of an average Pole and sixth (last) among the choices of business-people. In the light of those data, we can state that such a purely ethos objective of the law finds definitely more supporters in the nation-wide population than among business-people. The latter, on the other hand, choose much more often such pragmatic objectives of the law as: teaching discipline and responsibility, resolving interpersonal conflicts, enabling the society to exert some influence on what is happening in the country.

When interpreting the findings, we should pay attention to the sense of insecurity of that part of society which did not manage to adopt to the new situation, a feeling which accompanies systemic changes. In such situations, there always appears the need to reduce anxiety. One may assume with high probability that fair law, based on autonomous values, fulfils this function.

What is the scale of this sense of insecurity in our society? It follows from the data obtained from the survey that every second respondent in the nation-wide sample, when asked about the chances of people adjusting to the new situation of Polish economy, either declared the lack of such chances or did not have any opinion. Business-people felt insecure much less often, since three-quarters were convinced that such chances existed; hardly any journalists suffered from a sense of insecurity: 90 per cent were optimistic in this respect.

Respondents from the nation-wide group were asked how people coped with the new economic situation. Their answers indicated predominantly various active and, at the same time, legal ways of finding additional sources of income; sometimes, different criminal methods were indicated and, to a very limited extent, passive forms tightening one's belt.

4.2. Diversification of the world of values and interests - determining needs and expectations as regards the law - is particularly visible in answers concerning an evaluation of the law from the point of view of the respondents' social and professional roles. The influence of social and professional roles is reflected, for example, in making choices between wide or limited legal regulation. According to our findings, all the surveyed populations opted for a wide scope of legal regulation, but there were marked differences among them. Nearly 80 per cent of respondents in the nation-wide sample were for wide legal regulation; among business-people this opinion was slightly less popular (63 per cent for, 25 per cent against), and among journalists the opinions evidently varied (40 per cent for, 37 per cent against). Apparently, an average Pole has

a much stronger tendency to accept wide legal regulations than the other surveyed populations, a fact which can be interpreted in the previously adopted convention as the result of a sense of insecurity and a hope that the law can reduce it.

The variable, which can explain opinions of business-people on the issue in question, is their attitude to the legal regulation of economic activity, closely connected with their social and professional role. When asked about the scope of a legal regulation of economic activity, 70 per cent opted for such a regulation to leave much freedom for arrangements between business partners. This prevailing option occurs together with a critical evaluation of existing legal regulations in the field of economic activity. According to 62 per cent of the surveyed business-people, the regulations in force make carrying on such activity very difficult; less than 20 per cent hold the opposite view. Thus, one can say that the preference of business-people for wide legal regulation is concerned with the global functions of the law in organising social life and, to a limited degree, with the regulation of economic activity.

An analysis of the evidently varied preferences of journalists concerning the issue in question, must take into account two factors. Firstly, functioning in this role does not require them to use the law on an everyday basis. One-third of the surveyed journalists claimed that the law did not have any influence upon their professional activity, and that it did not pose obstacles to performing their profession. Secondly, the journalist profession is traditionally connected with observing the principles of professional ethics and the ethos of serving the society, which explains great reluctance as regards wide legal regulation.

This interpretation finds confirmation in the distribution of the answers of journalists to the question about their behaviour in a situation of a clash between legal norms and the norms of professional ethics. The majority (47 per cent) of the surveyed journalists were in favour of observing the norms of professional ethics in such situations. On the contrary, the majority of business-people (46,7 per cent) opted for obeying legal norms in the same situation. This finding undoubtedly proves the influence of the variable connected with the social and professional role of the respondents.

The effect of this variable in the case of business-people is also manifested in justifications for choosing the option of observing norms of the law in force. The overwhelming majority (77 per cent) of those who chose that option argued that the law binds everybody and, therefore, has to be observed, and that it gives equal opportunities to the parties of a dispute. Much less frequently (13 per cent) they indicated missing or indefinite rules of professional ethics, as a result of which the law has precedence in the case of a clash. An interpretation of this preference should refer to Weber's analyses of the role of the law in the formation of capitalist economy, where he concluded that the formalism of the law and its overall nature set up a safe framework for effective economic activity. Paradoxically, the dominating view among business-people (86 per cent) is that the law in force cannot guarantee fast and successful execution of one's claims and, according to a vast majority (69 per cent), it does not guarantee safety and continuity of economic activity; yet this group discloses a need for the precedence of legal norms over the norms of professional ethics. Our findings

indicate the emergence, in the business environment, of a type of rationality typical for private market economy. This kind of rationality influences also the choices of a relatively stable law (45 per cent) or a frequently revised law, more adequate for the changing situation (38 per cent).

5. The direction of the systemic change towards a private market economy and democratic order requires the society to absorb a new type of rationality, motivating individual and group behaviour. The empirical material obtained from our survey gives us sufficient grounds to formulate the conclusion that such a social process has been started.

Social perception of the existing legal disorder - both as regards axiology and its instruments - forces Polish society to make continuous choices regarding at least three dilemmas: more or less law; relative stability of the law or its frequent revisions; a legalist attitude towards the law or a purposeful and manipulative one. The conducted analyses show that those dilemmas are particularly visible in the opinions of business-people, since functioning in that role requires the constant use of the legal regulations in force.

What conclusions follow from the presented analyses of empirical data? In an answer to this final question, I would like to first emphasise the two legible tendencies, which comprise social needs-expectations as regards the law. The first tendency is characterized by a pragmatic approach, although not deprived of axiological content, and concerned with the social usefulness of the law. The findings of our survey show that Poles are in favour of effective yet, at the same time, subjectivised law. Such pragmatism, not deprived of axiological content, corresponds well to G. Skąpska's analysis concerning the criticism of instrumental law. According to Skąpska, "if the law is to provide the basis for a dynamic social organisation, satisfy the social demand for freedom of the activity of social subjects, and guarantee safety and security of social relationships, then it cannot be simply an instrument in the hands of state organs".[14] Such a form of pragmatic social attitudes as regards the law is far from pure instrumentalism. Analyses of the processes of the pragmatisation of the consciousness of Polish society argue that the attitude towards the authorities depends increasingly upon their purely instrumentally understood efficiency.[15] If the same does not apply to the law, then this can indicate that in social consciousness the law has remained a value in itself, and not only an instrument of action.

The second tendency displays ethos expectations as regards the law, conditioned, as we believe we have grounds to assume, by the phenomena of disorganisation, which always accompany profound systemic changes. In such circumstances, the inherent human tendency to look for universal values finds its expression together with the need

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[14] G. S k ą p s k a: "Społeczna podmiotowość, ochronna funkcja państwa, autonomia prawa - trzy warunki demokratycznych przemian" [Social Subjectivity, Protective Function of the State, Autonomy of Law - Three Conditions of Democratic Transformations] [in:] *Filozofia prawa a tworzenie i stosowanie prawa* [Philosophy of Law and the Creation and Application of Law], Katowice 1992, p. 449.

[15] M. Z i ó ł k o w s k i: "Pragmatyzacja świadomości społeczeństwa polskiego" [Pragmatization of the Consciousness of Polish Society] [in:] *Ludzie i instytucje* [People and Institutions], *op. cit.*, vol. 2, p. 42-43.

to diminish the sense of insecurity. In the circumstances of a society undergoing systemic change, this kind of expectations is characteristic for the individuals and social groups that could not find their place in the new situation. Such conditioning, resulting from a systemic change, does not allow the treatment of ethos attitudes in terms of an ideational attitude, as understood by F. Znaniecki.[16] However, such attitudes undoubtedly fulfil important functions as a normative point of reference for critical evaluations of the content of the law and legal practice. Thus, they are an important element of reflections about the law in times of systemic change.

As a result, the two tendencies indicated above, which comprise social needs-expectations as regards the law, express the same trend of a subjectivisation of the law or, in other words, its autonomy in the political system. That leads us to a conclusion about the existence of a social need to "depoliticise" the law, in a meaning most primary and universal for legal culture, namely, that the law does not belong to the state or political elite, but is a value shared by all citizens who, within the framework of fair law, can successfully achieve their aims.

[16] F. Z n a n i e c k i: *Nauki o kulturze* [Lessons on Culture], Warsaw 1971, p. 451.

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LES RAPPORTS DE L'EGLISE ET DE L'ETAT DANS LA NOUVELLE CONSTITUTION

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1. Les transformations constitutionnelles de 1989 et leur incidence sur la politique en matière confessionnelle

Au moment où, en 1989, commençaient les transformations constitutionnelles en Pologne, les rapports de l'Etat d'une part, et des églises et unions confessionnelles d'autre part étaient régis par les trois lois votées le 17 mai 1989 par la Diète de l'époque: loi sur la position de l'Etat au regard de l'Eglise catholique, loi concernant les garanties de la liberté de conscience et de religion, et la loi sur l'assurance sociale des ecclésiastiques. Ces textes rompaient avec la pratique du régime précédent qui avait cherché à faire de la Pologne un Etat athée. Ils donnaient un contenu nouveau au principe de la séparation de l'Eglise et de l'Etat, ce qui se traduisait par de vastes garanties de la liberté individuelle de conscience et de religion, l'entière liberté d'exercice des fonctions religieuses et organisatrices par les églises et les unions confessionnelles. En même temps, ces lois imposaient à tous les organes publics l'obligation d'observer la neutralité en matière religieuse et idéologique. Elles faisaient régler la situation juridique des églises et unions confessionnelles existantes par des lois spéciales, modelées sur les solutions institutionnelles de la première d'entre elles, et prévoyaient des conditions libérales de légalisation des églises et unions confessionnelles nouvelles. Par ailleurs, elles adaptaient la législation polonaise concernée aux normes en vigueur dans les Etats libéraux démocratiques européens[1]. Pour cette raison, les rapports de l'Etat et de l'Eglise n'ont pas fait l'objet de débats ni de résolutions à la «table ronde».

Dans les années 1989-1993, la politique confessionnelle des gouvernements de «post-Solidarité» (équipes de T. Mazowiecki, J.K. Bielecki, J. Olszewski et H. Suchocka) a dérogé, sous la pression de la hiérarchie catholique, aux principes et [*1]

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[1] Cf. M. P i e t r z a k: «Przełom w polskim prawie wyznaniowym» [Un tournant dans le droit confessionnel polonais], *RPEiS* 1990, n° 1, p. 1-41 ; J. O s u c h o w s k i: «Nowe ustawodawstwo w sprawach wyznaniowych» [Nouvelle législation en matière confessionnelle], *PiP* 1989, n° 10; G. R y d 1 e w s k i: «Geneza i tryb przygotowania ustawodawstwa wyznaniowego w Polsce w roku 1989» [Origine et procédure de préparation de la législation confessionnelle en Pologne en 1989] [dans:] B. G ó r o w s k a, G. R y d l e w s k i: *Regulacje prawne stosunków wyznaniowych* w *Polsce* [Les régulations juridiques des rapports confessionnels en Pologne], Warszawa 1992, p. 202 et suiv.

directives contenus dans la législation, notamment aux principes de laïcité et de neutralité de l'Etat. Le fait d'avoir reconnu, en 1989, que la Pologne est un Etat démocratique de droit, dont les organes sont liés par les dispositions du droit en vigueur, n'a pas empêché ces gouvernements de chercher à instaurer en Pologne des éléments d'un Etat confessionnel catholique.

La première dérogation au modèle normatif d'Etat laïc concernait l'instruction religieuse. Celle-ci fut introduite dans les écoles publiques non pas par une loi mais par une instruction du ministre de l'Education Nationale, laquelle prévoyait également, en dépit de l'interdiction légale, la rémunération des catéchistes par l'Etat. La loi du 7 septembre 1991 sur le système de l'éducation imposa aux écoles publiques - toujours laïques - l'obligation d'organiser l'instruction religieuse comme matière à option, tandis que le règlement d'application de cette loi autorisait la récitation de prières à l'Ecole, l'accrochage de croix aux murs dans les salles d'enseignement, la mention de notes de l'instruction religieuse sur le certificat scolaire. La loi précitée prévoyait l'instruction religieuse dispensée dans les écoles publiques par toutes les églises et unions confessionnelles existantes. Selon le règlement du Ministère de l'Education Nationale, il faut qu'il y ait au moins sept écoliers adeptes d'une religion pour qu'ils puissent bénéficier de l'instruction religieuse, ce qui pratiquement prive les non-catholiques de cette instruction à l'école[2].

La dérogation au caractère laïc de l'Etat se manifesta aussi dans d'autres actes normatifs, par le biais de la protection des valeurs chrétiennes dans les mass media, par la violation du principe de l'égalité des religions en droit, par l'attribution de prérogatives déterminées à la seule Eglise catholique (émetteurs de radio), par la différenciation des droits de l'individu selon les critères confessionnels, par la radiation dans la loi sur la position de l'Etat au regard de l'Eglise catholique de l'obligation d'agir dans le cadre du régime constitutionnel de la République de Pologne. De cette tendance témoigne aussi une large aide financière apportée par les organes de l'Etat aux activités religieuses, dont de nombreux allégements fiscaux et douaniers, et la rémunération des aumôniers dans des institutions publiques. De leur côté, la hiérarchie ecclésiastique et le clergé en général ne se comportaient pas en observateurs impartiaux de la vie politique, mais inspiraient ou participaient à différentes actions des partis procatholiques ou accordaient leur soutien à ces actions. Tout ceci dut conduire à des divergences entre les impératifs constitutionnels et la pratique constitutionnelle, incompatibles avec les principes de l'Etat démocratique de droit.

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[2] Cf. B. G ó r o w s k a: *Wolność sumienia i religii w realiach polskich. Dylematy wolności sumienia i wyznania w państwach współczesnych* [La liberté de conscience et de religion dans les réalités polonaises. Les dilemmes de la liberté de conscience et de religion dans les Etats contemporains], Warszawa 1996, p. 76 et suiv.; R. M. M a 1 a j n y: «Państwo a Kościół w Konstytucji III Rzeczypospolitej» [L'Etat et l'Eglise dans la Constitution de la III[e] République], *PiP* 1995, n° 8; Z. Ł y k o: *Wolność sumienia i wyznania w relacji: Człowiek - Kościół - Państwo. Podstawowe prawa jednostki i ich sądowa ochrona* [La liberté de conscience et de religion dans la relation Homme - Eglise - Etat. Les droits fondamentaux de l'individu et leur protection judiciaire], Warszawa 1977, p. 93; M. P i e t r z a k: *De l'Etat laïc socialiste à l'Etat confessionnel catholique. La protection des droits fondamentaux,* Paryż 1993, p. 67 et suiv.

2. Les modèles des rapports de l'Etat et de l'Eglise dans les projets de Constitution

Les travaux préparatoires de la Constitution avaient commencé, il est vrai, déjà en 1989, quand la Diète et le Sénat avaient nommé leurs commissions constitutionnelles, mais le processus législatif n'a été formalisé qu'en 1992, avec le vote de la loi sur la procédure de préparation et d'adoption de la Constitution de la R.P. Après les élections législatives anticipées en 1993, la Dicte et le Sénat ont nommé une Commission constitutionnelle qui a commencé ses travaux après que les organismes y habilités ont eu déposé leurs projets de Constitution.

S'agissant de la matière confessionnelle, ces projets se prononçaient plus ou moins expressément soit en faveur de la séparation de l'Eglise et de l'Etat, soit au contraire, en faveur des attaches de l'Etat avec la religion catholique. Dans la première hypothèse sont admis comme critères formels de la séparation: le caractère laïc, neutre de l'Etat, l'égalité en droit de toutes les confessions, l'égalité de tous les citoyens sans distinction de religion ou d'idéologie, l'entière liberté de conscience et de confession et la liberté d'exercice des fonctions religieuses par les églises et les unions confessionnelles, le caractère laïc du préambule. Les projets où ces critères sont contestés doivent être interprétés comme plus ou moins fermes partisans de l'Etat confessionnel.

Dans l'analyse de ces projets sous l'angle de leurs dispositions relatives à la religion, on ne saurait faire abstraction des conditions politiques dans lesquelles ils avaient pris naissance, car elles ont exercé une influence essentielle sur l'articulation juridique formelle des solutions proposées. Tous les projets ont tenu compte, quoique à un degré inégal, de l'opinion en cette matière de la hiérarchie de l'Eglise catholique. Certains reproduisaient directement les postulats de l'Episcopat ou cherchaient à adapter leurs formules à ces derniers. Les autres, tout en optant pour la séparation, la visaient, sous la pression des déclarations ecclésiastiques, d'une manière voilée, en usant des termes imprécis ou généraux. On renonçait aux formules employées dans la Constitution en vigueur et dans la loi sur les garanties de la liberté de conscience et de religion, par crainte de réaction de la hiérarchie catholique, soutenue par les hommes politiques et les publicistes catholiques. Les auteurs ou les partis politiques donnant leur nom ou autorité aux projets, voulaient éviter le reproche d'attitude hostile ou inamicale envers l'Eglise catholique, ce dont aurait témoigné le postulat de la séparation de l'Eglise et de l'Etat. Mme le sénateur A. Grześkowiak (actuellement président du Sénat - M.S.) l'a fait entendre vigoureusement, en reprochant aux experts de la Commission constitutionnelle se prononçant pour la séparation, une attitude hostile à l'égard de l'Eglise catholique[3].

Les projets favorables aux attaches de l'Etat avec la religion catholique prévoyaient un préambule à contenu religieux, déclaraient le principe - propre à l'Etat confession-

[3] Selon A. G r z e ś k o w i a k: *Projekty Konstytucji* [Projets de Constitution], Warszawa 1993, p. 18, l'idée de séparation fut inventée par les communistes pour détruire l'Eglise, et dans les Etats démocratiques, à majorité catholique décisive, l'admission de cette idée est artificielle.

nel - de la division des églises et des unions confessionnelles en celles reconnues et celles non reconnues légales, accordaient à la religion catholique la position prépondérante parmi les religions égales en droit. Seules les religions reconnues par la loi pouvaient bénéficier du droit à l'instruction religieuse à l'école publique. Les enfants adeptes des religions non reconnues par la loi étaient constitutionnellement discriminées.

Les projets favorables généralement à la séparation la visaient d'une façon spécifique, en évitant, la plupart du temps, l'affirmation expresse de la séparation des églises et des unions confessionnelles de l'Etat, ou qu'aucune église n'a de caractère étatique, et y substituaient l'indication de telle ou autre caractéristique de la séparation. Seul le projet de l'Union Démocratique indiquait directement le principe de séparation comme fondement des rapports de l'Etat d'une part, et des églises et unions confessionnelles d'autre part. D'autres encore substituaient au mot «séparation» une notion empruntée à la Constitution française, en déclarant que la République de Pologne est un Etat laïc, ou mettaient l'accent sur l'aménagement des rapports sur la base du respect de l'indépendance ou de l'autonomie et de l'indépendance.

3. Débats et recherche de solutions de compromis

Avant de prendre en considération l'idée directrice déterminant les rapports de l'Etat et des Eglises et unions confessionnelles, il fallait au préalable décider si cette idée devait figurer parmi les principes constitutionnels. La solution alternative consistait à la relier à la liberté de conscience et de religion, et partant, à amoindrir sa signification constitutionnelle. Comme parmi les députés et les sénateurs dominait l'opinion que la solution de cette question présentait une haute importance pour le modèle de l'Etat, et par conséquent aussi pour la politique confessionnelle et pour la pratique administrative, il fut décidé de conférer à cette matière un rang élevé et de la placer parmi les principes constitutionnels.

Les débats à la Commission constitutionnelle étaient caractérisés par une approche émotionnelle du problème, par une interprétation arbitraire des notions juridiques et constitutionnelles ayant un sens solidement établi dans le droit constitutionnel et le droit confessionnel, par la tendance à les considérer à travers le prisme de la pratique de la Pologne Populaire, déformant leur sens, par l'omission intentionnelle des solutions de la loi sur les garanties de la liberté de conscience et de religion, laquelle loi avait restitué à ces notions le contenu conforme aux standards ouest-européens. Dans la ferveur des polémiques et discussions on employait des arguments contraires à la vérité, notamment à la vérité historique[4].

[4] Pour plus de détails v. B. G ó r o w s k a: *Zagadnienia wolności sumienia i wyznania w pracach nad projektem Konstytucji R.P. Dylematy wolności sumienia i wyznania...* [Problèmes de la liberté de conscience et de religion dans les travaux sur le projet de Constitution de la R.P. Dilemmes...], *op. cit.*, p. 111 et suiv.; M. P i e t r z a k: *Rozdział kościoła i państwa. Modele i spór o ujęcie normatywne w nowej Konstytucji. Podstawowe prawa jednostki i ich sądowa ochrona* [La séparation de l'Eglise et de l'Etat. Modèles et controverse sur la formule normative dans la nouvelle Constitution. Droits fondamentaux de l'individu et leur protection judiciaire], Warszawa 1997, p. 118 et suiv.

Le grief généralement soulevé contre la séparation, c'était sa filiation communiste; on oubliait sciemment son origine libérale et aussi son interprétation libérale par les lois précitées de 1989. Devant les attaques contre le principe de séparation, ses partisans ont adopté la tactique de solutions de compromis, susceptibles d'acceptation par la majorité qualifiée de l'Assemblée Nationale. Ainsi, on a renoncé successivement à inscrire dans la Constitution le principe de séparation, de laïcité de l'Etat, et finalement de sa neutralité, tout ceci sous la pression de l'Eglise qui modifiait ses demandes en les surenchérissant chaque fois. Comme l'Episcopat contestait la formule proclamant la neutralité de l'Etat, le député T. Mazowiecki proposa le texte suivant: «Les pouvoirs publics gardent l'impartialité en matière de convictions religieuses et de conception du monde», qui fut accepté par la majorité de la Commission constitutionnelle[5].

Définitivement adopté par l'Assemblée Nationale, l'article 25 de la Constitution, le plus controversé des dispositions relatives aux questions religieuses, est ainsi conçu:

1. Les Eglises et les autres unions confessionnelles jouissent de droits égaux.
2. Les pouvoirs publics en République de Pologne gardent l'impartialité en matière de convictions religieuses, de conception du monde et d'opinions philosophiques, assurant la liberté de leur expression dans la vie publique.
3. Les rapports entre l'Etat et les Eglises et les autres unions confessionnelles se fondent sur les principes du respect de leur autonomie et de leur indépendance mutuelle dans le domaine qui leur appartient, ainsi que sur le principe de la coopération pour le bien de l'homme et pour le bien commun.
4. Les rapports entre la République de Pologne et l'Eglise catholique sont définis par un traité conclu avec le Saint-Siège et par des lois.
5. Les rapports entre la République de Pologne et les autres Eglises et unions confessionnelles sont définis par des lois basées sur des accords conclus par le Conseil des Ministres avec leurs représentants compétents.

Bien que l'art. 25 présente un intérêt essentiel pour la caractéristique du modèle des rapports concernés, il n'en épuise pas cependant tous les aspects. Il est complété par les dispositions des art. 53 et 48, qui règlent les questions de la liberté de conscience et de religion, et aussi par le préambule.

4. Le modèle des rapports de l'Etat et des églises et unions confessionnelles

Pour caractériser le modèle concerné, il faut tenir compte de l'analyse des dispositions de la Constitution régissant ses éléments composants. Ce sont: 1) le contenu du préambule, 2) les rapports de l'Etat et des églises et unions confessionnelles, 3) les modalités de régulation de la situation juridique des églises et des unions confessionnelles, 4) l'égalité en droit des églises et des unions confessionnelles, 5) la liberté de conscience et de religion.

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[5] V. Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego [Bulletin de la Commission Constitutionnelle de l'Assemblée Nationale], n° XVI, p. 71 et suiv.

4.1. Devant la divergence d'opinions sur le contenu religieux du préambule, la Commission Constitutionnelle avait primitivement renoncé à son insertion dans la Constitution. La question a été reprise à l'étape finale des travaux de la Commission, et après de long débats, l'on a adopté des formules de compromis, dérogeant à celles contenues dans deux anciennes Constitutions polonaises, à savoir: «Au nom du Dieu unique dans la Sainte-Trinité» (1791), «Au nom du Dieu Tout-Puissant» (1921). Le préambule est ainsi conçu: «(...) nous, la nation polonaise - tous les citoyens de la République, autant ceux qui croient en Dieu, source de la vérité, de la justice, de la bonté et de la beauté, que ceux qui ne partagent pas cette foi et qui puisent ces valeurs universelles dans d'autres sources, (...) reconnaissants à nos ancêtres (...) de la culture ayant ses racines dans l'héritage chrétien de la Nation et dans les valeurs humaines universelles (...), conscients de la responsabilité devant Dieu ou devant notre propre conscience (...)».

Contrairement aux formules traditionnelles, invoquant Dieu, rencontrées aussi dans les traités internationaux, par exemple dans celui des partages de la Pologne, signé en 1772 entre la Russie, l'Autriche et la Prusse, qui commence par les mots: «Au nom de la Très Sainte Trinité», notre Constitution développe largement, au-delà des normes contemporaines, les éléments religieux. Qui plus est, elle leur offre un champ d'application inconnu des constitutions contemporaines. Elle a tenté aussi de définir le concept de Dieu, en indiquant ses relations avec les valeurs telles que la vérité, la justice ou la beauté. Il serait difficile de ne pas voir ici un dépassement de la compétence du législateur laïc. Par ailleurs, le préambule divise les citoyens en croyants et incroyants, ce qui peut être entendu comme un critère de différenciation des droits du citoyen. Et puisqu'on était tombé d'accord sur cette formule, il aurait fallu, pour sauvegarder l'égalité des droits, indiquer les sources des valeurs auxquelles se réfèrent les incroyants.

La juxtaposition de l'héritage chrétien de la Nation et des valeurs humaines universelles suscite des doutes d'interprétation et fait naître la présomption que de sensibles différences existent entre les valeurs chrétiennes et les autres, ce qui suggère aussi qu'il y a des valeurs chrétiennes qui ne correspondent pas aux valeurs humaines universelles. En interprétant ces notions, il ne faut pas oublier que les valeurs proclamées par les différentes religions chrétiennes polonaises ne se recouvraient pas, voire s'excluaient mutuellement. Ne semble pas juste non plus la juxtaposition de la responsabilité devant Dieu et de celle devant la conscience de l'individu. Il aurait suffi d'évoquer la responsabilité devant la conscience, laquelle pour les croyant équivaut à la responsabilité devant Dieu.

4.2. La définition formelle des rapports de l'Etat et des églises et unions confessionnelles est le fruit de longues recherches de formules de compromis. Certes, la majorité des membres de la Commission Constitutionnelle acceptaient le principe de séparation, mais son expression normative suscitait de nombreuses divergences. On repoussa successivement les formules telles que la séparation de l'Eglise et de l'Etat, l'interdiction de l'Eglise dominante, l'Etat laïc, la neutralité religieuse et idéologique de l'Etat, pour retenir finalement les formules de l'art. 25, al. 2 et 3, complétée par l'ai. 7 de l'art. 53. L'accord sur le contenu de l'art. 25, al. 3, emprunté aux résolutions du

Concile Vatican II, avait pour but de gagner la bienveillance de l'Eglise catholique et de prévenir l'opposition de sa hiérarchie[6].

L'art. 25, al. 2 impose aux pouvoirs publics de garder l'impartialité en matière de convictions religieuses, de conception du monde et d'opinions philosophiques, tandis que l'art. 53, al. 7 interdit de contraindre quiconque à révéler ses convictions religieuses, sa conception du monde ou sa confession. L'art. 25, al. 3 impose à l'Etat le devoir de fonder ses rapports avec les églises et unions confessionnelles sur le respect de leur autonomie et de leur indépendance mutuelle, dans le domaine qui leur appartient, ainsi que sur le principe de la coopération pour le bien de l'homme et pour le bien commun.

Il semble que le contenu de l'art. 25, al. 2 et de l'art. 53, al. 7 indique le caractère laïc, neutre de l'Etat. Il est vrai que le terme «impartialité», apparu à l'étape finale des travaux sur la Constitution pour remplacer celui de «neutralité», est peu précis et peut seulement être considéré comme un élément composant essentiel de la notion de neutralité, mais, complété par le droit au silence (secret confessionnel), permet de constater que la Constitution reconnaît le caractère neutre de l'Etat. C'est précisément l'art. 53, al. 7 qui impose à tous les organes et établissements publics le devoir de s'abstenir de s'engager dans les affaires religieuses et idéologiques, de façon à garantir à l'individu la liberté de choix de la religion ou de l'idéologie ainsi que du comportement conforme aux prescriptions de celles-ci, sans aucune pression de la part de ces organismes. Il interdit aux organes publics de s'intéresser à la religion ou à l'idéologie du citoyen, conformément à la devise que, dès le berceau jusqu'à leurs derniers jours, l'Etat neutre ne s'intéresse pas aux convictions de ses citoyens en matière religieuse. Il interdit également de différencier les droits du citoyen selon le critère confessionnel[7].

Des formules de l'art. 25, al. 3 de la Constitution découle le principe de la séparation de l'Eglise et de l'Etat. Il est accepté, comme l'indique aussi l'affirmation que l'Etat et l'Eglise sont autonomes et indépendants dans le domaine qui leur appartient. De là résulte l'indépendance organisationnelle et fonctionnelle des organes et des institutions de l'Etat et des collectivités locales des organes et des institutions ecclésiastiques, ce qui est caractéristique essentielle de la séparation[8]. Les organes publics et leurs fonctionnaires n'exercent pas de fonctions religieuses, tandis que les organes et fonctionnaires de l'Eglise ne participent pas à l'exercice des fonctions publiques. Par la voie de conséquence, le droit créé par les uns et les autres, est indépendant. Le droit ecclésiastique ne produit pas d'effet dans l'ordre juridique de l'Etat, et le droit de l'Etat ne règle pas les questions religieuses et organisationnelles des églises et unions confessionnelles. Mais le droit de l'Etat règle les affaires qui ne relèvent pas de l'indépendance et de l'autonomie de l'Eglise. L'indépendance et l'autonomie ne peuvent empêcher la coopération de l'Etat avec les églises et unions confessionnelles, qui a pour objectif le bien de l'homme et le bien commun. La Constitution ne précise pas le champ de cette coopération. Il était dans les intentions des auteurs de la Constitution de donner à ce chapitre une allure amicale.

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[6] V. M. P i e t r z a k: *Rozdział kościoła i państwa, op. cit.*, p. 122 et suiv.

[7] V. M. P i e t r z a k: «Państwo świeckie» [Etat laïc], *Studia Juridica* 1993, n° XXVI, p. 13 et suiv.

[8] Cf. M. M a ł a j n y: *Konkordat polski z 1993 r. Altera pars* [Concordat polonais. Autre part]. *Prawa Człowieka* [Human Rights], *Humanistyczne Zeszyty Naukowe* n° 4/12, Katowice 1997, p. 33 et suiv.

Il n'empêche que les formules de l'art. 25, al. 2 et 3 suscitent des difficultés d'interprétation. La mise au point d'une interprétation concordante des notions constitutionnelles telles qu'impartialité, proclamation d'opinions religieuses, idéologiques ou philosophiques dans la vie publique, autonomie de l'Etat, «domaine qui leur appartient» ou respect, exigera de l'objectivité et une discussion exempte de postulats aprioristes et de contraintes politiques, dégagée d'émotions excessives qui obscurcissent le bon sens. C'est la condition nécessaire à ce que l'Etat soit un bien commun, tant pour les divers croyants que pour les incroyants.

4.3. S'agissant des modalités de régulation de la situation juridique des églises et des unions confessionnelles, la Constitution n'adopte pas le principe de la concrétisation des normes constitutionnelles dans une seule loi concernant toutes les communautés de fidèles, principe de plus en plus généralement accepté dans les Etats démocratiques, car elle fait régler séparément le statut de l'Eglise catholique et celui des autres églises et unions confessionnelles. L'art. 25, al. 4, impose à l'Etat l'obligation de définir ses rapports avec l'Eglise catholique par une convention internationale signée avec le Saint-Siège. Cette disposition est appelée aussi à dissiper les doutes juridiques liés au droit du gouvernement d'avoir signé, en 1993, le concordat avec le Saint-Siège, et confirme indirectement les réserves de tous ceux qui considéraient comme illégale cette signature sans délégation constitutionnelle. La convention internationale n'exclut pas la régulation des rapports de l'Etat et de l'Eglise catholique par des lois, mais leur fonction est complémentaire.

L'art. 25, al. 5 de la Constitution prévoit la régulation des rapports entre la République de Pologne et les autres églises et unions confessionnelles par des lois votées en vertu des accords conclus par le gouvernement avec leurs représentants compétents. C'est une solution nouvelle, modelée sur la Constitution italienne, qui tend à assimiler la situation des églises et unions confessionnelles autres que catholiques romaines à celle de l'Eglise catholique. La version adoptée par la Constitution impose au Conseil des Ministres l'obligation de conclure un accord avec chaque église ou union confessionnelle, dont le nombre total dépasse actuellement 120. Le refus d'engager des négociations ou leur prolongation intentionnelle justifient une plainte à la Haute Cour Administrative ou au Tribunal Constitutionnel. Le gouvernement, la Diète et le Sénat auront désormais à remplir une tâche de longue durée, car la solution adoptée aura pour conséquence que toute modification de la loi, y compris de celle déjà en vigueur, devra être précédée par la modification de l'accord respectif. Les propositions tendant à limiter la réglementation légale aux églises et unions confessionnelles existant légalement en Pologne depuis au moins 50 ans, ont été repoussés par la Commission Constitutionnelle.

La Constitution ne dit rien sur la procédure de fondation de nouvelles églises et unions confessionnelles. Ses auteurs ont laissé cette question à la compétence de la législation ordinaire. Ils n'y ont pas inscrit non plus de directives directes sur l'orientation des solutions en cette matière. Le droit de fonder de nouvelles églises et unions confessionnelles trouve indirectement son fondement constitutionnel à l'art. 53, al. 1, accordant à toute personne le droit à la liberté de conscience-et de religion. Il est vrai

que l'ai. 2 de cet article ne mentionne pas ce premier droit, mais son exclusion serait en contradiction manifeste avec les dispositions littérales du Chapitre II de la Constitution.

En ce qui concerne les droits des églises et unions confessionnelles, les dispositions de la nouvelle Constitution ne sont pas aussi développées que celles de la Constitution du 17 mars 1921. Elle ne définit que quelques-uns de ces droits, et encore d'une manière générale. L'art. 25, al. 3 garantit à toutes les églises et unions confessionnelles autonomie et indépendance. Si le contenu de la notion d'autonomie est bien fixé dans la science du droit, l'indépendance, elle, est une notion peu précise, lors même qu'on y ajoute qu'elle a son propre champ d'application. On peut seulement présumer qu'il s'agit de l'indépendance en matière religieuse et organisationnelle. Mais si des divergences surgissent entre les autorités publiques et les autorités ecclésiastiques sur l'interprétation de la formule «dans le domaine qui leur appartient», on ne saurait qui doit les trancher et sur la base de quels critères. La Constitution accorde en outre à toutes les églises et unions confessionnelles dont la situation juridique est réglée, le droit à l'instruction religieuse à l'école (art. 53, al. 4). Les autres droits des églises et unions confessionnelles n'ont pas de fondement dans la Constitution, et sont définis par des lois spéciales, votées en accord avec la délégation contenue à l'art. 25, al. 4 et 5, et, s'agissant de l'Eglise catholique, aussi par le concordat et par les lois régissant les droits et obligations précis des intéressés. Les droits extrareligieux des églises et unions confessionnelles sont régis par les dispositions de droit commun.

4.4. Le principe de l'égalité des religions en droit n'a pas suscité de controverses à la Commission et à l'Assemblée Nationale. De l'art. 25, al. 1 de la Constitution découle l'impératif de traitement égal, en ce qui concerne les droits à accorder et les obligations à imposer, de toutes les églises et unions confessionnelles, quelle que soit la forme de régulation de leur situation juridique. En conséquence, tous les droits dont disposent les églises et unions confessionnelles bénéficiant d'une régulation légale spéciale, doivent être étendus à celles inscrites au registre. L'instruction religieuse dans les écoles, prévue à l'art. 53, al. 4, exclut une différenciation de ces droits, ce qui signifie que l'instruction est dispensée en application des mêmes principes. Par ailleurs, cela signifie qu'il est interdit d'éliminer cette instruction par la fixation d'un nombre limite d'étudiants d'une même religion à l'école ou dans une classe, ce qui doit faire déclarer inconstitutionnelles les pratiques observées jusque-là. Le principe concerné est complété par celui de l'égalité des citoyens devant la loi, garantie par l'art. 32 de la Constitution. Ce principe interdit de différencier les droits du citoyen pour quelque cause que ce soit, donc aussi pour cause de leurs opinions en matière religieuse. Sa garantie institutionnelle est le droit au silence, et sa conséquence, l'interdiction absolue de différencier les droits de l'individu en fonction de sa religion ou conception du monde. Pour cette raison n'est pas conforme à la Constitution le projet d'accorder le droit à contracter mariage religieux produisant des effets civils seulement aux personnes adeptes des églises ou unions confessionnelles dont la situation juridique est réglée par des lois spéciales; n'est pas conforme à la Constitution non plus l'interdiction de porter sur le certificat scolaire la note de l'instruction religieuse dispensée hors de l'école.

4.5. La liberté de conscience et de religion a été traitée par les auteurs de la Constitution sans considération requise, tant en ce qui concerne l'aspect matériel que personnel. L'art. 53, al. 1 garantit à chacun la liberté de conscience et de religion. Les auteurs de la Constitution ont abandonné l'ancienne terminologie polonaise qui rattachait la liberté de conscience à la liberté confessionnelle, et rejeté la terminologie des traités internationaux ratifiés par la Pologne, où domine la formule: liberté de pensée, de conscience et de confession. On y voit apparaître, il est vrai, la notion de convictions, mais avec une tendance à les rétrécir aux convictions religieuses. Cependant l'art. 53, al. 7 parle de conception du monde, de convictions religieuses et de confession. L'art. 48, concernant les droits des enfants, leur accorde, autrement qu'aux adultes, la liberté de conscience et de confessions et la liberté de convictions. Il est vraiment difficile de comprendre pourquoi la Constitution utilise une telle variété de termes désignant la même liberté.

La formule de l'art. 53, al. 1 pourrait n'avoir qu'un sens terminologique, si dans les alinéas suivants le champ d'application des notions y employées n'était conçu d'une façon difficilement compatible avec l'interprétation contemporaine des libertés concernées. Selon les auteurs de la Constitution: «La liberté religieuse comprend la liberté de professer ou d'adopter une religion de son propre gré ainsi que la liberté de manifester individuellement ou avec d'autres, publiquement ou en privé, sa religion par l'exercice du culte, la prière, la participation aux cérémonies, les pratiques et l'enseignement. La liberté religieuse comprend aussi la possession de sanctuaires et d'autres lieux du culte en fonction des besoins des croyants, et le droit des personnes de bénéficier de l'assistance religieuse là où elles se trouvent». La concrétisation des droits individuels découlant de la liberté religieuse dans l'art. 53, al. 2, n'est pas indicative mais exhaustive. Elle n'est pas précédée par la formule «notamment» qui figure à l'art. 2 de la loi sur les garanties de la liberté de conscience et de confession. Les tentatives de certains membres de la Commission Constitutionnelle de faire en sorte que l'énumération des droits découlant de la liberté religieuse soit indicative, n'ont pas réussi.

Ainsi finalement, la liberté de conscience et de confession est limitée dans la Constitution à la liberté de choisir et de pratiquer une religion. C'est un anachronisme contraire non seulement au concept de cette liberté dans les Pactes relatifs aux droits de l'homme et dans les déclarations de l'ONU, mais aussi aux résolutions du Concile Vatican II qui se prononça pour la liberté en matière religieuse (Libertas in re religiosa)[9]. Ce qui manque à l'art. 53, c'est l'affirmation expresse que la liberté de conscience et de confession équivaut à la liberté de convictions en matière religieuse, et concerne donc aussi ceux qui ne professent aucune religion. La formule constitutionnelle, en particulier celle de l'alinéa 2 de l'art. 53, donne au principe de l'égalité en droit des croyants et incroyants un caractère illusoire.

S'agissant de l'aspect personnel, la liberté de conscience et de religion appartient à chaque individu. La Constitution emploie les termes «toute personne» et «nul». Ceci ne suscite pas de divergences d'interprétation quand il s'agit des adultes. Des doutes

[9] *Sobór Watykański II Konstytucja, dekrety, deklaracje* [Concile Vatican II. Constitution, décrets, déclarations], Poznan 1968, p. 695.

surgissent à propos des enfants. La Constitution accorde aux parents le droit d'orienter l'éducation religieuse de leurs enfants, en ajoutant que leur décision doit être conforme à leurs propres convictions (art. 53, al. 3). Mais, tenant compte des dispositions de la Convention sur les droits de l'enfant, elle exige qu'en réalisant leur droit ils tiennent compte du développement des capacités de l'enfant, de sa liberté de conscience et de religion et de ses convictions (art. 48, al. 1). La disposition de l'art. 53, al. 6 va encore plus loin. Elle interdit de contraindre qui que ce soit à participer ou à ne pas participer aux pratiques religieuses et les parents n'échappent pas à cette interdiction à l'égard de leurs enfants, contrairement à ce que prévoyait la Constitution de mars 1921. Il faut donc interpréter cette interdiction comme une limitation de l'autorité parentale.

En accordant aux parents le droit de choisir l'orientation de l'éducation religieuse des enfants conformément à leurs propres convictions, les auteurs de la Constitution ont omis l'hypothèse d'une différence d'opinions entre les conjoints sur la réalisation de ce droit. Chacun d'eux en effet peut être adepte d'une religion différente. Qui alors, et selon quels critères, serait appelé à régler les différents surgissant entre eux? Dans le passé, c'était le sexe de l'enfant qui était le critère décisif: le père décidait de l'éducation du fils, la mère de celle de la fille. Mais à présent, où les séparations religieuses et idéologiques gagnent en importance, comment faut-il faire? Il est difficile de répondre à cette question.

La liberté de conscience et de religion, ou plus précisément la liberté de manifester ses convictions en matière religieuse est susceptible - comme les autres libertés - de restrictions. Celles-ci ne peuvent être arbitraires et doivent être sérieusement motivées. Réglant cette question dans son art. 53, al. 5, la Constitution tient compte des dispositions des conventions et des déclarations sur les droits de l'homme. Elle prévoit que les restrictions à la manifestation d'une religion ne peuvent être introduites que par la loi, donc exclusion faite de règlements et d'actes du droit local. Les motifs justifiant la mise en place des restrictions ont un caractère exhaustif et comprennent la protection de la sécurité de l'Etat, de l'ordre public, de la santé et de la morale ainsi que des libertés et des droits d'autrui. Ces motifs sont susceptibles de recevoir un riche contenu. Ils ne doivent pas présenter à Γ avenir une menace pour la liberté de conscience et de religion, car la Constitution exige qu'ils soient nécessaires et ne portent pas atteinte à la nature de cette liberté.

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En dépit des réserves, principalement de nature terminologique, le modèle constitutionnel des rapports de l'Etat et des églises et unions confessionnelles doit être qualifié de système de séparation de l'Eglise et de l'Etat. Cette opinion est confirmée par:

1. les dispositions reconnaissant la distinction organisationnelle et fonctionnelle de l'appareil de l'Etat et de l'appareil ecclésiastique (autonomie et indépendance);

2. les dispositions obligeant les organes publics à observer l'impartialité en matière de convictions religieuses, de conception du monde et d'opinions philosophiques, et les dispositions interdisant à ces organes de demander à qui que ce soit des informations

sur sa conception du monde, ses convictions religieuses ou confession, ce qui décide du caractère laïc, neutre de l'Etat;

3. les dispositions garantissant l'égalité devant la loi de toutes les églises et unions confessionnelles et l'égalité devant la loi des citoyens sans distinction de leur religion ou conception du monde;

4. les dispositions régissant les modalités de régulation de la situation juridique des églises et des unions confessionnelles;

5. les dispositions définissant la liberté de conscience et de religion, avec des réserves essentielles.

Cette opinion est affaiblie par:

1. le contenu religieux du préambule;

2. les dispositions garantissant la liberté de manifester ses convictions religieuses, idéologiques et philosophiques dans la vie publique;

3. les dispositions réduisant la liberté de confession à la liberté de religion;

4. les dispositions accordant à toutes les églises et unions confessionnelles légales le droit à l'instruction religieuse à l'école, sans définir les principes de son application;

5. la substitution à des termes ayant un contenu bien établi et univoque en droit constitutionnel et droit confessionnel, des notions peu claires, équivoques ou imprécises, ce qui risque de provoquer une confusion dans l'interprétation et d'aboutir à des directives différentes que recevrait l'appareil de l'Etat, en fonction des options religieuses ou idéologiques de la majorité à la Diète, au gouvernement ou au Tribunal Constitutionnel.

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THE COMMISSIONER FOR CITIZENS' RIGHTS - PAST, PRESENT AND FUTURE

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1. Ten years after the establishment of the Office of the Commissioner for Citizens' Rights it is a good moment to reflect both on the road we have made in this time and the place of the institution of the Commissioner in the present state and legal system of Poland. It is also an occasion to consider whether it is necessary to make any modifications in the present form of this institution. At any rate, legislative intervention will probably be necessary in the nearest future. The new Constitution of 2 April 1997[1] introduced a number of changes to the legal status connected with the Commissioner's activity, and in Article 236, paragraph 1 provided for a two-year period for preparing such bills as are necessary for the implementation of the Constitution.

Our further reflections focus on matters whose present legal regulation is doubtful. It seems, however, worth starting with some historical remarks. Besides, according to a frequently quoted saying by Norwid, the past is today, but a little further.

2. The act on the Commissioner for Citizens' Rights (CCR) was adopted on 15 July 1987.[2] Although the first proposals concerning the establishment of this kind of institution in Poland go back to the period after 1956, it was not until the early Eighties that discussions on this matter became more intense.[3]

Not much earlier, the Chief Administrative Court, appointed pursuant to the Act of 31 January 1980 on the Chief Administrative Court and on the amendments to the Act Code of Administrative Procedure,[4] initiated its activity; so did the Tribunal of State, established pursuant to the Constitutional Amendment of 26 March 1982[5] and the Act of 26 March 1982[6] on the Tribunal of State, as well as the Constitutional Tribunal,

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[1] *Dz.U. {Dziennik Ustaw* [Journal of Laws]) no. 78, item 483.

[2] *Dz.U.* no. 21, item 123. The constitutional amendment of 7 April 1989 *(Dz.U.* no. 19, item 101) introduced to the Constitution Article 36a concerning the institution of the Commissioner. The version of the Act on the CCR is now a consolidated text as of 10 October 1991 *(Dz.U.* no. 109, item 471).

[3] S. G e b e t h n e r: "Przesłanki ustanowienia Rzecznika Praw Obywatelskich w Polsce" [Prerequisites for Establishing the Commissioner for Citizens' Rights in Poland] [in:] *Rzecznik Praw Obywatelskich* [The Commissioner for Citizens' Rights], Warszawa 1989, p. 29.

[4] *Dz.U.* no. 4, item 8. The Act of 11 May 1995 on the Chief Administrative Court is now in force (Dz.U. no. 74, item 368).

[5] *Dz.U.* no. 11, item 83.

[6] *Dz.U.* no. 11, item 84. A consolidated text of this Act was published in the Announcement of the Marshal of the Sejm of the Republic of Poland of 7 April 1993 *Dz.U.* no. 38, item 172.

whose establishment was based on the provisions of the Constitutional Amendment of 26 March 1982[7] and the Act of 29 April 1985 on the Constitutional Tribunal.[8]

Disputes are still held on the evaluation of amendments consisting in the introduction of those institutions into the Polish legal system. The disputes started anew on the occasion of the Sejm discussion connected with an examination of the first annual report of the Commissioner's third term of office. Apart from the opinion that the institution of the Commissioner was designed to be a mere façade of democracy,[9] an opposite view was expressed: that it was proof of the fact that, in the field of the protection of citizens' rights, Poland was heading in the right direction, though taking account of the systemic context of that time.[10] Without involving ourselves in political evaluations, one can formulate a hypothesis that since the establishment of the office of the CCR, similarly to the Chief Administrative Court, the Tribunal of State or the Constitutional Tribunal, was collective work, the motivations might have been different. Therefore, it is not surprising that certain lawyers, involved in creating those institutions with the best of intentions, deny the accusations that they were only trying to establish some sort of a fig leaf and consciously took part in make-believe actions. On the other hand, we have to remember that when those institutions were being created, people claimed that they would defend socialism on par with the independence of the Homeland.

The importance of the above-mentioned institutions was determined by their later practice. In particular, from the beginning of the office of the CCR, first Prof. Ewa Łętowska, and later on, after the transformations of 1989, Prof. Tadeusz Zielinski, tried to make use of all the existing possibilities in order to build the authority of the Commissioner's Office in Poland through involvement in a determined protection of citizens' rights and freedoms. Its present high social prestige has been, to a considerable degree, their achievement. It has also been the accomplishment of numerous employees of the Office and experts, assisting the subsequent Commissioners in their activities with knowledge and experience.

Today, nobody questions the fact that the office of the Commissioner is necessary. Furthermore, the institution of the ombudsman functions all over the world and is on the increase. There are nearly 80 such offices, including almost 30 in Europe, with the European Ombudsman at the level of the European Union. It is now considered whether there is a need to establish such an organ within the Council of Europe. International organizations encourage the establishment of ombudsman institutions in countries which started to build democratic systems a relatively short time ago. Ombudsman provide an

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[7] *Dz.U.* no. 11, item 83. See also the Constitutional Amendment of 7 April 1989 *Dz.U.* no. 19, item 101.

[8] *Dz.U.* no. 22, item 98. A consolidated text of the Act on the Constitutional Tribunal is comprised in the Announcement of the President of the Sejm of the Republic of Poland of 10 October 1991 *(Dz-U.* no. 109, item 470). This text has been amended three times since then, due to subsequent amendments to the Act on the Constitutional Tribunal.

[9] *Diariusz Sejmowy* [Sejm Diary] 114th session of the Sejm on 29 August 1997, Warszawa 1997, p. 42.

[10] See previous, p. 49.

additional level of control over the functioning of state organs, being at the same time flexible and not very formalised, which often makes it possible to achieve aims which would be difficult to attain otherwise.

3. Since it was adopted, the Act on the CCR has undergone very few and insignificant amendments. From the point of view of the growing importance of the Office of the Commissioner, a very characteristic amendment was introduced by the Act of 24 August 1991 on amendments to the Act on the Commissioner for Citizens' Rights and the Acts Code of Criminal Procedure on the Supreme Court, and on the Constitutional Tribunal *(Dz.U.* no. 83, item 371). That amendment consisted in lifting restrictions as regards the handling by the Commissioner of cases concerning national defence, armed forces and state security. According to the initial tenor of Article 16 of the Act on the CCR, the Commissioner could refer such cases to relevant supreme organs of state administration, which were obliged to inform him, within 30 days, on the actions undertaken or on the opinions held, and the Commissioner, finding the way of handling the case to be unsatisfactory, could, within 30 days of receiving such information, apply for revision of the case by the State Defence Committee. Repealing this provision meant extending the competence of the Commissioner so as to include such cases. This was accompanied by introducing the possibility of appointing a special Commissioner's deputy for soldiers' affairs (Article 29, paragraph 3 of the Act on the CCR); however, none have been appointed so far.[11]

On the other hand, legislation concerning the legal institutions, which the Commissioner can use, changed quite quickly. As a result, the Act on the CCR was frequently inconsistent with other Acts. Examples of such inconsistency include the abolition of extraordinary appeal against valid court judgments, which is referred to in the Act on the CCR, and the introduction of cassation or widening the scope of the cognition of the Chief Administrative Court so as to include various administrative acts, while the Act on the CCR still stated that the Commissioner was only authorised to appeal against administrative decisions. Those inconsistencies could be resolved by reference to the principle of *lex posterior derogat legi priori.* This does not, however, change the fact that, as a consequence, the Act on the CCR became less legible, and that the resulting inconsistencies can lead to various interpretational doubts.

The constitutional legal status has also changed. The biggest number of changes were brought by the new Constitution, which strengthened the institution of the Commissioner. The principles of the Commissioner being independent in his activities,independent of other state organs, and accountable only to the Sejm, in accordance with the principles specified by statute, received constitutional sanction (Article 210). The Commissioner's obligation to submit an annual report about his activities to the Sejm and the Senate was replaced by a much less troublesome duty of providing information (Article 212). The immunity of the Commissioner was constitutionally [11]

[11] The Office of the CCR includes, however, a separate Team for the Rights of Soldiers and Officials of Public Services, which specialises, among other things, in military problems.

guaranteed (Article 211). His term of office was extended to a period of 5 years (Article 209, para 1), so that it is not linked with the term of office of a given parliament.

In order to resolve inconsistencies in this field, we can refer to the principle of *lex superior derogat legi inferiori*, particularly in connection with the provision envisaging the direct application of the provisions of the Constitution (Article 8, paragraph 2). It is, however, difficult to accept the situation of a statute being inconsistent with the Constitution for a longer period.

Finally, it should be borne in mind that global legal reflections on the model for the ombudsman institution is still developing. In particular, the exchange of views and information within the framework of the European Ombudsman Institute and the International Ombudsman Institute allows for the identification of new needs and possibilities. The Act on the CCR, although adopted in the period of a non-democratic system, was an example for many countries building their democracies. Since that time, numerous new normative acts have been adopted in the world; in them, Polish lawyers can find much interesting material.

4. In the sub-chapter devoted to means for the defence of human and citizens' freedoms and rights, the Constitution mentions the right to apply to the Commissioner for assistance in the protection of one's freedoms or rights infringed by organs of public authority. This right corresponds to the Commissioner's duty to assume a standing every time he is applied to. According to the Constitution, this right is granted to everybody (Article 80).

Here, there arises another inconsistency with the Act on the CCR, to be removed without delay. According to the Act on the CCR, its provisions apply to Polish citizens, and - *mutatis mutandis* - to foreigners (Article 18, paragraph 2) as well as to stateless persons permanently residing in Poland (Article 18, paragraph 1). The exclusion from the scope of the application of the Act of stateless persons staying, and not permanently residing in Poland, cannot be justified on the grounds of the Constitution, which declares that the freedoms and rights ensured by the Constitution, including the right to apply to the Commissioner for assistance, shall be enjoyed by anyone under the authority of the Polish State (Article 37), that is to say, also by stateless persons temporarily staying in Poland.

5. It is often said that the Polish model of the ombudsman takes much from the Swedish one. There is much truth in this statement. Although Polish solutions differ at some important points from the Swedish model, there are more similarities than differences. The reference to the Swedish model is not only caused by the desire to establish links with a certain historical tradition. It is worthwhile to emphasise that, during international meetings, representatives of countries whose ombudsman institutions have nothing in common with the Swedish example, also make references to this model.

What makes the Polish and Swedish models similar is, above all, a very wide scope of the competence of the Commissioner. All ombudsman institutions comprise, among their competence, control of the activity of the state administration. Sometimes, they deal also with infringements of citizens' rights and freedoms by the legislative power,

which is expressed in ombudsman's authorisation to institute proceedings before constitutional courts in the case of a normative instrument being inconsistent with the Constitution, or another instrument superior in rank being adopted, and in the possibility of presenting his observations concerning the need to change the existing legal status. Much more rarely does the ombudsman's competence include infringements of citizens' rights and freedoms by courts. Such is the competence of the Swedish ombudsman.[12] The Polish solutions constitute an obvious reference to this example.

6. In order to protect citizens from infringements of their freedoms and rights by the legislative power, the Commissioner was authorised to apply to the Constitutional Tribunal for verifying the conformity of statutes and international agreements to the Constitution, the conformity of statutes to ratified international agreements, the conformity of statutes to ratified international agreements and the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes (Article 191, paragraph 1, sub-paragraph 1 of the Constitution; Article 16, paragraph 2, sub-paragraph 2 of the Act on the CCR). He was also vested with the power to approach relevant organs with proposals for legislative initiative (Article 16, paragraph 1, sub-paragraph 1 of the Act on the CCR).

The Act of 1 August 1997 on the Constitutional Tribunal *(Dz.U.* no. 102, item 643) additionally guaranteed a special position of the Commissioner in proceedings for a constitutional complaint, which may be referred to the Constitutional Tribunal by any person whose constitutional freedoms or rights have been infringed by a statute or another normative act, pursuant to which a court or an organ of state administration issued a final decision on his freedoms or rights or on his obligations specified in the Constitution (Article 79 of the Constitution). The Commissioner should always be informed of such proceedings having been instituted. He can announce his participation in such proceedings (Article 51 of the Act on the CT) and if he does, he becomes a participant in the proceedings (Article 52, paragraph 1 of that act). However, the time limit for making such an announcement is 14 days from the Commissioner being notified of the initiation of the proceedings. In many cases, such a period may prove to be too short for the Commissioner to make a decision whether to take part in the proceedings or not, which may, in turn, have adverse effect on his activity in such cases. On the other hand, the Commissioner can himself institute proceedings before the CT, also while the proceedings for a constitutional complaint are already pending, which allows him to avoid at least some of the difficulties.

Another shortcoming of the existing legal status is the limitation of the effective protection of citizens' rights and freedoms in proceedings before the CT as a result of Article 39, paragraph 1, sub-paragraph 3 of the Act on the CT maintaining the principle of discontinuing the proceedings before the CT in a situation when a normative act questioned its binding force before the Tribunal issued its judgment. Although the

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[12] See, e.g. C. E k l u n d h: "The Ombudsman Specialized in Judicial Matters" [in:] VI International Conference of the International Ombudsman Institute, Buenos Aires 1996 and a collection of studies: *Judicial Ombudsman. International Outlooks*, Mexico 1996.

Tribunal assumes that this can only take place when the content of the norm causing a normative act to lose its binding force allows an unequivocal statement that the repealed provision has lost its binding force completely, so that it cannot be applied to past, present or future factual states,[13] this solution means that the author of a normative act, repealing such an act before the Tribunal issued its judgment, can prevent the occurrence of a legal effect consisting in the possibility of resuming the proceedings ended with a final judgment, administrative decision or another final settlement, and preventing thereby citizens' rights or freedoms from being infringed. It is understandable that in such a situation a sense of wrong can occur, particularly in the case of the citizen who submitted the constitutional complaint.

Neither can one consider it proper that the provisions of the Act of 8 March 1990 on Local Self-government *(Dz.U.* 1996, no. 13, item 74 with subsequent amendments) and of the Act of 22 March 1990 on Local Organs of Government Administration *(Dz.U.* no. 21, item 123 with subsequent amendments) limited the possibility of the Commissioner submitting a complaint to the Chief Administrative Court, when a provision of local law infringes a legal interest or a right of the citizens. The Commissioner is bound by a general time limit for submitting a complaint; moreover, Article 25a, paragraph 4, sub-paragraph 2 of the Act of 22 March 1990 on Local Organs of Government Administration excludes the possibility of declaring the invalidity of a provision of local law, referred to in this Act, if the complaint was submitted after the lapse of one year after its publication in a voivodeship official journal; Article 101, paragraph 4 of the Act on Local Self-government makes it impossible to declare the invalidity of a resolution of an organ of a commune after the lapse of one year after its adoption, and envisages only issuing a judgment on its unconformity to the law. Nevertheless, it is quite probable that the defectiveness of such provisions becomes evident later.

Quite often, the Commissioner used the power to submit proposals for legislative initiative, which brought up the problem of his participation in the legislative process. Many parliamentarians expect this participation to be very active. Nevertheless, it must be taken into consideration that, according to the existing law, the Commissioner safeguards the human rights and freedoms specified in the Constitution and other normative acts (Article 208, paragraph 1). He is, therefore, a guardian of the existing legal status. Consequently, typical Commissioner's proposals for legislative initiative include, for instance, motions indicating insufficient implementation in ordinary statutes of principles resulting from the Constitution or international agreements concerning the protection of human rights, ratified by Poland, inconsistencies in the law, which may threaten citizens' freedoms and rights or other defects of the existing legal solutions. The Commissioner's deep involvement in current legislative activities would be incompatible with such a legislative conception. Moreover, it would certainly be detrimental to other spheres of his activity. This would also result in the Commissioner

[13] Judgment of the CT of 21 September 1987 - P. 3/87, *OTK* 1987, item 5, and of 26 September 1995 - U. 4/95, *OTK* 11/1995, item 27.

assuming a position of a party in the legislative process and, inevitably, getting involved in various political disputes. As a consequence, all this could affect adversely his impartiality and subsequent activity as regards questioning certain provisions before the CT. In any case, such situations require a reasonable sense of measure.

7. The main field of activity of ombudsman institutions is protecting citizens from infringements of their rights and freedoms by organs of the executive power, since in this area infringements of citizens' rights occur particularly often. This also applies to the situation in Poland.

The legal means which can be used by the Commissioner in order to counteract such infringements are manifold, and enable him to undertake various actions, according to the existing state of affairs. Those are both means pertaining to the protection of a citizen in a specific situation and ones of a more general nature. Their catalogue seems to be sufficient. The problem still involves the way in which organs of the administration react, and particularly delays in responding to Commissioner's applications, the vagueness of such responses and attempts to defend evidently mistaken opinions.

8. In principle, the means at the disposal of the Commissioner as regards the activities of the organs of the administration of justice also seem to be sufficient.[14] Nonetheless, some critical remarks spring to mind.

In civil (including family cases and cases concerning employment relationships and social insurance) and administrative cases, the Commissioner can institute proceedings before a court, and then participate in them with such powers as are vested in the public prosecutor (Article 14, sub-paragraphs 4 and 6 of the Act on the CCR). The possibility of using such powers is of great importance, even though the Commissioner does so very rarely, since usually the activity of persons concerned is, in itself, sufficient.

It must be considered as a fortunate solution that the Commissioner, who is not a public prosecutor, cannot institute criminal proceedings. Nor can he participate in criminal proceedings already pending,[15] but can only demand that preparatory proceedings be instituted by a competent public prosecutor in cases concerning offences prosecuted *ex officio* (Article 14, sub-paragraph 5 of the Act on the CCR). The Commissioner may move for punishment in proceedings concerning minor offences (Article 14, sub-paragraph 7 of the Act on the CCR). Such cases are examined by a court if, in the situation specified in Article 508, paragraph 1 of the Code of Criminal Procedure, a minor offences board or its president refer the case to a court. Courts examine also the means of appeal against decisions of minor offences boards (Article 508, paragraph 3 of the CCP). The Commissioner may also move for the reversal of a valid

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[14] I discussed this question in more detail in the article entitled "Rzecznik Praw Obywatelskich a sądy" [The Commissioner for Citizens' Rights and the Courts], submitted for publication in a book in honour of Prof. J. Łętowski: *Państwo prawa. Administracja. Sądownictwo* [Law State. Administration. Judiciary], Warszawa 1999.

[15] In the course of preparations of the Act on the Commissioner for Children's Rights it was suggested that this Commissioner should have the right to participate in criminal proceedings according to the same principles as envisaged for a social representative.

decision of a minor offences board, a valid decision on the discontinuance of the proceedings or a valid criminal order (Article 14, subparagraph 7 of the Act on the CCR in connection with Article 515, paragraph 2 of the CCP). Those means, too, are used by the Commissioner with moderation.

An especially important right of the Commissioner is to lodge cassation in civil and criminal proceedings, and extraordinary appeal against decisions of the Chief Administrative Court. As a rule, it can be evaluated only at that stage of the proceedings whether a court judgment infringes citizens' freedoms or rights.

The Commissioner may lodge cassation in civil cases only if he previously participated in appeal proceedings in this case (Article 392 of the CCP). Since the Commissioner, as a rule, will not participate in appeal proceedings, in practice this signifies depriving him of the possibility to lodge cassation in civil cases. This solution is deservedly criticised in the doctrine for not providing adequate protection to citizens' rights.[16]

Lodge cassation against a valid judgment ending the court proceedings, issued before or after the day of this act coming into force, including a judgment of the Supreme Court issued as a result of an examination of an extraordinary review. After the new Code of Criminal Procedure enters into force, the Commissioner may lodge cassation against a judgment ending the court proceedings in criminal cases (Article 521 of the Code of Criminal Procedure). This is a reference to the cassation in defence of statute,[17] which existed in the period between the two world wars. The grounds for cassation are the same as for the parties; nevertheless, The Commissioner may lodge cassation at any time (Article 524, paragraph 2 of the Code of Criminal Procedure).[18] The persons lodging cassation criticise the exclusion of the possibility of lodging cassation exclusively against a judgment stating the penalty,since such judgments can glaringly infringe their rights.

In administrative cases, the Commissioner can, probably until a two-instance system of administrative courts is introduced, for which the Constitution envisaged a period of five years (Article 236, paragraph 2) pursuant to the Act of 1 March 1996 on Amendments to the Code of Civil Procedure (...), lodge with the Supreme Court an extraordinary appeal against a judgment of the Chief Administrative Court (Article 14, paragraph 8 of the Act on the CCR). The hitherto existing grounds for extraordinary appeal, as laid down in Article 57 of the Act on the Chief Administrative Court, have not changed. The time limit for lodging extraordinary appeal is 6 months, and lodging extraordinary appeal after the lapse of this time limit is inadmissible (judgment of the Supreme Court (7) of

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[16] See W. B r o n i e w i c z: "Nowelizacja prawa postępowania cywilnego z dnia 1 marca 1996 r." [Amendments to Law on Civil Procedure of 1 March 1996], *Kwartalnik Prawa Prywatnego* 1997, no. 2, p. 216.

[17] The institution of cassation in defence of the statute is known in some countries of Western Europe. See, for example, A. M u r z y n o w s k i: "Ogólna charakterystyka nowego kodeksu postępowania karnego" [General Characteristic of the New Code of Criminal Procedure], *Państwo i Prawo* 1997, no. 8, p. 17.

[18] It is, however, inadmissible for the Supreme Court to examine cassation against the accused, applied after the lapse of 6 months of the day of the judgment becoming valid (Article 524, paragraph 3 of the Code of Criminal Procedure).

21 November 1996 III ZP 2/96, *OSNAP* 1997, no. 10, item 158). In the original tenor of this act, this time limit started from the day of the issue of the judgment. It was often difficult to observe it, since judgments of the Chief Administrative Court are frequently delivered to parties with delay, while extraordinary appeal can only be prepared after receiving the judgment. Upon the initiative of the Commissioner, this state was changed by Article 98 of the Act of 29 August 1997 on Court Executive Officers and Execution *(Dz.U.* no. 133, item 882), which states that such a term starts from the day of the judgment of the CAC being delivered to the party concerned.

The provisions hitherto in force envisaged, in certain cases, the possibility of the Commissioner lodging extraordinary appeal with the Supreme Court against decisions of non-court organs. After the day of the entry into force of the Act of 1 March 1996 on Amendments to the Code of Civil Procedure (...), the Commissioner can also lodge extraordinary appeal (Article 10 of this Act), according to the hitherto existing rules.

9. According to Article 16, paragraph 2, subparagraph 4 of the Act on the CCR and Article 16, paragraph 2 in connection with Article 3, paragraph 3 of the Act of 20 September 1984 on the Supreme Court *(Dz.U.* no. 13, item 48 with subsequent amendments), the Commissioner may approach the Supreme Court for resolutions aimed at explaining legal provisions in two situations: if such provisions appear vague or if their application has caused inconsistencies injudicial decisions. Whereas the second situation seems clear, the concept of legal provisions, which appear vague in practice, has received very different evaluations. It is unclear whether it is sufficient for adopting such a resolution if vagueness occurs in the practice of state organs, organs of local self-government or even social organs, or whether it is necessary that such vagueness occurs in court practice.[19] In some of its judgments, the Supreme Court opts for an interpretation according to which it is necessary that the vagueness of legal provisions occurs in juridical practice.[20] This would signify a limitation of the scope of the application of this provision to a situation where the tendencies revealed in judicial practice appear vague.

This problem is an extremely important one, since it is concerned with the role to be played by the Supreme Court in the field of the protection of citizens' rights and freedoms through a judicial interpretation of legal provisions, unconnected with a specific case, particularly after the new Constitution abolished the institution of the universally binding interpretation of statutes provided by the Constitutional Tribunal. In many cases, such an interpretation may prove useful for the purpose of avoiding infringements of citizens' rights. It can also help to protect the fundamental values, upon which the legal system should be based. Besides, it is not unusual that no court judgment is issued, for example, in cases belonging to bankruptcy proceedings, in spite of the fact that a defective settlement of such cases by way of arrangements in the pre-court phase may have serious consequences. Moreover, court proceedings are often so

[19] J. I w u 1 s k i: "Podejmowanie przez Sąd Najwyższy uchwał na podstawie art. 13 pkt. 3 ustawy o Sądzie Najwyższym" [Adopting Resolutions by the Supreme Court Pursuant to Article 13, Subparagraph 3 of the Act on the Supreme Court], *Przegląd Sejmowy* 1994, no. 11-12, p. 43.

[20] See also judgment (7) of the Supreme Court of 27 September 1995 III CZP 83/95 with a critical gloss by E. Gniewek *(OSP* 1996, no. 6, item 108).

lengthy that in many other cases irreparable losses are sustained before the court issues a judgment, which could be prevented by removing the existing legal doubts earlier.

Thus, doubts may arise whether the tendency to narrow down the interpretation of the provision in question is justifiable. Referring, in this context, to the example of renouncing the universally binding interpretation of statutes or guidelines for the administration of justice and judicial practice, which, fortunately, disappeared from the Polish legal system, is pointless insofar as the interpretation of statutes provided by the Constitutional Tribunal was universally binding,[21] and the non-observance of the guidelines constituted grounds for applying a remedy. In practice, the effect of the guidelines was the same as that of a legal provision, which was unacceptable in a state of law observing the principle of judges being subject only to statutory law. However, the resolutions provided for in Article 13, paragraph 3 of the Act on the Supreme Court are not binding, and they only exert influence by virtue of the authority of the Supreme Court. The fact that this influence is so small is a pure consequence of the weakness of arguments evoked in judgments of the Supreme Court and of the anticipation that, in case of a dispute, the Supreme Court may sustain an opinion expressed in the resolution. The principle according to which judges are only subject to the statutory law, is not violated in that situation.

10. In order to perform his duties, the Commissioner may demand that case files be presented to him. In respect of Article 13, paragraph 1, subparagraph 2 of the Act on the CCR, which provides for this right, doubts arose whether it created the obligation to send the files to the Office of the Commissioner or whether it was sufficient to enable him to examine the files on the spot. The doubts of public prosecutors were quickly resolved by the Prosecutor-General, and now public prosecutor's offices send case files to the Commissioner without any obstacles. By virtue of the Regulation of the Minister of National Defence no. 43 of 30 September 1996 on detailed rules for securing the archives of the department of national defence (unpublished), a prohibition was imposed against making available to the Commissioner files of military courts dating from before 1 August 1990 away from the place of their storage.[22] The Commissioner applied to the Constitutional Tribunal for a declaration of unconformity to the Act on the CCR of the provision introducing that prohibition, and the Minister of National Defence repealed the said provision. It might be, however, worthwhile to provide a clearer statutory regulation of the Commissioner's right to be presented with case files.

11. According to the Constitution, there exists one Commissioner for Citizens' Rights, who, being an organ for the protection of the law, safeguards the freedoms and rights of persons and citizens specified in the Constitution and other normative acts, and whose scope and mode of activity are specified by statute (Article 208 of the

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[21] It is a well-known fact that it was disputed whether such an interpretation was binding for courts (represented by the Constitutional Tribunal) or not (this opinion was expressed in the judgments of the Supreme Court).

[22] *Sprawozdanie Rzecznika Praw Obywatelskich za okres od 8 V 1996 do 7 V 1997* [Report of the Commissioner for Citizens' Rights for the Period 8 May 1996 to 7 May 1997], Warszawa 1997, p. 340.

Constitution). At the final stage of the work of the Constitutional Commission, a provision was introduced into the Constitution concerning the establishment of the Commissioner for Children's Rights. This provision was, however, placed outside Chapter IX of the Constitution, concerning organs of state control and the defence of rights, containing a sub-chapter devoted to the Commissioner for Citizens' Rights. More specifically, paragraph 4 was added to Article 72 of the Constitution, concerning the protection of the rights of the child, and stating the competence and procedure for the appointment of the Commissioner for Children's Rights. Due to such regulations and the lack of a constitutional regulation of the relationship between the CCR and the Commissioner for Children's Rights, there are two possible interpretations. First, that the Commissioner for Children's Rights is an institution supplementing means for the protection of freedoms and rights, and as such does not limit the right of the CCR to deal with the protection of children's freedoms and rights. Second, that the sphere of the protection of children's freedoms and rights has been excluded from the competence of the CCR, and that, in the future, the CCR will only deal with the protection of freedoms and rights of the remaining members of family or of the family as a whole. There seem to be more arguments in favour of the first interpretation; a particularly powerful one is the fact that in matters of the protection of children and youth, the use of means of control, at the disposal of the CCR, is not as necessary as providing extensive assistance: educational, social and financial.[23] As a consequence, one should conclude that the Commissioner for Children's Rights is a similar institution to that of the Commissioner of the Insured, who operates pursuant to Articles 90b to 90d of the Act of 28 July 1990 on Insurance Activity *(Dz.U.* 1996, no. 11, item 62), with the sole difference that his existence is envisaged in constitutional provisions. The Commissioner of the Insured, protecting the interests of insured persons and persons having rights in insurance contracts, does not limit the powers of the CCR.

On various occasions, it has been suggested to appoint other more specialized commissioners. Such suggestions concerned, for instance, the appointment, by the statute, of commissioners for taxpayers, patients, disabled persons, soldiers and pensioners. Bills, introduced to the Sejm of the second term of office, concerning acts on the equal status of women and men and on the protection of personal data, envisaged appointing two separate commissioners for matters covered by those acts.[24] At one time, the President of the National Bank of Poland appointed a commissioner for bank customers, who existed only for a short period, since later his scope of activity was included in that of the department of customer complaints at the National Bank of Poland. Deputies of supervisors of education, who were, pursuant to paragraph 6, subparagraph 3 of the Regulation of the Minister of National Education of 31 December 1996 on detailed rules for exercising pedagogical supervision, specification of posts and qualifications

[23] On the other hand, instead of creating an additional control authority, repeating, to a certain extent, the example of the CCR, it would probably be better to establish in Poland an extensive system of administrative organs dealing with care of children, such as the well-known Jugendamts.

[24] Eventually, the Act on Protection of Personal Data of 29 August 1997 *(Dz.U.* no. 133, item 883) established the office of Inspector General for the Protection of Personal Data.

necessary for occupying them *(Dz.U.* 1997, no. 9, item 46), charged with exercising pedagogical supervision over the observance of the rights of a pupil and child in schools and establishments listed in Article 2 of the Act of 7 September 1991 on the Educational System *(Dz.U.* 1996, no. 67, item 329 with subsequent amendments), are referred to as commissioners for pupils' rights. However, certain pupils' organizations criticise this solution, claiming that commissioners for pupils' rights should represent pupils' self-government and not school administration. In some hospitals, there exist, without a particular legal basis, commissioners for patients rights, some communes have commissioners for children's rights, and the National Council of the Disabled - a Commissioner for the Rights of Disabled Citizens.

All this speaks in favour of determining a general conception of the commissioner and not violating such a conception while preparing specific statutes. This conception should be based on the assumption that, from the point of view of the effectiveness of the protection of citizens' rights and freedoms, an adequately powerful office gives the best guarantees. Ancient Romans already noticed that the best way to make an enemy weaker is to divide his rights among various subjects, according to the principle: *divide et impera*, because in this situation such subjects can have different opinions, and engage in disputes as regards competence and conflicts. All this can be applied to ombudsman institutions. Although there are countries where several ombudsmen specialise in various fields, the intensity of the protection of citizens' rights and freedoms does not increase as a result.

Indubitably, different specialized protective institutions, particularly public ones, which would not limit the powers of the Commissioner, might provide firm support for his actions. The creation of such institutions should be deemed useful. There can only emerge doubts as to whether the term "commissioner for rights" should be used in their names, since this may cause misunderstandings as to the relationship between such institutions and the CCR. Nonetheless, this question does not seem particularly important.[25]

12. During the VI Congress of the International Ombudsman Institute in Buenos Aires, held in 1996, the importance of the impartiality of ombudsman institutions was emphasised very strongly.

It is a commonly known fact that there are systems in which ombudsmen are members of political parties or parliamentarians. In Polish conditions, with distinct political divisions in society and fierce fights between political parties, sometimes continued even in the Parliament, the impartiality of the Commissioner should also mean his non-political status. This is how the new Constitution sees it, expressly excluding the possibility of the Commissioner belonging to any political parties or trade unions, prohibiting him to perform other public activities incompatible with the dignity of his office (Article 209, paragraph 3), holding his office jointly with the mandate of a Deputy or a Senator (Article 103, paragraph 1 and Article 124) or any other post, except for a professorship in an institute of higher education, or performing any professional

[25] Quite a different kind of misunderstanding was caused by the activity of several persons, described in the press, who decided to deal with the protection of citizens' rights, without remuneration, and called themselves commissioners for citizens' matters.

activities (Article 209, paragraph 2). The notion of public activities incompatible with the dignity of the office of Commissioner is not fully clear. What is seems to imply, however, is that the Commissioner should also refrain from expressing opinions on purely political subjects, evaluating programmes of political parties, participating in party conferences and other such events, since his presence might be interpreted as supporting a given political option, taking part in election campaigns to organs of authority or in rankings designated for politicians.[26] Above all, however, he must ensure that none of his actions is motivated by political considerations.

13. The principle that citizens should have unrestricted access to the office of the Commissioner is very important. However, if the number of cases is as great as now it is impossible to implement this suggestion by way of personal contacts between the Commissioner and all persons submitting complaints. Nonetheless, citizens must have an opportunity to present their complaints personally to employees of the Office of the CCR. This principle, which is observed in the practice of the office of the CCR, is a very important element inspiring trust in the office of the CCR.

It has already become an impossible task for the Commissioner to read personally all incoming correspondence. As the office of the CCR is monocratic, many authors of complaints expect the Commissioner to take cognizance of the content of their complaints. Moreover, public opinion harbours the belief that he does so. In reality, practice of this kind is not feasible. Consequently, it is necessary to create such conditions which would guarantee that the Commissioner is aware of the contents of all the correspondence he receives, and that the most important cases reach him.

The suggestion of unrestricted access to the office of the Commissioner poses yet another problem. The legislations of certain countries still includes provisions ensuring the anonymity of citizens submitting complaints to the Commissioner.[27] The Act on the CCR does not contain a similar provision. Since the police has already attempted to identify one citizen, who applied to the Commissioner, under the pretext that the provisions on the protection of state secrecy had been infringed on that occasion, the introduction of an adequate provision seems desirable.

14. At the time of writing of those remarks, complete statistical data concerning the whole decade were not available. The total number of cases submitted to the Commissioner in that period can be expected to approach 300,000, and the total number of letters addressed to the Commissioner - 400,000. Those figures prove that there is a great demand for the Commissioner's activity, and that the Polish office is one of the busiest in the world.

15. The Act on the CCR allows the Commissioner to appoint his local representatives subject to approval by the Sejm. Towards the end of the second term of office of

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[26] The popularity of the Commissioner can be compared to that of other non-political institutions, including courts, tribunals or the Supreme Chamber of Control.

[27] See, for example, Article 5, paragraph 3 of the Act on the Latvian National Human Rights' Office: "The Office has the right to refrain from revealing information about the person submitting a complaint or about another person, if doing so is necessary for protecting the rights of an individual".

the Commissioner, preparations were made for the appointment - by way of an experiment - of two local representatives (in Szczecin and in Rzeszów). Since this conception required more detailed preparation, and in particular making decisions whether there were to be only local offices of the Commissioner or fully autonomous organizational units, which would, in turn, affect matters of human resources and the preparation of many technical details, appointing such representatives within the expected time proved impossible. As new financial needs arose in other fields, the Sejm decided not to assign means from the budget for the appointment of representatives of the Commissioner in 1997. The question of appointing local representatives remains still open and is worth further discussion.

16. Some countries, apart from, or instead of ombudsmen, have national commissions of human rights. As a rule, they accompany heads of state or government, in spite of being fully independent organs. Such commissions are usually composed of representatives of various public organizations and state institutions dealing with problems of human rights' protection. Usually, they enjoy very high status. Those commissions prepare opinions on the degree of respect for citizens' rights in particular fields, formulate appropriate conclusions for relevant organs of state administration and co-ordinate the work of organizations and institutions acting within their framework. A classic example of such a commission is the French Commission Nationale Consultative des Droits de l'Homme.

During his visit to Poland, Mr. J. Kahn, the President of the French commission, tried to promote the idea of establishing such a commission in our country. However, the responses varied. The government organs of that time welcomed this idea. However, bad experiences from the time of the People's Republic of Poland, when co-ordination served manipulating social initiatives and subordinating such initiatives to political objectives, immediately provoked a considerable skepticism of Polish organizations for the protection of human rights.

17. As a mark of acknowledgement for the Polish Office of the Commissioner, on 7 November 19997 an agreement was concluded, upon the initiative of the Regional Bureau for Europe and Countries of the CIC (RBEC) of the United Nations Development Programme (UNDP), between the Commissioner and that Bureau, providing technical assistance for countries of Eastern and Central Europe, the Baltic Republics and the countries of the Community of Independent Countries in the field of ombudsman institutions and other institutions for the protection of human rights. The agreement concerns mainly specialist consultation, creating a centre for gathering and exchanging information, organising conferences, assistance in creating new legal instruments, etc.

The coincidence of the time of signing this agreement and the tenth anniversary of the office of the Commissioner has a symbolic meaning, documenting the distance that this office has made since its establishment until reaching its present position at home and abroad. It is also a cause of satisfaction for all persons who have, for the past decade, contributed to it.

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COLLECTIVE AGREEMENTS IN POLAND

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1. The Early Model for Collective Agreements in Poland

Collective agreements were first legally sanctioned in Poland by the Act of 14 April 1937 concerning collective agreements.[1] Until that time collective agreements, generally referred to as "group contracts" existed *de facto* but were only partly acknowledged in labour law. Due to the 1937 Act Poland became one of the few countries at that time which accorded legal recognition and protection to collective agreements in a single act.

According to the above-mentioned Act, collective agreements could specify all the conditions of contracts of employment and include other provisions mutually binding on both parties to the contract. Collective agreements could be concluded at different enterprise levels and vary in scope; decisions regarding the range and scope of an agreement were left to the parties. According to the so-called legal theory, which guided the legal interpretation of collective agreements in Poland, the normative provisions of a collective agreement applied to all workers in the enterprise or branch which the agreement encompassed, regardless of whether or not they belonged to the trade union organisation which was party to the agreement.

By its nature, the "legal theory", accepted together with all its implications, granted workers a privileged legal position (known as the principle of "workers' privilege"). This principle determined the relationship of collective agreements to legislative acts as well as to individual employment contracts. The provisions of collective agreements which deviated from legislative norms were legally recognised so long as such deviation was to the advantage of the workers. Similarly, from the moment of its taking effect its provisions superseded those of individual employment contracts so long as said provisions were more advantageous to the workers than the superseded provisions of the employment contracts. The collective agreement, however, could not negate

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[1] *Dziennik Ustaw (Dz.U.)* [Journal of Laws] no. 31, item 242. Various problems concerning collective agreements against the background of this Act are discussed by W. S z u b e r t in his monographic study: *Układy zbiorowe pracy* [Collective Agreements], Warszawa 1960. For a concise presentation of the development of collective agreements in Poland, encompassing the 1937 law, see my article: "Le role des accords collectifs dans le droit du travail polonais", *Acta Universitatis Lodziensis, Folia Iuridica* 1991, no. 46, p. 79 and following.

those provisions of employment contracts or legislative acts, which were more advantageous to the workers.

The principle of the workers' privilege was also applied in the event of a conflict between the provisions of various collective agreements. In those cases, employers were required to comply with the provision(s) of the applicable collective agreement, which was most advantageous to its workers. In addition, the principle was extended to provide that upon the expiration of a collective agreement those original conditions less advantageous to the workers were not automatically reinstated. The workers retained the advantages of the expired agreement. Even in those cases where the expired collective agreement was replaced by a new agreement, the provisions of the new agreement could not eliminate those privileges which were vested in the workers as a result of the earlier agreement, unless, of course, they contained more advantageous provisions.

2. Collective Agreements during the Period of "Real Socialism"

After regaining independence at the end of the second world war Poland inherited the 1937 Act on Collective Agreements together with the entire system of labour law prevailing from the inter-war period. In the new systemic conditions, based on centralised planning and administration, the entire process of collective bargaining was transformed fundamentally. Following a short period of intensive development, first the freedom of the parties to negotiate wages was restricted, and later their freedom to negotiate work conditions was further limited. This period is marked by the intervention of government organs responsible for the wage and income policy. The legislative act became the major mechanism for regulating labour relations, and collective agreements were assigned a subsidiary role. They became used primarily as an instrument to implement wage policy in a socialised economy and as a means to differentiate branch policies.

As a result, collective agreements lost their "bargaining" element. Instead of being the result of negotiations over normative provisions in labour relations between autonomous parties, they became a form of coerced cooperation between economic administrators and trade unions in creating the law governing labour relations. Their provisions were carefully selected on the basis of laws, regulations, and politico-economic directives setting forth the government's reigning socioeconomic policy. Only on those conditions and subject to those limitations were collective agreements recognised as a primary source of law.

The above-mentioned changes, presented in a synthetic manner, were carried out in practice; they were not reflected in the existing law and regulations until the codification of labour law in 1974. Up to that time, however, as much as one might have tried, it was almost impossible to justify the existing practices as a means of implementing the 1937 Act, which legally remained in force. Labour policy was being dictated by the government, and not formed on the basis of a freedom to bargain collectively. There-

fore, the changes which took place were regarded as transformations in the legal form of collective agreements, naturally occurring without a corresponding modification of the basic law. The decisive factor was deemed to be the new reality, in which collective agreements were concluded.

The first step in significantly restricting the negotiating freedom of the 1937 model for collective agreements was instituted by making the legal effect of collective agreements dependent upon their consistency with the assumptions of the government economic plans. This, above all, concerned wages and other benefits which were an economic burden to the enterprise or branch concerned.

Control and supervision over the projected nature of collective agreements by such means was already occurring as early as 1946 with regard to collective agreements of a national scope. Before such agreements could be concluded, they had to be submitted to the central planning authorities for their opinion. In later years, the scope and principles underlying such supervision and control were changed, but they always constituted a form of *a priori* control, with compliance and approval being necessary for the conclusion of a collective agreement.

It should be noted that - as has already been indicated - until the adoption of the Labour Code in 1974 the requirement that the provisions of collective agreements comport with existing economic plans and policies was nowhere to be found in the laws and regulations. Therefore, failure to comply therewith should not obviate a concluded collective agreement, as the Supreme Court declared in a 1956 decision.[2] In the situation, however, where one of the parties to such agreements was almost always a governmental supreme administrative organ (either a Minister or the President of a central administrative office), those occasions where compliance with the principle of prior review and acceptance was omitted, were few and far between.

Another deviation from the 1937 model occurred by concentrating the negotiations and collective agreements almost exclusively at the branch level. The negotiating freedom of the parties as to the range and scope of agreements was thus significantly reduced. Collective agreements could encompass only a branch, either in whole or in part. This process was significantly facilitated after the nationalisation of the economy in 1946, when governmental economic units, based on the branch principle, began to predominate, and eventually became almost the exclusive form of economic activity.

The concentration of collective agreements at the branch level was brought about by increasing administrative centralisation and a connected desire on the part of the administrative authorities to exercise strict control over the social and economic policies and activities in their branches. A significant development in this regard was also the formation of branch structures in the trade union movement.

The centralising tendency in national economic administration also formed the background out of which the third significant deviation from the 1937 model arose. In the increasingly dominant and eventually almost exclusive governmental sector, the "employer" (state enterprise), conceived as party to a collective agreement, became more

[2] Decision no. 740/56, published [in:] *Przegląd Zagadnień Socjalnych* 1957, no. 3, p. 52-54.

and more often a governmental administrative organ. Initially, representatives of the central (branch) industrial boards constituted the authorised employers, and later authorisation was assigned to appropriate ministries. Those officials had the exclusive competence to conclude such agreements. The representatives of the branch trade unions could conclude agreements with them alone. This process of authorising government organs to take the place of authentic employers affected both the substance and, as was already indicated, the character of collective agreements.

The codification of labour law in 1974[3] introduced a new system of regulating collective labour agreements. The new provisions and regulations gave legal sanction to the changes which had evolved in practice, and additionally introduced further restrictions, which severely limited collective agreements as a primary source of labour law. The new model for collective agreement constituted a complete expression of its role in a centralised economy, where the only thing that mattered was the law established by the central authorities, and collective agreements were reduced to a wholly secondary role, fulfilling primarily the function of differentiation, and then only to a limited extent.

The decision as to whether a particular collective agreement was in accord with the assumptions of existing economic plans was entrusted to the Minister of Labour, Wages and Social Affairs. If he refused to register a particular agreement, his decision was not subject to review or appeal. Thus, the Minister became a behind-the-scene third party to all agreements, vitiating their legal character.

The criteria for determining branches and occupations became fixed exclusively by legislation. The practice of entrusting to ministries or central administrative managers the role of the "employer" party was also given legislative sanction in the 1974 Code.

Immense significance in reducing the role of collective agreements was ascribed to provisions restricting the normative scope of such agreements. According to the regulations issued in 1974, collective agreements could only concern those work conditions which were specific to a particular branch or profession. Collective agreements were assigned the function of adjusting the existing labour policy and provisions to conditions prevailing in a particular branch. Given such restrictions, collective agreements lost their force as an impetus in the development of labour law.

The restrictions placed on the role of collective agreements were undoubtedly influenced by the fact that they were included in, and intended to be part of the Code section designed to unify workers' rights and benefits, as well as by the false conviction on the part of the Code's drafters that, following codification, collective bargaining agreements would no longer have a necessary function to fulfil in the development of labour law.[4]

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[3] Labour Code of 26 June 1974, *Dz.U.* no. 24, item 141. Regulations concerning collective agreements constitute Section Eleven of the Code. After the amendment of 1996, the consolidated text of the Labour Code is published in *Dz.U.* 1997, no. 25, item 128.

[4] The falseness of this conviction, expressed during discussions prior to codification, was proved by W. S z u b e r t: "Rola układów zbiorowych w dalszym rozwoju prawa pracy" [The Role of Collective Agreements in Further Development of Labour Law], *Zeszyty Naukowe Uniwersytetu Łódzkiego* 1974, no. 107, p. 18-19.

The substantive limitations placed in collective agreements by the Labour Code also included wages. From this time on, collective agreements could not establish any general conditions concerning remuneration. The parties to an agreement could only establish the details of applying the wage and benefit regulations fixed by the government in accordance with an agreement between it and the Central Council of Trade Unions.

The next model for collective agreements arose out of the 1986 amendments to the Labour Code. The 1986 model for collective agreements did differ somewhat from the earlier model as a result of the increased autonomy granted to state enterprises, conceived as economic units by changes in the law in 1981.[5]

The content of collective agreements concerning state enterprises differed in certain respects from other government sectors. In particular, their provisions regarding wages established a basic framework. The specific provisions implementing the established framework were fixed at the enterprise plant level, in accordance with each enterprise's financial capabilities, by plant wage agreements, which were intended to constitute the central means of negotiating wage payments.

The aforementioned distinguishing features of collective agreements concerning state enterprises were, in principle, headed in the right direction, i.e. decentralisation and démocratisation. Their scope was too limited, however, to allow collective bargaining agreements to play a significant role, as was afterwards conclusively proven by practice.

The above concise description of the legal status of collective agreements demonstrates that they were known in Polish labour law during the years of "real socialism". The scope of the regulation, which the agreements provided, varied with time, primarily depending on the legislature's views on the value of collective agreements as a means of formulating wage and working conditions during different stages of the socialist system.

The legislative framework, however, does not fully reflect the role which collective bargaining agreements really played in practice. First and foremost, it should be stated that their actual importance was more widespread than could be deduced from the legislative norms themselves. As was indicated at the outset, collective agreements are of a specific nature, and are sometimes more influenced by such non-legal factors as economic and political conditions than by legislative norms themselves.

In concluding this section it may be stated that, aside from the beginning of the second half of the 1940s and several short periods of increased trade union power, collective agreements in Poland were characterised by the lack of any features of authenticity and, owing to their nature, became entirely discordant from corresponding agreements reached in democratic countries. The nature and (non)importance of collective agreements was determined by the predominant position of the state, which not only assumed the role of the employer party to such agreements, but also effectively controlled their content. The 1974 codification of labour law significantly reduced the legal contents of collective agreements, which thereafter bore more similarity to execu-

[5] By virtue of the state enterprise law of 25 September 1981, *Journal of Laws* no. 24, item 122.

tive regulations than an autonomous source of labour law, formulated by parties enjoying equal rights.

3. Towards a New Legislative Regulation of Collective Agreements

The year 1989 marked a great turning point in Poland. The socialist regime collapsed and Poland began its path towards the establishment of democracy and a free-market economy.

Fundamental political transformation has been accompanied by widespread systemic and social change. Economic reform, which determines the transformation of labour relations, and especially collective labour relations, has been implemented at a much slower pace. Due to the protracting privatisation process, state enterprises, many of which were hit by the economic crisis, continue to dispose of more than half of national assets. The private sector developed initially more in terms of the number of economic entities it comprised than actual economic potential. Among private enterprises small commercial or service establishments, less important for the development of collective labour law than big enterprises, continue to predominate.

In spite of the relatively slow pace of economic transformation, the early years of systemic change and reconstruction have already brought about significant progress in the reform of the labour relations law. Three new legislative acts were passed in May 1991: the trade union law, which endowed trade unions with even more authority to represent and defend workers' rights and interests; the employers' organisation law; and the law concerning the settlement of labour disputes.[6] These enactments do not include the fourth pillar of labour relations, i.e. concerning collective negotiation and collective agreements. It was not included within the scope of the initial reform due to its complex nature and the lack of well-established institutions, especially as regards stable, independent employers' organizations, to carry the same into effect. The 1991 law on employers' organizations is deemed to have paved the way for the establishment of appropriate bodies for collective bargaining.[7]

The aforementioned should not be taken to mean, however, that regulations concerning collective agreements were not the subject of legislative activity during the discussed period. Rather, the drafters of new legislation did not envisage the possibility of concluding collective agreements beyond the enterprise level, and thus concentrated on preparing an enterprise-oriented law. Besides, enterprise-wide agreements constituted a question of utmost urgency, since the numerous agreements concluded at the plant level lacked legislative sanction and consequently, not being of a defined legal nature, left many issues unresolved.

Thus, two legislative acts concerning collective agreements concluded at the plant (enterprise) level were drafted in 1991. One of them was a trade union draft (formu-

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[6] See laws of 23 May 1991, published [in:] *Journal of Laws* no. 55, items 234, 235 and 236.

[7] See also M. S e w e r y ń s k i: "Les accords de la table ronde et les rapports de travail en Pologne", *Revue Internationale de Droit Comparé* 1989, no. 4, p. 1005 and following.

lated by the Solidarity National Committee); the other was prepared by the governmental Commission for Labour Law Reform. Neither, however, was passed as a legislative enactment. The union draft was submitted to the Sejm (the Polish parliament) by a group of deputies, but parliamentary work thereon was abrogated.

The new legislative solutions proposed in 1992 and concerning collective agreements, together with other draft legislative acts, were included in the governmental project known as the "Enterprise Pact", which aimed at increasing workers' involvement in the transformation process and attaining public acceptance thereof. In February 1993, following several months of negotiations, the pact was signed by the government and representative social partners. As a consequence, the government was required to submit the draft law concerning collective agreements to the Sejm. Contrary to expectations, the legislative process was protracted, and the law was not passed until 29 September 1994. The new regulations constitute Section XI of the Labour Code "Collective Agreements", and replace the previous 1986 regulations. Today it is questioned whether the inclusion of provisions governing collective agreements in the Labour Code is justified, inasmuch as the Code, contrary to what its title might suggest, is an act concerning individual labour law. The provisions of Section XI regarding collective bargaining are thus separated from other sections of collective labour law, which are regulated outside the Labour Code.

4. A New Model for Collective Agreements

Discussions prior to and accompanying the enactment of the new law on collective agreements revealed dissension *vis a vis* the time frame to be adopted for the implementation of the future model for collective agreements, i.e. whether the new model should be oriented towards the transition period or projected in advance to accommodate the conditions of a free-market economy. The author took this occasion to express his opinion that the new model should be adapted to a free-market economy, i.e. that it should constitute, so to speak, a purposeful model, but, at the same time, should be applicable in the period of socioeconomic transformation. Such an all-purpose applicability, during both the transition period and the full functioning of a free-market economy, could be reached, primarily, by formulating the new regulations with an appropriate degree of generality. In the event of the necessity to temporarily slow down wage increases in the state sector, financial or organizational instruments of a temporary nature could be applied so as not to undermine the model itself.[8]

In solving this problem the legislature adopted a position of partial compromise. The adopted model takes into account systemic and socioeconomic transformation, yet it is not free of constraints that can only be considered as remnants of the old system. In particular, this concerns the exclusion of a number of issues from the

[8] H. L e w a n d o w s k i: "Przyszły model układu zbiorowego pracy w Polsce" [Future Model for Collective Bargaining Agreement in Poland], *Problemy Prawa i Pracy i Polityki Społecznej, Acta Universitatis Lodzienisis, Folia Iuridica* 1993, no. 58.

substantive contents of collective agreements and making the conclusion of a collective agreement dependent upon a consensus of all trade unions involved on the workers' part. As to the general principles governing collective agreements, it should be stressed that the new model provides certain effective tools for inducing the social partners to correlate the wage and salary provisions of collective agreements with economic reality. We will return to these aspects when we discuss the respective elements of the collective agreement model.

The current law regarding collective agreements is extremely complex. It regulates the substance (content) of agreements, and determines the proper parties and respective procedures for concluding, amending and dissolving collective agreements, subject to mandatory registration. The legislative act regulates the scope of coverage and levels at which collective agreements may be concluded, differentiating agreements concluded at the enterprise level and those concluded at a higher level. It also determines the relationship of the normative provisions of an agreement to, respectively, the act itself and individual employment contracts. It should also be stressed that the law extensively regulates the process of collective bargaining aimed at concluding an agreement, issues regarding adherence thereto, and the so-called generalisation of agreements. The regulation is extremely detailed and, thus, to a certain extent, inconsistent with the underlying principle of collective agreements which declares that they should be formulated by social partners rather than by legislative bodies. In this regard it is also important to note that the detailed regulations are not necessarily clear; the first commentaries on the act indicate that its provisions are the source of many questions.

The definition of a collective agreement constitutes an appropriate starting point for our description of the new model. A collective agreement is an agreement relating to work which satisfies two conditions: it is concluded by parties representing both employees and employers, vested with relevant competence, and it contains definitive provisions. On the part of the workers the competence to conclude collective agreements is the sole prerogative of trade unions, and on the part of employers - that of the employers themselves, employers' organizations and, to the extent stipulated by the law, appropriate state and local administrative organs. The conditions concerning the content of collective agreements are deemed to be satisfied if a given agreement sets forth the conditions governing employment contracts and defines the mutual obligations of parties to the agreement. Fundamental importance is attached to those provisions concerning conditions of employment which constitute the agreement's normative part and are determinative of the categorisation of the entire agreement. Provisions of the latter type, i.e. defining the mutual obligations of the parties, constitute its procedural aspect. Normative provisions are recognised as a primary source of law and, similarly to legislative acts, directly influence the conditions of employment contracts, unless they are less advantageous to the workers than the original provisions of their individual employment contracts.

The content of a collective agreement may be more extensive than that indicated above, as the general remarks on the legal notion of a collective agreement were limited

only to the minimum content required for such an agreement to be legally recognised as a collective agreement. Aside from setting forth the conditions to be satisfied by an employment contract and the mutual obligations of the parties, an agreement may also regulate other issues relating to work. Such a synthetic legal approach (Art. 240, para. 1 and para. 2 of the Labour Code) opens up wide opportunities for social partners to influence the situation of workers in a given enterprise.

Substantive conditions contained in employment contracts should be understood in the widest meaning of the term. They encompass almost all regulations concerning practically every conceivable element of an employment contract, such as: type of work, working hours, vacation leave, salary and/or wages (both with regard to amount and determining elements), as well as questions related to the termination of an employment contract.

The above-used word "almost" was intentionally chosen, as this area is subject to certain limitations. In fact, as has been indicated in the initial remarks, the law excludes a number of questions from the content of collective agreements. They concern special protection of the workers against employment termination; workers' rights arising from unlawful termination of an employment contract with or without notice (except for claims for wages or indemnity, or in the event they are the result of disciplinary action, or maternity or child-rearing leave). One would search in vain for any substantial reasons to justify the aforementioned exclusions. We can but guess that such questions as the special protection of workers and rights arising from unlawful termination of employment have been excluded from the range of collective agreements in order to prevent enhancing those rights which are already excessively broad and/or are not fully consistent with the free-market economic principles which are to govern enterprise labour relations. In such cases, however, the law itself needs to be changed instead of imposing restrictions on the freedom to conclude agreements. It should also be stressed that currently the main focus of workers' claims consists of (and undoubtedly will continue to for a long time) questions concerning wages and salary, and that there is little pressure to enhance the above-listed other rights.

It would also be pointless to argue that the aforementioned rights subjected to exclusion need to be uniformly regulated for all workers, a feat which can be accomplished only by a legislative act. Uniform regulations should be limited to questions of fundamental importance, and any differentiation contained therein would signify discrimination among certain groups of workers, whereas the rights in question are by no means of a discriminatory nature. Therefore, excluding them from the range of collective agreements weakens the differentiating function, which is presumed to be one of their fundamental purposes.

In addition, it must be noted that the above-mentioned limitations are in conflict with the norms of international labour law. The International Labour Organisation invariably deems all legal forms of state interference in the contents of collective agreements as inconsistent with convention No. 98 of 1949 (ratified by Poland). Deviations from this rule are allowed in extreme circumstances and only for a short period of time. There is reason to believe that the Polish legislature will take this argument into consid-

eration, and will cancel the much criticised limitations placed on the subject matter of collective agreements.

The scope of the procedural obligations contained in collective agreements is limited to defining the rights and obligations of parties (signatories). Provisions contained therein are not of an obligatory nature and do not constitute a source of justifiability under the law. According to Art. 241(1) of the Labour Code such provisions in an agreement may concern the following: the form of publishing the agreement and distributing its content; the means of periodically assessing its application; the mode of explaining the agreement's provisions and settling disputes arising between parties with regard thereto; mutual obligations of the parties concerning observance of the agreement's provisions. This group of provisions may also include a perseverance of public order clauses stipulating that the parties will not provoke collective disputes and will have recourse to strike only within officially defined limitations.

By virtue of the provisions stating that collective agreements may settle "other issues than those stated herein", other conditions may be subject to negotiation, such as: employment policy (trade unions may be vested with certain rights with regard to employing and dismissing workers); designating workers' representatives chosen by the personnel and endowed with specific participatory functions and establishing procedures for settling collective labour disputes. According to Art. 241(3), para. 2 of the new regulation, such agreed-upon procedures would take precedence over methods provided for by a separate legislative act.[9] The law also sanctions the inclusion of various programmes and social benefits in a collective agreement. The above-enumerated issues do not constitute a comprehensive list of those that may be settled by collective agreements in addition to the conditions of employment contracts and the mutual obligations of the parties.

Taking into account the above, we must complete our previous description of the structure of a collective agreement. In "reconstructed" agreements we can thus identify not two, but three parts: the normative provisions, the procedural provisions, and those concerning social programmes. The normative part may contain not only normative provisions concerning individual employment contracts (concluding and terminating employment contracts, remuneration, working hours, vacation leaves and other elements of the employment contract), but also normative provisions concerning collective labour relations (trade union representation, collective labour disputes, workers' participation, etc.). This distinction between the individual and collective normative provisions is of substantial importance, especially with regard to the generalisation of a collective agreement or the determination of its effects after expiry.

In discussing the substantive scope of a collective agreement it is important not to overlook its relationship to legislative acts. It is evident that none of the agreement's provisions may contradict legislative norms, which are explicitly binding and do not allow for any exceptions, in contrast to the legal nature of the above criticised provision which excludes certain issues from the scope of collective agreements. The relation-

[9] Law of 23 May 1991 on settling collective labour disputes *(Journal of Laws* no. 55, item 236).

ship is different as regards legislative norms of a semi-imperative nature, designed to protect workers' rights. Of course, we are talking only about the normative provisions of collective agreements, i.e. those which constitute a primary source of law. In this case, the relationship is determined on the traditional principle of workers' privilege, introduced to the Polish system by the 1937 Act on collective agreements. This means that provisions of a collective agreement may be more advantageous to the workers than legislative norms, but may not contravene the latter to the disadvantage of the workers.

It was indicated in the initial remarks to the present section of this work that the drafters provided the discussed legislative act with mechanisms designed to prevent excessive wage increases which, it was held, would contribute to and perpetuate inflation. In the present Polish reality, where systemic transformation is accompanied by a high inflation rate, those instruments are of crucial importance, and the provisions of collective agreements should be in accord with social interest.

A great advantage of those mechanisms is that they are themselves devised by means of collective negotiation, contrary to the previously applied means of protecting the state's interests, which consisted of administrative control over the provisions of an agreement relating to wages or of high taxation of wages which surpassed the established growth index. The limits on wage increases are set by a national agreement concluded between representatives of trade unions, employer organizations and the government, and are to be observed by all parties to collective agreements. The national agreement is not normative, and it is the duty of the signatories themselves to ensure its observance. Legal sanctions are provided for only with regard to the managers of state enterprises, i.e. in the event a state enterprise surpasses the defined wage growth index and, as a consequence, ceases to fulfil its financial obligations, the director of such an enterprise will be denied his bonus or recalled from his post.

It should be stressed that the discussed mechanisms, introduced for the sake of attaining a common social purpose and setting, to some extent, upper limits on a negotiating freedom to conclude agreements, do not constitute an integral part of the legislative model of collective agreement. Rather, the limitation arises from a separate legislative act[10] which can be modified or annulled, as appropriate, without changing the legislative model for collective agreements. Furthermore, its scope of application is not limited to the regulation of wages in collective agreements, but encompasses all economic entities with more than 50 workers employed.

The new legislative model for collective agreements is also significant as regards its scope of coverage, especially inasmuch as it extends the rule invariably applied in Polish law concerning collective agreements, which holds that an agreement encompassing an enterprise or another organizational unit applies to all workers employed there, irrespective of their union membership, *vel non.* Consequently, the workers who may take advantage of a given agreement include members of the trade union which was signa-

[10] Law of 16 December 1994 on negotiatory system of determining the average wage growth in economic units *(Journal of Laws* no. 1, item 2).

tory to the agreement, members of trade unions which were not parties thereto, as well as workers not associated in any union organisation whatsoever. It is possible, however, to exclude certain groups of workers from the coverage scope of an agreement, e.g. if they are encompassed by another agreement, but such exclusions cannot be based on the criterion of union membership. The author believes that this rule, both for social and economic reasons, is more justified than the contrary rule, applied in a number of countries and based on the representation concept, maintaining that the rights arising out of a collective agreement are vested only in workers who are members of the trade union which is a party to the given agreement.

The scope of coverage contained in the new model for collective agreements is far more extensive than was the case previously, due to the fact that under current regulations collective agreements may encompass certain areas of employment or, strictly speaking, certain types of employment contracts, which previously had been subjected to legislative regulation. Before the Act of 29 September 1994 took effect, collective agreements concerned labour relations according to the so-called universal principle of labour law, i.e. relations founded on contractual basis, with economically independent entities appearing as the employer party. Current collective agreements may also concern the so-called budget sector, where funds for wages and salaries come from the national budget or budgets of territorial or local self-governments. The new law on collective agreements applies even to those workers of the budget sector who are employed on an appointment basis, e.g. school teachers and professors employed at universities or at scientific research and development institutes. The only workers' groups outside the scope of the new law are appointed workers of the state and local administration (officials), as well as judges and prosecutors.

The above-described extension of the law regarding collective agreements into new areas exerts considerable influence on the model itself and satisfies the commonly formulated requirement that collective agreements should be available to all workers endowed with the right to associate. It should be stressed, however, that the model for collective agreements is not completely uniform. The law stipulates that in the state budget sector collective agreements shall not be concluded at the lowest level, i.e. at the level of establishment units which theoretically could be recognised as employing units; at higher levels, the agreements shall be concluded by an appropriate minister or another duly authorised body acting on the employer's behalf. The above-listed are not the only differences and/or limitations placed on collective agreements in the public budget sector. There are others as well, related to the content and legal nature of the agreements.

The decision concerning the scope of the coverage of a particular agreement, i.e. specifying employers and their workers encompassed by the same, is entrusted to subjects endowed with legal competence to conclude agreements, and arises from their actions within this sphere of competence. Thus, a given agreement may concern only a given enterprise or have a much wider coverage scope. In the latter case, it may encompass either a branch, in whole or in part, the workers of a given profession, or enterprises from a defined territory.

Those agreements, varying in scope of coverage, may function independently from one another, each of them containing provisions consistent with existing legislation. From this viewpoint they are mutually independent, and may regulate various or even the same questions. This concerns also collective agreements concluded at the enterprise level.

The possibility of concluding collective agreements at various levels and of various scopes of coverage involves the risk that one particular employer may find himself within the scope of more than one collective agreement, in relation either to its entire personnel or a part. For example, a given employer might be encompassed by a collective agreement concerning his enterprise, by a branch agreement, as well as, in relation to a specific group of workers, by an agreement concerning a given profession. The question arises whether, in such circumstances, the employer is bound by all these agreements, and how to settle possible conflicts between them.

The law clearly resolves this question with regard to the relation between a collective agreement concluded at an enterprise level and an agreement of a wider scope. This solution, based on the principle of workers' privilege, states that provisions of an agreement concluded at the enterprise level cannot be less advantageous to workers than provisions of another agreement, superior to its scope. Hence the conclusion that in those cases when the provisions of two agreements concern the same subject, provisions of the earlier concluded agreement may determine the way of implementing provisions of the latter, or complete the same, thus removing hindrances to their simultaneous application. In the event when the agreement concluded at the enterprise level comprehensively regulates a question in a way more advantageous to the workers, it supersedes the wider-scope agreement.

The existing legislation does not provide any definitive solutions as regards the question of conflicts between two collective wider-scope agreements (beyond the enterprise level). Some implications can be deduced from the legislative provision concerning mergers of enterprises (into one entity), which were previously encompassed by different agreements of a wider scope (Art. 241 [20] of the Labour Code). Under this provision, the decision which provisions of such agreements shall apply is made jointly by the new employer and the union organizations. Most probably, the chosen agreement will be the one which is generally the most advantageous to the workers. Once the choice is made, however, the chosen agreement is binding in its entirety, irrespective of the fact that some of its provisions may be less advantageous to the workers than those of the rival agreement(s). On the other hand, the discussed provision does not prohibit choosing more than one agreement to be applied simultaneously, as follows clearly from the formulation that the said subjects decide by themselves **which ones of the agreements will be applied.** In the event when more than one agreement is adopted, any conflicts between individual provisions of the different collective agreements will be settled according to the principle of workers' privilege.

It appears that the above-discussed provision, regarding conflicts between collective agreements in the event of a merger, should be appropriately applied in a situation when an enterprise finds itself within the coverage of more than one collective agree-

ment. With regard to what has been said previously, there arises the question: who should decide which agreements are to be applied if there is no union organisation at a given enterprise. Can the employer himself make the decision? No doubt the answer to this question is negative. Hence, it should be assumed that if an employer does not have a trade union partner with which to make a joint decision as to the choice of the collective agreement or agreements, all the agreements involved will have binding force. It is important to notice that in choosing the most advantageous agreement a comparison should be made between the individual provisions of the evaluated agreements.

As a rule, the above remarks concerning the scope of coverage and possible conflicts between collective agreements do not apply to the budget sector.

The question of the scope of the coverage of collective agreements is logically connected to that of the subjects authorised to conclude them, which, to a significant extent, determines who shall be covered thereby. The question of competence to conclude agreements, i.e. who is an appropriate party to a particular collective agreement, is one of the essential elements of the legislative model.

With regard to employers, legal competence depends on the level at which a given agreement is concluded, with all collective agreements being divided into those concluded at the enterprise level, i.e. concerning particular enterprises, and those concluded at a higher level, i.e. of a wider scope.

The competence to conclude agreements at the enterprise level is vested in individual employers. Such collective agreements should encompass one particular enterprise. According to legislative provisions, two or more employers cannot conclude one common agreement for their enterprises. If, for reasons of their own, for example, for the sake of their business cooperation, several employers wish to adopt uniform employment conditions, they must conclude separate collective agreements containing the same uniform provisions. They may also accomplish the same goal in yet another way, i.e. by adhering to a collective bargaining agreement concerning one of the enterprises involved. This requirès an agreement to be concluded at the enterprise level between the "adhering" employer and the competent trade union, providing for the application of the "foreign" agreement at the given enterprise.

The law allows one exception from the rule stating that an agreement concluded at the enterprise level cannot encompass more than one employer. Such an agreement may encompass more employers, provided that they form a legally recognised economic organisation, in which case an appropriate organ of this organisation is competent to conclude the agreement.

The competence to conclude collective agreements at higher levels, i.e. those of a branch, professional, or territorial nature, is vested in employers' organizations functioning under provisions of the employers' organisations law of 23 May 1991 *Journal of Laws* no. 55, item 235). Other organisations grouping employers, e.g. industrial chambers or chambers of commerce, are denied this right even if they are endowed with appropriate authorisation by their members: entrepreneurs-employers. One may reasonably question whether the above-described limitation is justified, especially in the light of the slow process of creating employers' organizations.

With regard to the employee representatives in collective agreements, it should be stressed that the exclusive competence to conclude such agreements is vested in trade unions. In those enterprises where no union organisation exists the adopted law does not allow for the practice, which was proposed and is in use in some countries, of concluding collective agreements by workers' representatives duly selected for this purpose. Vesting trade unions with the exclusive competence to conclude collective agreements is, in part, a form of promoting trade unions, yet it is important not to forget that this choice is also based on the principle of continuing responsibility. The mere conclusion of a collective agreement does not necessarily represent a final resolution of a labour dispute. During the term of the agreement, and in the course of its application, questions may arise with regard thereto; their resolution will be impossible without the cooperation of both parties. Therefore, the agreements' function of protecting workers' interests must be assigned to one particular body. Furthermore, it is important not to overlook that during the term of a collective agreement order and discipline are supposed to be maintained within the given enterprise. Vesting the competence to conclude agreements in a group of workers chosen by the staff only for the purpose of carrying out this task would seriously weaken the continuing future functioning of collective agreements.

At the enterprise level, collective agreements may be concluded by plant union organizations; at a higher level, irrespective of the scope of the particular agreement, by appropriate supra-plant union organizations, e.g. a nationwide trade union, trade unions' association (federation) or national joint-union organisation (confederation). Under the existing legislative provisions, the trade unions' competence to conclude collective agreements is not conditioned on their actual presence, i.e. membership rolls, proportion of employees registered therewith, or proportion of members to be encompassed by a given collective agreement and associated in supra-plant union organizations.

This leads to the conclusion that even a trade union which comprises only a minor percentage of workers to be encompassed by the given agreement may be a party to a collective agreement. Such a solution may be subject to criticism since, under the provisions of Polish labour law, a collective agreement encompassing one or more enterprises is binding for all employees of the said enterprise(s) regardless of their union membership. Therefore, the competence to conclude collective agreements should be vested in "representative" trade unions, i.e. those which comprise an appropriate percentage of the staff employees.

The above remarks refer to those situations where, in the envisioned scope of the coverage of a given agreement, there is only one trade union. If there exists more than one such trade union, the question of workers' competence to conclude collective bargaining agreements is resolved in a different way. It should be indicated at the outset that the adopted solution is not only complex and extremely complicated, but, to make matters worse, authorises even the most insignificant of all negotiating trade unions to veto the conclusion of a collective agreement.

With regard to agreements concluded at the enterprise level, the right to negotiate and conclude collective agreements is vested in all the plant union organizations, which

are able to establish their common representation or to act jointly. If not all the unions concerned are engaged in negotiations, the agreement reached thereby will be valid, provided that the participating union organizations together comprise at least 50% of the staff.

A similar solution has been adopted for collective agreements of a wider scope. If the workers to be encompassed by a given agreement are represented by more than one supra-plant union organisation, all those organisations, acting jointly or by their common representation established for this specific purpose, may be party to a negotiated collective agreement. If not all of the said organisations are interested in concluding the agreement, then relevant competence rests with the representative union organisation(s), which shall be determined by the Warsaw Regional Court. Representative status can be attributed to any appropriate supra-plant union organisation which includes either at least 500 000 workers or at least 10% of the total number of workers encompassed by the statute, but not less than 5 000 people, or the largest number of workers to be encompassed by the given agreement.

It is important to indicate that in the above-described case the concluding of a collective agreement is also conditioned on its acceptance by all union organizations taking part in the negotiations. In the author's opinion, this constitutes an evident fault in the new regulation on collective agreements. The lack of a consensus among union representatives, which is a widely encountered phenomenon in the present state of the union movement (characterized by a large number of organizations and their considerable fractionalisation), may paralyse the functioning of collective bargaining, a fundamental institution of labour law.

The description of the model of collective bargaining agreements should conclude with several remarks concerning the negotiating of an agreement and its registration, issues which are found among the new activities regulated by the law on collective agreements.

Under the Code's provisions, a party legally authorised to conclude a collective agreement may not refuse the other party's request to enter into negotiations aimed at the conclusion of such an agreement. Each of the parties is obliged to enter into negotiations upon the receipt of an appropriately submitted request by the other party. In fact, however, the obliged party is usually the employer. A plant union organisation might find itself under such an obligation if, e.g. a proposed collective agreement at the enterprise level was to be used as a means of provisionally limiting (suspending) workers' rights registered in a collective agreement concerning a branch or profession, in which case the proposal for such an agreement would come from the employer.

It is important to note that the law does not proscribe definitive sanctions for the refusal to enter into negotiations. Of course, in the event of an employer's refusal, the trade union would be authorised to take appropriate collective measures, including a strike.

In order to take legal effect, a collective agreement must be duly registered, as was the case in earlier regulations. The statute vests the competence to register collective agreements concluded at the enterprise level in regional labour inspection offices. Agree-

ments concluded at a higher level are registered by the Ministry of Labour, Wages and Social Policy. Compared with the earlier regulations, the new law contains fundamentally different provisions *vis a vis* the discretion granted to the registering organ. It is no longer assigned the function, so typical in the era of real socialism, of checking the agreement's conformity with governmental socioeconomic policy, especially with respect to wage conditions. Under the current law, the registering organ is only obliged to check whether a given agreement conforms with the existing law on collective agreements; specifically, whether the agreement was concluded by competent parties, whether it is actually a collective agreement and not another type of group contract (the relevant criterion is the obligatory content), whether it was concluded in written form, and whether it does not violate explicitly binding regulations and/or deviate from legally mandated or guaranteed standards to the disadvantage of the workers.

Thus, it is evident that the control exerted by the local labour inspection and by the Ministry of Labour, Wages and Social Policy is primarily focused on verifying whether required legal formalities have been observed. The criteria and range of the control are defined precisely. It should be emphasised that the controlling organ is not authorised to interfere into the content of a collective agreement formulated by parties acting within the confines of their legal competence and autonomy.

The above-discussed issues seem to be the most important ones regulated by legislation on collective agreements, which undoubtedly constitutes a turning point in the development of this most important part of Polish labour law. There is ample reason to believe that the two major sources of labour law[11] - legislation and collective agreements, may exchange their roles in the future, and that collective agreements may move from a supplementary to a primary role in the creation of working conditions for workers. [11]

[11] In 1997 there arose a new theoretical problem, since the new 1997 Constitution of the Republic of Poland does not mention collective agreements among the general sources of law.

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THE NEW POLISH CRIMINAL LAW CODIFICATION IN THE LIGHT OF THE CONSTITUTION

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One year ago, I had the opportunity to express my opinions on the principles of criminal law contained in the Polish draft Constitution.[1] Today, that Constitution is in force and a new codification of criminal law will soon be effected.[2] Therefore, there reappears a need to examine, on the one hand, to what extent the Constitution provides for the protection of fundamental rights and freedoms in the area of the application of criminal law, both from the point of view of the protection of the values threatened by the perpetrator and the good of the citizens endangered by activities of the State. On the other hand, there exists an equal need to examine the constitutionality of that codification. In view of my interests and scope of expertise, I will focus my comments on some aspects of our substantive criminal law.

The starting point of any analysis of Polish criminal law codification in the light of the Constitution is the definition of the hierarchy of the sources of law in the Constitution and the precedence of the Constitution over any other legal norms. It is also of significance for criminal law that the Constitution gives precedence to international agreements (ratified by the consent of the Parliament) over laws. In the case of a conflict between a law concerning legal responsibility and international standards for the protection of human rights, the latter take precedence and are applied directly (Article 91(1) and (2)). Thus, on the basis of the existing constitutional order, a judge cannot confine himself to the use of the Criminal Code when determining the scope of the responsibility of a defendant: he should also refer to the text of the Constitution and relevant instruments of international law.

The Constitution and international agreements binding in Poland provide an adequate standard of the protection of human rights in domestic criminal law. The Constitution has strengthened the existing, whilst introducing new, mechanisms aimed at ensuring the conformity of laws to the Constitution. This is achieved through extended powers granted to the Constitutional Tribunal and the introduction of the mechanism of the constitutional complaint. In practice, before the Constitution came into force, the

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[1] A. Z o 1 1: "Zasady prawa karnego w projekcie Konstytucji" [Principles of Criminal Law in the Draft Constitution], *Państwo i Prawo* 1997, no. 3, p. 72 and following.

[2] The Criminal Code, the Act of 6 June 1997 *{Dziennik Ustaw* [Journal of Laws], no. 88, item 553).

Constitutional Tribunal, due to limitations on its jurisdiction, had no occasion to adjudicate on the conformity of laws to the then-existing constitutional provisions. This situation deserved radical changes. Let me, however, concentrate on the issue of the constitutional complaint, since it has raised high hopes for the protection of the constitutional rights and freedoms of the individual and their observance in the field of criminal law.

It should be understood, however, that the only effect of a successful constitutional complaint is the repeal of a normative act found by the Constitutional Tribunal not to conform to the Constitution. Any court judgment or administrative decision previously issued on the basis of such a normative act is not thereby quashed by the adjudication of the Constitutional Tribunal. A court judgment or administrative decision based on such a normative act only forms the basis for an application - in accordance with the procedure operative in a given branch of law - to revive an action. Hence, constitutional complaints, functioning as abstract reviews of norms, serve to eliminate from the legal system provisions inconsistent with the Constitution. The individual interests of the applicants play a subordinate role and lie beyond the cognizance of the Constitutional Tribunal. Surprisingly, provisions introducing the constitutional complaint are contained in the chapter entitled "Means for the defence of freedoms and rights". Such protection, however, is effected indirectly. An effective constitutional complaint forms only its first stage. A constitutional complaint does not protect citizens from a wrongful (i.e. inconsistent with the Constitution) application of the law by adjudicating courts. This fact considerably limits the application of this procedure as an instrument of the protection of the fundamental freedoms and rights of the individual in the sphere of criminal law.[3]

Article 30 of the Constitution has a paramount meaning for criminal law. It states that "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". In criminal law this constitutional norm plays the role of a fundamental "interpretational key", which discharges a protective function and sets limits to the scope of the intervention of criminal law. Article 30 of the Constitution imposes an obligation on State bodies, and on the legislator, to protect the dignity of a person not only against threats posed by State bodies but also by other persons. The legislator is obliged to protect that dignity against any transgressions. This obligation was fulfilled not only by the inclusion of relevant types of offences in chapter XXVII. Many types of prohibited acts, specified in the Criminal Code, relate to the dignity of the person as a subject of criminal law protection. Article 3 of the Criminal Code extends the provisions of Article 30 of the Constitution to the imposition of punishment and punitive sanctions by criminal law. The imposition of punishment should take into account the obligation of respect for the

[3] The purpose of such a narrow approach to a constitutional complaint was to separate the jurisdiction of the Constitutional Tribunal and the general judicature. The Constitutional Tribunal has to be a court over the law, but not an agency of the administration of justice. For more on this problem, see B. W i e r z b o w s k i: "Skarga konstytucyjna - oczekiwania i problemy" [Constitutional Complaint - Expectations and Problems], *Przegląd Sądowy* 1997, no. 4, p. 3 and following.

dignity of the person. There is a close relation between Article 3 of the Criminal Code and Article 40 of the Constitution: the latter prohibits subjecting anyone to torture or cruel or inhuman treatment. Specific sections of the Criminal Code introduce new types of acts prohibited under penalty (Articles 246 and 247(3)). Those provisions provide a basis for bringing to justice [before a criminal court] those public functionaries who have applied unlawful methods of investigation or tolerated cruelty towards persons deprived of liberty.

The key issue from the point of view of the guarantee function of criminal law is the definition of the prerequisites of criminal liability. Since those prerequisites bear on the possible restriction of the fundamental freedoms and rights of the person, it is necessary to draw limits to criminal liability at the constitutional level in order to impose constraints on the ordinary legislator, and thus preventing any possible influence exerted on the scope of criminal liability by any given political composition of Parliament.

The limits of criminal liability are specified by the first sentence of Article 42(1) of the Constitution which states that "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." Hence, the Constitution contains the classic formula *nullum crimen sine lege poenali anteriori,* replicated in Article 1 of the Criminal Code, and which has been a foundation of criminal law for more than 200 years. The inclusion of the *nullum crimen ... anteriori principle,* both in the Constitution and the Code, is fully justified. In fact, it is primarily the legislator to whom this constitutional norm is addressed. Therefore, the first sentence of Article 42(1) should be understood as an obligation imposed on the legislator to define, in any statute, those features of behaviour that are prohibited under penalty. The legislator has to establish a catalogue of punishable behaviours. The norm of the code is primarily addressed to the judge and it forbids him to hold responsible any person who has not committed an act prohibited by a law in force at the moment of the commission thereof.

The constitutional principle of *nullum ... anteriori* results in an obligation to determine the features of any act prohibited by a normative act in the nature of a statute. The legislator cannot delegate this power to the Executive or local government. This means that any provisions of the criminal law of a "blank" character, which do not specify the characteristics of an act attracting criminal liability, would have to be considered inconsistent with the Constitution. The provisions of an act lower in the hierarchy than a law may only supplement such characteristics, but are quite unable to extend the foundations of liability specified in the law. The *nullum. ..anteriori* principle - by virtue of the first sentence of Article 42(1) of the Constitution - is addressed to the legislator. It also forbids the application of general clauses in order to describe an act as a prohibited act: this imposes on a judge an obligation to answer the question as to which types of acts are deemed prohibited under penalty.

The first sentence of Article 42(1) states the principle expressing the prohibition of any retroactive operation of a provision introducing the principle of legal liability *{lex retro non agit)* and which is also a constitutive canon of the guarantee function of criminal law. Due to some specific questions - relating primarily to the prescription of

penal liability - the application of this principle on a constitutional basis will be discussed in detail below.

An exception to the first sentence of Article 42(1) of the Constitution is specified in the second sentence of that constitutional clause. Despite the lack of statutory penal liability for an act of a given category at the time of its commission, the actor can be held criminally responsible if such act constituted a criminal offence under international law. The norm specified in the second sentence of Article 42(2), reflects the constitutional status given to the regulation contained in Article 7(2) of the European Convention for Protection of Human Rights and Fundamental Freedoms. Amongst the most important issues is the interpretation of the notion of "criminal offence under international law", since it is also a matter of importance to define the limits - allowed by the Constitution - of admissible exceptions from the principle of *nullum crimen sine lege.* The case law of the International Court of Human Rights involving the interpretation of that provision is minimal. One may claim with absolute certainty that only under international law does the notion of criminal offence include crimes against humanity and war crimes.[4] It seems that the extension of this exception to further categories of offences would require an explicit basis in international law. The issue of the exception resulting from the second sentence of Article 42(1) will be discussed below, together with the problems of prescription.

It should be noted that the Constitution omits the principle of *lex severior retro non agit* contained in the norms of international law.[5] This principle has been expressed in Article 4(1) of the Criminal Code. Due to the specification of that principle in international law instruments binding in Poland, any failure by the legislator to satisfy the requirements resulting from that principle would have no practical meaning in the light of Article 91 of the Constitution.

The constitutional principle of *nullum crimen sine lege* obliges the legislator to specify those acts which he considers punishable. From the point of view of guarantees, such duty is insufficient because it does not protect a person against the arbitrary practices of the legislative power. Only on the basis of the provisions of the first sentence of Article 42(2) is the legislator not obliged to justify the introduction of prohibition under penalty for particular behaviour, and thus does not have to justify his restrictions - through the use of criminal law - of the fundamental freedoms and rights of the person. Accordingly, the Constitution should contain a norm expressing the principle of *nullum crimen sine periculo sociali.* This principle has a long tradition as a constitutional principle addressed to the legislator: it appeared in the Declaration of Human Rights of 1789. The principle should not be confused with the condition for criminalization of an act, specified in Article 1(2) of the Criminal Code, namely one possessing a higher than minimal level of social harm. The command - addressed to the legislator - not to penally prohibit behaviours which are not socially harmful concerns very particular types of behaviour (e.g. the legislator cannot penalise public criticism of the authorities). The condition of criminalization con-

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[4] Cf. J. A. F r o w e i n, W. P e u k e r t: *Europäische Menschenrechtskonvention. Kommentar,* 1996.

[5] See Article 7(1) of the European Convention for Protection of Human Rights and Fundamental Freedoms.

tained in Article 1(2) of the Criminal Code relates to a particular behaviour possessing the features of a type of penally prohibited act. This does not imply a correction of the legislator's mistake in specifying the features of a type of the prohibited act, since even a properly specified type is always an abstract thing, incapable of taking into account the individual features of a particular behaviour and which can have decisive impact on the assessment of the social harm of such an act.[6] We have no norms in the Constitution which would explicitly forbid the legislator from penally prohibiting a category of acts which are not characterized as socially harmful. The omission of the *nullum crimen sine periculo sociali* principle in the Constitution should be considered a defect, particularly as there appear interpretative difficulties in indirectly deriving that principle from the text of the Constitution. On the basis of the constitutional provisions existing before 1997, the principle of *nullum crimen sine periculo sociali* was derived from the principle of a democratic state ruled by law,[7] and particularly the principle of proportionality. According to the former principle, the intervention of the state in the sphere of the freedoms and rights of citizens cannot be reconciled with the principle of a democratic state ruled by law without appropriate justification.[8] The application of criminal law sanctions in respect of behaviour which produces no social harm would be a classical example of a violation of the principle of proportionality.[9] Due to the lack of specific rules in the previously existing constitutional provisions, it was admissible to derive guarantee rules relating, *inter alia,* to criminal law from the principle of a democratic state ruled by law. The Constitution of 2nd. April 1997, however, enunciates specific rules applicable to the criminal law as well: Article 42(1) is evidence of this. Thus, there arises the question: if the principle of *nullum crimen sine periculo sociali* is not explicitly formulated in the Constitution, can it be derived from Article 2 of the Constitution?[10] The principle of proportionality, in relation to the criminal law, may be derived also from Article 31(3) of the Constitution. Therefore, in my opinion, even if not specified in the Constitution, the principle of *nullum crimen sine periculo sociali* can be derived - indirectly from constitutional principles - as a principle limiting the legislator's discretion in the area of criminal law.

In criminal law, the principle of proportionality is reflected in the selection of penalties and legal measures applied to a particular type of offence. The extent of statutory sanctions should be proportional to the abstractly assessed level of the social harm of a given type of prohibited act.

Article 38 of the Constitution, ensuring the protection of everyone's life, results in the prohibition against the introduction of the death penalty into ordinary legislation.

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[6] For more on this subject, see A. Z o l l: "Materialne określenie przestępstwa" [Material Definition of an Offence], *Prokuratura i Prawo* 1997, no. 2, p. 7 and following.

[7] Article 1 of the Constitutional Provisions Continued in Force by the Constitutional Act of 17 October 1992.

[8] See Judgment of the Constitutional Tribunal, U 10/92, *OTK* 1993, item 2.

[9] The Constitutional Tribunal derived the constitutional principle of the adequate specification of acts penally prohibited from the principle of a democratic state ruled by law, see Judgment S 6/91, *OTK* 1991, item 34.

[10] See M. D ą b r o w s k a - K a r d a s: "O dwóch znaczeniach pojęcia społecznego niebezpieczeństwa czynu" [On the Two Meanings of the Concept of a Socially Harmful Act], *Czasopismo Prawa Karnego i Nauk Penalnych* 1997, no. 1, p. 27 and following.

This assertion is reinforced by the essence of the second sentence of Article 40. The former norm forbids the application of corporal punishment. The death penalty can undoubtedly be included in that type of punishment. Bearing in mind the political disputes associated with the adoption of the Constitution, and its subsequent confirmation in a referendum, we can understand why the prohibition of the death penalty is not explicitly stated in the Constitution. Nevertheless, I think that the combined provisions of Articles 38 and 40 leave little room for the restoration of the death penalty in Poland. Unfortunately, some politicians - in particular, the authors of a recent bill attempting to introduce severer penalties for criminal offences - are attempting to exploit a confused public opinion to obtain political support.[11] The bill in question is extremely harmful to the legal culture of Polish society, but not only because it proposes the restoration of the death penalty. Our legal culture is not improved by a discussion as to whether an appeal against the verdict imposing a death sentence should be reviewed at a trial, or sitting *in camera,* with only the possibility of the presence of defence counsel, or only such defence counsel included in a list at the disposal of the Minister of Justice - or whether the Public Prosecutor-General should, according to the bill, be admitted to cases to which that bill relates. Politicians who try to muster public opinion in support of such a bill commit an unforgivable sin against legal culture.

As I mentioned in my initial remarks, one consequence of granting precedence over laws to international agreements ratified prior to the consent of the Parliament, is that Polish criminal law legislation inconsistent with such agreements cannot be applied and should be eliminated from the legal system (see: Article 188 (2) of the Constitution). Ratified international agreements also dictate the mode of the interpretation of domestic legal provisions. A good example of such mandatory interpretation is provided by Article 25(1) of the Criminal Code in the context of Article 2(2)(a) of the ECHR. The prevalent view in Polish doctrine, rejecting the subsidiary character of self-defence and adopting the principle according to which the law should not yield to anarchy,[12] must now be restricted in the light of Article 2(2)(a) of the Convention. The intentional taking of somebody's life is permitted only if absolutely necessary to repel an assault against a person. In such cases, with so limited a scope, self-defence should be interpreted as a subsidiary institution.[13] For example, it is forbidden to deliberately kill an attacker who is trying to steal a car radio.

A very important role in determining the scope of criminal liability, of medical doctors in particular, is played by Article 39 of the Constitution which prohibits scientific experimentation, including medical experimentation, without the voluntary consent of the person being subjected to it. This constitutional norm has found its expression

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[11] The draft prepared by the politicians connected with Porozumienie Centrum [Centre Alliance] (Jarosław Kaczynski), initially treated as a citizens' initiative, submitted to the Sejm as a Deputy's Bill due to the lack of a law on citizens' initiative (see Article 118(2) of the Constitution).

[12] Cf. A. M a r e k: *Prawo karne. Zagadnienia teorii i praktyki* [Criminal Law. Theory and Practice], Warszawa 1997, p. 238.

[13] See A. Z o l l [in:] K. B u c h a ł a, A. Z o l l: *Kodeks karny. Część ogólna, Komentarz* [Criminal Code. General Part, A Commentary], Kraków 1998, p. 223.

in Article 27 of the Criminal Code, though to a very limited extent. Article 27(1) specifies the basic requirements for cognitive, medical, technical and economic experimentation. However, under paragraph 3 of that Article - added by a Sejm Committee - the specification of rules and conditions for carrying out medical experimentation is referred to a specific law. Such rules and conditions are laid down by the Act on the Doctor's Profession, of 5 December 1996 (Journal of Laws of 1997, No 28, item 152). There is a substantial misunderstanding over the definition of the legal character of medical experimentation. One must appreciate the difference in the scope of the constitutional norm and the provisions of Chapter 4 of the Act on the Doctor's Profession on the one hand, and that of Article 27(1) of the Criminal Code (supplemented by the norms contained in some provisions of the Act on Doctor's Profession) on the other. The Criminal Code, and the provisions supplementing it, are applied only to situations where behaviour constituting medical experimentation exemplifies the features of a type of a prohibited act. This is, as the norm of the Criminal Code specifies, a counter-type, i.e. the exclusion of the illegality of behaviour normally prohibited under penalty. The constitutional norm and the provisions of Chapter 4 of the Act on the Doctor's Profession also relate to behaviours which do not exhibit the features of a prohibited act and are primarily irrelevant to criminal law. One should also bear in mind that in the new Criminal Code the list of such behaviour is limited to the extent that Article 192(1) defines as penally liable any act in the performance of a medical operation committed without the consent of the patient. This provision also concerns surgical intervention of an experimental character.

The Act on the Doctor's Profession establishes in an extremely complex, and internally incoherent, fashion the conditions for the admissibility of medical experimentation, in particular the requirement of consent given by the person subjected to experimentation. Some solutions adopted in that Act are inconsistent with Article 39 of the Constitution, since it can enable experimentation based on the consent given by a guardianship court where the statutory guardian of the person to be subjected to experimentation refuses to give such consent (see: Article 25(6)-(8): this could be regarded as fulfilling the requirement of consent to medical experimentation. In my opinion a guardianship court, having received such an application, should apply - in accordance with Article 193 of the Constitution - for an examination of the conformity of those statutes to the Constitution.

I now turn to problem of limitation. The Constitution dedicates two provisions to this issue. In Article 43, the Constitution states that there shall be no limitation in relation to war crimes and crimes against humanity. Article 44 formulates a rule suspending the period prescribed of limitation for offences committed by, or by the order of, public officials, and that have not been prosecuted for political reasons. The provisions of the new Criminal Code contain different regulations in this respect. Article 105(1) states that there shall be no limitation as regards liability and the imposition of penalty, in relation to crimes against peace and humanity and war offences. The application of this norm of the Code, as compared to Article 43 of the Constitution, should not cause any substantial problems of interpretation, since one could defend the view that war

crimes, within the meaning of Article 43 of the Constitution, also include crimes against peace. It is, however, not desirable to resort to such interpretational contortions. A more difficult problem arises in connection with Article 44 of the Constitution. Article 105(2) excludes from general limitation the offences specified therein and committed by a public functionary in connection with the performance of his official duties. Hence, Article 105(2) goes much beyond the constitutional norm, by excluding limitation and not only suspending the periods prescribed by them. (At this point, I shall not delve into the problem of how the substantive scope of the constitutional and criminal code norms may overlap, but remain incongruent with each other, a source of further problems.) Is, therefore, Article 105(2) in conformity with the Constitution, or should it be eliminated from the legal order ? To answer this question we shall have to ascertain the legal nature of limitation. An issue of particular importance is whether the limitation on penal liability or the execution of the penalty is a right of the perpetrator. The Constitution places Articles 43 and 44 within Chapter II, in the subchapter entitled „Personal freedoms and rights". This might indicate a positive answer. If so, Articles 43 and 44 should be understood as constitutional exceptions to the exclusion or restriction of the right to limitation, and any departure from the scope of such exceptions in ordinary legislation would be inadmissible. Such an understanding of the limitation would also mean that Article 44 should be comprehended as possessing sense only for the future, and providing the ordinary legislator with a basis for the introduction of a suspension of the period of limitation in relation to the offences specified in the Constitution. If the limitation is treated as a personal right, then Article 44 - lacking any explicit expression tending in this direction - cannot have a retroactive effect, depriving thereby a perpetrator of his rightful expectation concerning the limitation. This presumption also inevitably leads to doubt the conformity to the Constitution of Article 9(1) of the Act of 6 June 1997 - The Regulations Introducing the Criminal Code (*Journal of Laws,* No. 88, item 554). However, it seems to me that the institution of limitation deserves a different approach, one which concludes that a systemic interpretation is not conclusive. There is no personal right to limitation and, in this connection, there is no expectancy of limitation due to the perpetrator. None of the provisions of the Constitution provide such a right. The ordinary legislator enjoys discretion in shaping the institution of limitation as it relates to penal policy (advisability of punishment), but not to the personal right of the perpetrator. Theoretically, the legislator could generally exclude limitation, without constitutional authorisation, in relation to, e.g. all felonies. Articles 43 and 44 of the Constitution contain norms which introduce minimum solutions. The legislator has to exclude limitation in relation to war crimes and crimes against humanity (Article 43) and, at least, suspend limitation periods to the extent specified in Article 44. Such an understanding of the institution of limitation and the meaning of Articles 43 and 44 of the Constitution allows us to treat Article 105 (1) and (2) of the Criminal Code as consistent with the Constitution. The placing of Articles 43 and 44 in Chapter II should be understood as expressing the legislator's will to strengthen personal freedoms and rights and to protect them against the assaults specified in those two constitutional provisions.

The assessment of conformity to the Constitution of Article 9(1) of the Regulations Introducing the Criminal Code deserves a separate analysis. This provision has a retroactive effect, since it applies to acts committed between 1 January 1944 and 31 December 1989. It covers two fundamentally different situations. The first occurs when the limitation period has not expired before the day the introductory regulations come into force. At the moment the regulations come into force, the perpetrator is subject to penalty and - according to the above provisions - has no expectation of limitation. Any extension of penal liability is, therefore, a legitimate decision of the legislator, based on Article 44 of the Constitution. The second situation arises when the limitation period has expired before the regulations introducing the Criminal Code have come into force. At the moment those regulations come into force, the perpetrator is not subject to criminal liability. Such liability is based on introductory provisions.[14] Hence, from the point of view of the guarantee function of criminal law, the situation is similar to that which we would meet if the retroactive effect of penal liability of a specified act was introduced. The prohibition against penal liability functioning with retroactive effect on a particular act results directly from the first sentence of Article 42(1). The restoration of the penal liability of acts, in relation to which the limitation periods have already expired, is obviously inconsistent with Article 7(1) of the ECHR. This also relates to those cases where penal liability expired as a result of the application of an amnesty or the abolition (Article 9(2) of the regulations introducing the Criminal Code. At this point, there arises the question whether the principle of justice could justify a departure from the principles of a democratic state ruled by law. It seems to me that it could not. The guarantee principles of criminal law set up a barrier for the satisfaction of the sense of justice. Such a departure to satisfy a sense of justice might have been justifiable in a period immediately following the expiry of a period engendering an obstacle to the conduct of proceedings. However, a long time has passed since 31 December 1989, and from today's perspective such a departure could not be justified.

Another fundamental problem of a constitutional nature arises in connection with the regulations introducing the Criminal Code. Article 14(4) states that „The provisions of the Criminal Code relating to parole apply, as appropriate, to persons conditionally released and to those serving a term of imprisonment". Regulations on parole are, in general, more stringent in the new Criminal Code as compared with the old legal system. May, e.g. persons who satisfy the requirements of the former legal order for parole (i.e. they have served one-third of their sentence) be released after the new Criminal Code comes into force if the prerequisite of serving a specified part of a sentence has not been satisfied? Article 14(4) prevents this. Again, there appears the question whether any provision inflicting greater punishment may have retroactive effect. When we reject the principle of a democratic state ruled by law, then we

[14] Strictly speaking, the decisive moment is the coming into force of the Act of 22 July 1995 on the Amendment of the Criminal Code, the Executory Criminal Code and on the increase in minimum and maximum levels of fines and penalties in criminal law (*Dziennik Ustaw*, no. 95, item 475), which introduced to the Criminal Code of 1969 Article 108 (2) the same wording as in Article 9(1) of the Regulations Introducing the Criminal Code of 1997.

cannot find any clear answer to this question in the Constitution. It seems that the issue should be resolved as follows: If a decision on conditional release from serving the full sentence has been based on the old regulations and the convicted criminal offender is on probation, then, even if under the new regulations the conditions for conventional release have not been met, such conventional release cannot be withdrawn only for that reason. However, when the convicted person has not begun a probation period, it should be presumed that conditional release will require satisfying all the conditions specified in the new regulations.

An analysis of the conformity of criminal law with the Constitution cannot be limited to the new Criminal Code. Due to an evident mistake of the authors of the Constitution, special problems occur in the area of tax criminal law. Article 175(1) of the Constitution establishes the jurisdiction of the courts over the whole administration of justice, including obviously all criminal cases. Consequently, Article 42(3) states that: "Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court". The exclusive jurisdiction of the courts will also cover decisions in cases prosecuted as misdemeanours, while Article 237(1) of the Constitution establishes a 4-year period following the coming into force of the Constitution, for the implementation of this principle. Unfortunately, the authors of the Constitution overlooked the fact that in Poland extrajudicial adjudicating agencies decide not only in cases prosecuted as misdemeanours. According to Article 123(1) of the Tax Criminal Act, financial adjudicating agencies have jurisdiction over tax offences for which only punishment of a fine may be inflicted, and over tax misdemeanours. Hence,as regards tax offences, the above mentioned Article is inconsistent with Article 175(1) and Article 42(3) of the Constitution. At this point, we must explicitly note that this provision allows, within the two year period of the date the Constitution comes into force, for the application - and even adoption - of provisions inconsistent with the Constitution. This Article should be understood literally, and it expresses only the obligation of the Council of Ministers to submit bills indispensable for the application of the Constitution. Hence, it refers to situations where a constitutional norm cannot be applied directly without the adoption of an appropriate law, prescribed by the Constitution. However, Article 236(1) of the Constitution does not provide for any peculiar *vacatio legis* for constitutional norms. It seems, however, that the simplest way to bring tax criminal law into conformity with the Constitution, before the implementation of a fundamental reform in this field of law, would be by changing the definition of a tax misdemeanour to cover those tax offences falling within the jurisdiction of financial adjudicating agencies. I am aware of all the imperfections attendant on such a solution. Nevertheless, in my opinion, there is no other way to avoid the consequences of the mistake made by the authors of the Constitution.

Conflicts between the provisions of the tax criminal law and the Constitution result not only from the problem of competence. Article 46 of the Constitution states that property may be forfeited only in cases specified by the law and only by virtue of a final judgment of a court. The Tax Criminal Act provides for an additional penalty of forfeiture of property for the commission of tax offences falling within the jurisdiction of

financial adjudicating agencies (e.g. Article 65(1) in conjunction with Article 48(1) or Article 49). The inconsistency of those provisions with the Constitution is so evident that it deserves the immediate intervention of the legislator. Pending such intervention, the financial adjudicating agencies should not - by reason of Article 8(2) - impose forfeiture of property even in those situations where such adjudication would be obligatory under the provisions of the Tax Criminal Act.

The enforcement of the adopted Codes will be vital for the completion of the reform of criminal law. Demands for further delay in the statutorily specified date of their coming into force are alarming. The Codes are not perfect. Nevertheless, we need to collect the experience of their application to enable their further amendment and deletion of errors. Any changes introduced today could lead to an inconsistency in such solutions. The postponement of codification coming into force provides an opportunity for irresponsible ventures of a populist nature, detrimental to our legal culture.

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THE CRIMINAL LAW ISSUES OF THE NEW POLISH LAW COUNTERACTIVE OF DRUG ABUSE*

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The drafting of the new law on narcotic drugs and psychotropic substances, which was expected to replace the previous law of 1985 on drug abuse prevention, was a time-consuming process. The first suggestions of amending it were lodged with the State agencies as early as 1992, and were motivated by the post-1989 changes in the use and illegal traffic in narcotics. Those changes rendered the numerous solutions of the 1985 law inadequate to the new situation.[1] The legislative activities became more intense on the occasion of ratifying the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances. The ratification made it necessary to adapt Polish domestic law to that of the Convention. At first, it was not clear, however, whether the adapting should be implemented through amending the 1985 law or through creating a new one. Those doubts were reflected in the two-lane approach that, starting with the autumn of 1994 was adopted in preliminary legislative activities. The Ministry of Justice prepared a draft of the amendment, while the Ministry of Health and Social Welfare - a totally new law. Eventually, it was the second of the two solutions that proved successful. Indeed, the concept of the Ministry of Health and Social Welfare laid the foundations for the governmental draft law which, according to the routine of the law-making process, was presented to the Speaker's staff on 3 July 1995.[2] On 24 April 1997, the legislative work ended with the adoption by the Seym (the lower House of the Polish Parliament) of the Law Counteractive of Drug Abuse. This law, approved by the Senate and signed by the President, came into force on 15 October 1997.[3]

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* This is a slightly changed version of an article which appeared originally in Polish [in:] *Państwo i Prawo* 1998, no. 4.

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[1] Cf. K r a j e w s k i: "W kwestii kryminalizacji posiadania środków odurzających i psychotropowych" [On the Question of Criminalizing the Possession of Narcotic Drugs and Psychotropic Substances], *Państwo i Prawo* 1992, no. 2, p. 49-57.

[2] See *Sejm RP II kadencji, druk 1131* [The Seym of the Republic of Poland, Second Term, Print no. 1131]. Earlier, in November 1994, a group of deputies filed a draft amendment of the 1985 law. See *Sejm RP II kadencji, druk 816* [The Seym of the Republic of Poland, Second Term, Print 816]. The first reading of both drafts was held on 28 September 1995. See *Diariusz Sejmowy, 61 posiedzenie Sejmu RP II kadencji* [Seym Diary, 61 Session of the Seym of the Republic of Poland, Second Term], p. 57-88. In the course of further legislative activities in the subcommission (which was an agency of the Commission of Health), formed to deliberate on the deputies' and governmental projects of a law on drug abuse prevention, both projects were reviewed jointly. The Subcommission concluded its work principally on 17 October 1996.

[3] *Dziennik Ustaw (Dz. U.)* [Journal of Laws] 1997, no. 75, item 468.

The present contribution is concerned, above all, with the penal issues of this law. Since, however, most of its provisions are of an administrative law nature, a few remarks must be made about them, the more so that those provisions are not indifferent for the problems of criminal responsibility for offences defined in the discussed Act.

The first thing that attracts one's attention is the change of the title of the law compared to its 1985 predecessor. While the 1985 law mentioned "drug abuse prevention", the new law is "counteractive of drug abuse". This new approach results, *inter alia*, from the thesis that the preventive and therapeutic model of an approach toward the drug problem, characteristic of the previous law, is out-dated and has to be replaced by more repressive solutions. This line was even reflected in the suggestions that the new law should be called the law "against drug abuse". The legislators were right to reject this idea. In view of the fact that the new law understands drug abuse as "a regular or periodical use of narcotic drugs or psychotropic substances, or their substitutes, for non-medical purposes" (Art. 6, item 5), the use of the term "against" might suggest that the emphasis is placed, above all, on the repression of those persons who use such drugs, substances or substitutes, i.e. drug addicts and other consumers. However, if one can consent to the repression of those who are involved in the illicit traffic in narcotic drugs and psychotropic substances (i.e. their production, smuggling, traffic, etc., in other words: who secure their supply), and even agree that the previous Polish legislation was insufficiently determined while dealing with such offenders, then one should admit that the approach toward the consumers (those who represent the demand) should continue to be preventive and therapeutic.[4] If it were necessary to include the phrase "against" into the law, then the title of law should resemble that of the aforementioned U.N. Convention: the law against the illicit traffic in narcotic drugs and psychotropic substances. When we consider, however, that Polish law, unlike most laws of this type in western countries, lays considerable emphasis on the questions of prevention and treatment, a title containing the term "against" might be found inadequate. Generally speaking, the compromise in the matter of the title seems to be reasonable.

As far as legislative definitions are concerned (Art. 6.), it is characteristic that the technique applied by the previous law in defining narcotic drugs and psychotropic substances (sect. 2 and 3) has been preserved; this technique is also applied by the U.N. Conventions of 1961 and 1971. It consists in the definitions being composed of essential (substances of natural or synthetic derivations affecting the central nervous system) and formal components (substances included in a special schedule). The same technique was applied while defining the new, earlier unknown, notion of "precursor", i.e. a substance which may be processed into a narcotic drug or psychotropic substance, or may serve their production, and is placed in the schedule of precursors (sect. 1). At this point, the legislator introduced a significant modification. In the previous law, the respective schedules were included into the appendix to the Ordinance of the Ministry of

[4] More details on the legal models of drug policies may be found in K. K r a j e w s k i: "Prawo karne wobec środków odurzających i psychotropowych. Z problematyki teorii kryminalizacji" [Illegal Drugs and Criminal Law. Some Problems of the Theory of Criminalization], *Archiwum Kryminologii* 1995, vol. 21, p. 41-79 and the bibliography quoted therein.

Health and Social Welfare, issued within the delegated legislation.[5] In the present law, the schedules became appendices to the law itself. This solution is by all means correct. The point is that the notions: "narcotic drug", "psychotropic substance" or "precursor" make up the statutory constitutive elements of all the offences defined in chapter 6 of the law. A situation when the aforementioned schedules, without which it is impossible to establish whether the given substance is a narcotic drug, psychotropic substance or precursor, was contained in the appendices to the Ordinance, provided for the possibility of raising an objection that the statutory definition of the forbidden act was, in fact, transferred to the level of a Ministerial Ordinance, something very questionable from the point of view of the rule *nullum crimen sine lege.* In this context, it is also worth noting that the new law resigned from forming the analogous schedule of substitutes and, while defining the latter, limited itself (sect. 4) exclusively to the "substantial" component (the substance which is a poison or harmful, and which is used instead or for the same non-medical purpose as a narcotic drug or psychotropic substance). This approach makes the statutory definition of this notion more elastic (since many substances may be used as substitutes). Nonetheless, such an approach is irrelevant from the point of view of criminal law issues, because the notion of the substitute is not to be found in the law in question as a constitutive element of a forbidden act.

Chapter 3 of the discussed law deals with methods of approach applied toward the drug addicts. In this respect, the law introduced an essential novelty, laying the legal foundations for so-called maintenance treatment (Art. 15), whose details are to be regulated by the Ordinance of the Ministry of Health and Social Welfare.[6] This form of treatment has been applied in Poland for a few years now, but the legal status of the treatment was not clear. The point is that Art. 6 sect. 10 of the law provides that the maintenance treatment is tantamount to "applying narcotic drugs or psychotropic substances while implementing the programme of the treatment of drug addiction". Formally speaking, the application of such drugs or substances may constitute a criminal offence defined in Art. 45 of the Law Counteractive of Drug Abuse in the sense of supplying another person with a narcotic drug or psychotropic substance. Art. 15 of the law in question creates, therefore, the legal defence or, according to Polish legal terminology, the so-called "counter-type", i.e. the circumstance making an otherwise criminal act legal.

When viewed in terms of the regulations of the discussed law, the admissibility of other forms of harm reduction also cannot be called to question by criminal law. This refers, for instance, to the programmes of distributing among the drug addicts sterile syringes and needles as well as their exchange. Such a method is considered to be essential in preventing the spread of the HIV virus among drug addicts. In the legal systems of many European states this question gave, and still gives, rise to a considerable problems,

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[5] See the Ordinance of the Ministry of Health and Social Welfare of 21 September 1985 on narcotic drugs and psychotropic substances and the control over them, *Dz.U.* no. 53 (1985), item 275.

[6] Until 31 December 1997 none of the 8 implementing ordinances foreseen by the discussed law were issued. In Art. 61, this law provides, however, that until 15 October 1998 the implementing Ordinances issued on the basis of the delegation arising from the 1985 law remain in force unless they contradict the new law.

because such preventive activities may constitute criminal offences of facilitating drug use.[7] However, pursuant to Art. 46 of the discussed law, offering such facilities to persons indulging in narcotic drugs (as opposed to supplying those drugs or inciting their use) is punishable only when the perpetrator acts in order to obtain material profit or personal gain. This means that the penal liability of those who work within the framework of the discussed programmes is not considered. The same concerns the so-called injection rooms, i.e. premises organised under the supervision of medical staff and volunteers, where the drug addicts may give themselves injections of their own narcotic drugs in hygienic conditions; they also usually receive help and counselling.[8]

The new law did not introduce any changes in relation to the admissibility of applying compulsory treatment. In Art. 13, the law provides for the principle that submitting oneself to treatment, rehabilitation and réadaptation is voluntary. The new law adds, moreover, (Art. 14, sect. 7) that such treatment is free of charge if rendered by a public health service institution. Nor did the law change the previously existing exception to the rule of the voluntary character of treatment; namely, in Art. 17 (Art. 25 in the 1985 law) the present law permits compulsory treatment and rehabilitation when decided by a juvenile court *vis-a-vis* a minor drug addict.[9]

In turn, Chapter 4 on "Precursors, narcotic drugs and psychotropic substances" introduced significant changes. This chapter is considerably larger than the analogous chapter (chapter 3) in the 1985 law, due to its extension by provisions referring to the classification and control of legal turnover in narcotic drugs and psychotropic substances, questions previously dealt with in the already mentioned 1985 Ordinance of the Ministry of Health and Social Welfare. Likewise, the discussed chapter was expanded by new provisions controlling the turnover in precursors - the fulfilment of obligations under Art. 12 of the Vienna Convention of 1988.

Art. 22 preserved the principle that narcotic drugs and psychotropic substances as well as precursors possessed without licence are subject to confiscation. On the other hand, the new law introduced considerable innovations with respect to Art. 13 sect. 4 of the 1985 law. The point is that the 1985 law provided that the above mentioned drugs,

[7] This problem existed for a long time, for instance, in Germany, where it was the subject of numerous legal disputes until the German law on narcotic drugs was modified by the introduction of an express provision confirming that such activities do not constitute offences. Programmes of needle and syringe exchange are prohibited in the USA. and Sweden. On the other hand, they function in Austria, Denmark, France, Germany, the Netherlands, Italy, Switzerland and the United Kingdom. See H.-H. K ö r n e r: *Betäubungsmittelgesetz. Arzneimittelgesetz. Beck'sehe Kurzkommentare*, Munich 1994, p. 572-557.

[8] The purpose of such initiatives, apart from the fact that they prevent the spread of the HIV virus, is also prevention of overdosing and other negative health consequences arising from the illicit consumption occurring in subcultural circumstances. Those initiatives have another objective consisting in rendering quick medical assistance in cases of an overdose or other complications. The latter may appear when one considers the fact that the discussed premises function also as dormitories, baths and stations rendering any assistance and counselling needed. Such premises function, for instance, in numerous German and other European cities. Their existence, although usually tolerated by the authorities, is, however, sometimes fairly controversial from the legal point of view, and the controversy may arise on the basis of the facilitation of drugs by providing addicts with this kind of premises. Cf. H.-H. K ö r n e r: *op. cit.*, p. 583-588.

[9] See H. H a a k: *Prawo karne wobec narkomanów* [Criminal Law and the Drug Addicts], Warszawa-Poznan 1993.

substances and precursors were *ipso iure* subject to confiscation or seizure in favour of the State Treasury, with the application of executive proceedings in administrative law. This was due to the fact that under the regime of the previous law, the possession of narcotic drugs and psychotropic substances did not constitute a criminal offence. In such circumstances, when the possessor could be accused of nothing but possession itself, the confiscation of drugs or psychotropic substances could be implemented only outside criminal proceedings. The situation changed only when the possession of the drugs and substances in question was criminalised pursuant to Art. 48 of the new law. In accordance with Art. 22 sect. 2 of the discussed law, provisions relating to executive proceedings in administration are applicable only in order to seize and secure drugs and substances possessed without a required licence. However, it is the court which decides about their confiscation during criminal proceedings. This means that while convicting the perpetrator for offences provided for in Art. 40-50 of the discussed law, it is mandatory for the court, pursuant to Art. 55 sect. 1 and 2 of this law, to pronounce the confiscation of the secured narcotic drugs, psychotropic substances or precursors.[10] [11] Since the new penal codifications came into force,[11] this duty to pronounce confiscation refers also to cases of conditional discontinuance of proceedings, irrespective of whether the latter is pronounced on the basis of general principles or those laid down in Art. 57 of the discussed law. This results from the fact that, in accordance with Art. 66 § 1 of the new Criminal Code, the conditional discontinuance of proceedings will be applied exclusively by courts, and not by public prosecutors, as was the case under the 1969 Code of Criminal Procedure. In those cases, however, when absolute (as opposed to conditional) discontinuance of criminal proceedings is at stake, the public prosecutor, in view of the content of Art. 55, sect. 2 of the discussed law, will have to turn to the court with a request that such confiscation be pronounced.

A separate situation will come to being when criminal proceedings have not been instituted in the given case. This situation becomes significant with respect to the purview of Art. 48 sect. 4 of the discussed law. This Article provides that the possession of narcotic drugs or psychotropic substances for one's own use, and in small quantity, defines circumstances that exclude punishability. In such a situation, therefore, the proceedings are not instituted and, in case they had been instituted, they are to be discontinued. In those cases, which in practice may be fairly frequent, Art. 22 sect. 4 of the law in question assigns the Voivodeship Pharmaceutical Inspector the competence to pronounce the confiscation of narcotic drugs or psychotropic substances pursuant to the provisions on executive proceedings in administration. This means that public prosecutors would have to lodge suitable requests with the aforementioned Inspectors. Unfortunately, there is no doubt that Art. 22 sect. 4 of the discussed law is unconstitutional,

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[10] In case of the perpetrator being convicted for offences provided for in Articles 40-47 and 49-50 of the discussed law, the obligation of the court is broader and extends not only to the forfeiture of the object of the offence (in practice, this is most frequently the narcotic drug, psychotropic substance or precursor), but also of the objects and tools that served or were designed to serve the commission of the offence.

[11] The new criminal code, code of criminal procedure and execution of punishments code passed by the Seym on 6 June 1997 entered into force on 1 September 1998.

since according to Art. 46 of the Constitution of the Republic of Poland confiscation may be pronounced exclusively by courts.

As far as penal provisions in the discussed law are concerned, it may be said that the scope of penalisation was significantly extended while showing restraint in lavishing penalties. This approach deserves some approval, since it contradicts the long-lasting tendency observed in many countries to develop an absurdly sharp punitive policy *vis-à-vis* narcotic-related offences.[12] In the discussed law, the only symptom of sharpening repressions is the introduction of a new felony[13] that consists in: supplying a minor with narcotic drug, facilitating a minor's use of a narcotic drug or inducing him to use this drug or substance, if committed for the purpose of obtaining material profit or personal gain (Art. 46, sect. 2).[14] In turn, Art. 45 sect. 1, treating the plain (i.e. without any involvement of the perspective of material profit or personal gain) supply of the narcotic drug or psychotropic substance, or inducing another person to indulge in it, as an offence, lowered the maximum statutory penalty to be imposed on the perpetrator from 3 years of deprivation of liberty (as foreseen by Art. 31 of 1985 law) to 2 years of deprivation of liberty, 2 years of limitation of liberty, or a fine. The remaining sanctions, to which perpetrators are liable according to the new law, do not differ from those provided for in the 1985 law.

However, when juxtaposed, some sanctions of the discussed law may give rise to certain doubts. This refers particularly to a discord between the sanctions provided for by Art. 40 (illicit manufacture of narcotic drugs or psychotropic substances) and those provided for by Art. 42 (illicit import, export, and transport). As a result, the illicit manufacture of a considerable quantity of narcotic drugs is a misdemeanour carrying a penalty up to 5 years of deprivation of liberty (Art. 40, sect. 2), while the smuggling of the same amount of narcotics is tantamount to a felony threatened by the penalty of deprivation of liberty for a term of no less than 3 years (Art. 42. Sect. 3). Is a laboratory, which manufactures narcotics, really so much less harmful than smuggling them? In fact, the abstract threat to the legal value protected by those provisions, which is nothing else but public health, and thus, consequently, the proportion of social harm arising from both offences,

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[12] In Polish circumstances, a particularly drastic example of this tendency was the project of amendments to the 1985 law, drafted in 1994 by the Polish Psychiatric Society. Apart from its embarrassingly low legislative standard, the project distinguished itself by proposing that almost all offences defined in it constitute felonies.

[13] It is very difficult to find proper English equivalents for the Polish categorisation of the acts prohibited by the criminal law, namely "zbrodnie", "występki" and "wykroczenia". This translation is made even more difficult since, technically, only two first categories constitute criminal offences *sensu stricto.* The third category constitutes a separate type of prohibited petty acts regulated not in the criminal code, but in separate law. In translating those Polish categories this article follows the terminology adopted by S. W a l t o ś, M. A b r a h a m o w i c z and H. H o r b a c z e w s k i in their translation of the Polish Code of Criminal Procedure of 1969 (see S. W a l t o ś (ed.): *Code of Criminal Procedure of the Polish People's Republic,* Warszawa 1979), i.e. felony, misdemeanour and transgression. Although this approach may be controversial from the point of view of the meaning of those notions in Anglo-American legal tradition, its justification provided by the mentioned authors (see p. 73) seems to be quite convincing.

[14] As a result, the new law provides for two felonies. The second consists in the importation, exportation or transportation of narcotic drugs and psychotropic substances in considerable quantities (Art. 42 sect. 3), this offence being classified as felony already in the 1985 law (Art. 29 sect. 3).

is almost the same. One may also ask why the felony defined in Art. 42 sect. 3 (aggravated form of smuggling) is threatened by a cumulative fine, while the felony provided for in Art. 46 sect. 2 (supplying a minor with narcotics for the purpose of obtaining material profit) is not. This solution is not very consistent, since in both cases the intent of obtaining material profit belongs to the constitutive elements of the offence.

The extension of the scope of penalisation[15] in the new law consists, above all, in the introduction of a provision that criminalises the possession of narcotic drugs or psychotropic substances (Art. 48). In Art. 44, the discussed law criminalises also preparations for the commission of offences consisting in the illicit import, export or transport of narcotic drugs or psychotropic substances (Art. 42), or in their illicit introduction into drug traffic (Art. 43).[16] Similarly, this law introduced the penalisation of certain activities bound with traffic in precursors (Art. 52 and 53). Such activities were, however, classified as transgressions.[17] In addition, in some cases, the extension of criminalisation was achieved by a change of the wording applied in the provisions. For instance, on the basis of Art. 43, not only the introduction of substances listed therein into drug traffic (penalised already by Art. 30 of the 1985 law), but also any sort of participation in such traffic is penalised.

Most of the provisions that criminalise respective activities, whose object are narcotic drugs or psychotropic substances (manufacture, importation, exportation, transportation, introduction into traffic, supply, supply in order to obtain material profit, possession, etc.) are composed of basic, aggravated and mitigated forms of offences. The mitigated offence is always defined as a case of minor importance. The constitutive element of an aggravated type is, in turn, a considerable quantity of a narcotic drug or psychotropic substance, this element being found in most provisions. In addition, in Art. 45 sect. 2, and in Art. 46 sect. 2 supplying a minor with a narcotic drug or psychotropic substance is also tantamount to an element qualifying for an aggravated offence. The adoption of a legislative technique that amounts to multiplying mitigated and aggravated forms of offences doubtless makes the penal segment of the discussed law fairly complicated and unclear. This, however, is a sin committed by all laws on narcotic drugs all over the world, creating a jungle of aggravated and mitigated offences, or aggravating and mitigating circumstances, sometimes formulated in an extremely casuistic way. All this is formative for confusion difficult to disentangle, and provides for numerous problems in practice. The frequent use of evaluating features in cases of thus formulated types is responsible for an additional difficulty. It is also worth noting that the phrase “for the purpose of obtaining material profit or personal gain” (Art. 40

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[15] All the cases of new penalisation fulfil obligations arising from the ratifying of the Vienna Convention of 1988.

[16] It is essential, however, that punishability of the preparation refers exclusively to the basic and aggravated, and not to the privileged forms of those offences. This is important for at least one reason: privileged forms, in the shape of a case of minor importance, will, in practice, refer most frequently to the prohibited acts committed by the drug addicts.

[17] Illicit cultivation of the low-morphine poppy and the fibrous hemp plant (Art. 51) was also penalised as only a transgression. As a result, the discussed law contains three types of transgressions. The previous law did not provide for any transgressions at all.

sect. 2, Art. 42 sect 3, Art. 46 sect. 1) is used in the new law as an element qualifying the act as an aggravated offence. Yet the way the legislator uses this element demonstrates a manifest logical error, which existed already in the previous law. The point is that while turning every, however slight, material profit, and every personal gain, into an element classifying the given act as aggravated offence, the legislator renders the basic forms of offences to be practically empty categories! While reviewing all the acts referred to in the above quoted provisions, one would hardly find any in which obtaining material profit or, above all, personal gain, would not be the motive of the perpetrator's activity. Hence the feature of the aggravated offence should be limited merely to the phrase: "considerable material profit" while the qualification: "personal gain" should be eliminated.[18]

When compared with the 1985 version, the major novelty of the present law is the introduction (in Art. 48) of the criminalization of the possession of narcotic drugs or psychotropic substances. In recent years, this question was subject to numerous controversies, because the scope within which the possession of narcotics is criminalised is, to a large extent, determinative of the model of the drug policy adopted by the legislator. The acceptance of a broad scope of criminalisation, including cases of "minor possession", tantamount to possessing small quantities of narcotics for one's own use, most frequently means the adoption of a restrictive and repressive model. On the other hand, the décriminalisation of such "minor possession" is equivalent to adopting the permissive and therapeutic model, which gives priority to prevention and therapy and not criminal sanctions as measures applicable towards those addicted to narcotics.[19] Apart from the controversy relating to the role of criminal law in drug policies, another question raised during the discussion held in recent years was the scope of obligations under the Vienna Convention of 1988, especially under Art. 3 sec. 2.[20] The presently discussed law dealt with the obligations in question in a compromise manner. The legislator tried to reconcile requirements arising from international obligations with his intention to preserve a permissive and therapeutic approach toward the drug addicts. This was conducive to a policy of criminalising activities concerning the supply side of the drug problem, and combining them with a partial décriminalisation (or strictly speaking: non-punishablity) of drug consumption or demand.

Thus Art. 48 of the discussed law, which reflects the above tendencies, provides for four forms of possessing narcotic drugs or psychotropic substances. They include a basic offence (sect. 1), followed by a case of minor importance (sect. 2), an aggravated of-

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[18] In the course of the legislative process the motion to this end was tabled by deputy A. Gaberle. However, it was not taken into consideration.

[19] On the essence of this dispute in Poland see K. K r a j e w s k i: *Prawo karne wobec..., op. cit.,* as well as his: "Czy i jak dokonać w ustawodawstwie polskim kryminalizacji posiadania środków odurzających i psychotropowych - wokół seminarium Grupy Pompidou" [Should the Possession of Narcotic Drugs and Psychotropic Substances be Criminalized in Polish Law and How to Reach this End - on a Seminar of the Pompidou Group], *Przegląd Sądowy* 1994, no. 9, p. 44-58 and the bibliography quoted therein.

[20] See K. K r a j e w s k i: "Problematyka kryminalizacji posiadania środków odurzających i psychotropowych w świetle regulacji prawnomiędzynarodowych" [The Question of Criminalizing the Possession of Narcotic Drugs and Psychotropic Substances from the International Law Perspective], *Państwo i Prawo* 1997, no. 1, p. 58-69.

fence qualified by the element of possessing a considerable quantity of the drug (sect. 3); last but not least, the law provides that the offender possessing even a small quantity of narcotic drugs or psychotropic substances for his own use is not liable to penalty (sect. 4). This means that full depenalisation of "minor possession" was not introduced in the discussed law. All forms of narcotic possession constitute criminal offences, and "minor possession" constitutes a circumstance excluding only the punishability but not the criminality of an act.[21] From the point of view of criminal proceedings this means that pursuant to Art. 11 sect. 2 of the Code of Criminal Procedure of 1969 (which is Art. 17 § 1 item 4 of the new Code) criminal proceedings shall not be instituted in cases of "minor possession". This means that the decision about the refusal to institute the proceedings is to be issued, and if the proceedings has already been instituted, it is to be discontinued. This manner of dealing with "minor possession" of narcotics by those addicted to them or their occasional consumers is expected to prevent those groups from being driven underground by incessant "hunting" conducted by law enforcement agencies. It is believed that the adoption of a "hunting" attitude most frequently impedes any contact with those groups and an eventual preventive or therapeutic approach by social and medical services.

Though the above outlined solution generally deserves approval, it gives rise to certain reservations and doubts as regards details. The point is that the final formulation of Art. 48 sect. 4 differs considerably from the version of this Article approved by the report of the Subcommision which worked on it, and which was far better than the wording finally adopted in the law. The Subcommission's draft did not use the phrases "small quantity" and "for his own use" but simply adopted so-called "border quantities", i.e. maximum quantities of possessed drugs that justify the unpunishablity of the perpetrator.[22] True, such a solution may seem excessively rigid. This probably was the argument which, eventually, led to the final introduction of evaluating elements, whose role was to provide for more elasticity in solving specific cases of possession of small quantities of narcotics. Yet, as is always the case with legislation relating to narcotics,

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[21] Hence, this solution seems to comply with the requirements of the Vienna Convention of 1988. More details on this may be found in K. K r a j e w s k i: *Problemy kryminalizaeji..., op. cit.*

[22] See "Sprawozdanie podkomisji o poselskim projekcie ustawy o zapobieganiu narkomanii i rządowym projekcie ustawy o zapobieganiu narkomanii i zwalczaniu nielegalnego obrotu środkami odurzającymi i substancjami psychotropowymi" [The Subcommission Report on the Deputies' and Governmental Projects of a Law on the Prevention of Drug Abuse and Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances], *Sejm RP, II kadencja, druk 1131* [The Seym of the Polish Republic, Second Term, print no. 1131], Art. 49 sect. 4. The mentioned "border quantities" were laid down in the appendix to the draft of the law and amounted to: 5 g of "Polish heroin" or "kompot", 10 g of marijuana, 3 g of hashish, 0,25 g of amphetamine, 0,1 g of meta-amphetamine, and 0,2 *g of* MDM. The schedule did not provide for "border quantities" with respect to all narcotic drugs and psychotropic substances, and, above all, to those as essential as morphine, heroin or cocaine. This was the weak point of the schedule. Those responsible for its drafting argued, however, that it exhausted the list of drugs and substances at the moment of significance on the Polish consumer market. One has to admit, however, that in order to avoid future problems and the necessity, for instance, to quickly supplement the schedule (which would amount to using full parliamentary procedure), the schedule should have to be extended. On the other hand, this was not an easy task to perform on account of differences of opinion among experts relating to those quantities and criteria of their establishment. In this situation, the compromise on the abridged list could be regarded a considerable success.

such legislation demonstrates neither good nor bad solutions, but only more or less unsatisfactory ones. Unfortunately, for a variety of reasons, the solution finally adopted in the discussed law seems to be worse than that suggested by the Subcommission and, significantly, more troublesome in practical application.

Criminal law must frequently resort to various arbitrarily defined bounds. The so-called "insobriety limit" may serve as a classical example. A statutory definition of the "border quantities" that justify the use of Art. 48 sect. 4, although to all appearances non-flexible, would have, above all, the advantage of sharply differentiating between punishable and non-punishable activities. Thus, the decision on this problem should not be left with the law enforcement and prosecuting agencies. Simultaneously, this would provide the latter with a clear suggestion about the boundaries set for their intervention. If the quantity of the seized and secured narcotic drug or psychotropic substance were below the limit (weighing the drug or substance being sufficient to establish this), then the agencies might without further involvement refuse to institute the proceedings. Unfortunately, the solution accepted in the discussed law will burden the police and the public prosecutors with much additional work, often deprived of any sense sincę its only aim would be to find grounds for the refusal to institute the proceedings. In each case, it will be necessary to estimate whether the given quantity is in fact small, and whether it is designed only for the suspect's own use. The need to arrive at this kind of estimation may lead to the unnecessary drawing of addicts and other consumers into the orbit of criminal investigation. It is also worthwhile to note that the small quantity of a drug or substance is practically the most frequent circumstance pointing to this drug or substance being designed for someone's own use. In practice, the possibility of proving the aim of the possession of the drug or substance by circumstances other than their quantity, is fairly rare and accounts for the small role played by the element: "for one's own use".

All this means that in practice there will have to function, sooner or later and in a less or more formal way, some border quantities that unfortunately were left unspecified by the law. Similarly, it may be assumed that, contrary to what might be expected, judicial decisions will play only a marginal role in this respect. The simplest solution to be applied would be the formulation of the Supreme Court's guidelines for the lower courts relating to this problem. However, from 1990 on, this solution is not applicable.[23] One may also hardly suppose that the regular appelate decisions of the Supreme Court or the Appellate Courts would play a significant role. In fact, one may assume that in this sort of cases appeals will be filed relatively rarely, and that they will reach the Supreme Court or Appellate Courts only in exceptional cases.[24] What will be left,

[23] Since 1990, Polish law does not provide for the right of the Supreme Court to issue any guidelines for the lower courts, since earlier the former were often abused to encroach on judicial independence.

[24] Under the current law, regular appeals ("apelacja") of the decisions of district courts are heard by the appellate chambers of the Voivodeship Courts (there are 49 of them). Appellate Courts (14) hear only appeals brought against the decisions of the voivodeship courts acting as a court of first instance. As a third instance the Supreme Court hears only extraordinary appeals ("kasacja") of the decisions of other courts. Only the decisions of the Supreme Court and Appellate Courts are published, and exert influence on the decisions of the courts of the

therefore, are case-by-case decisions of the lower courts which, however, may be quite discordant. This situation may be responsible for the fact that solutions applied in practice vary considerably. But even if the courts were to arrive at a certain standardisation of their decisions, this target could be reached only after a few years practice. In the meantime, the public prosecutors and the district courts will have to cope with the problem themselves. This may lead to a series of remarkable problems in view of their lack of experience in narcotic cases.[25] In practice, some sort of guidelines, along which one may proceed, will have to appear, first of all in prosecutorial practice. However, they will comprise the internal rules of prosecuting agencies instead of those that might emerge from criteria clearly established in the law.

In the new law, the question of border quantities has a wider aspect, which in practice may lead to still larger difficulties. The point is that the discussed law, apart from the small quantity element contained in Art. 48 sect. 4, uses in its numerous provisions (Art. 40 sect. 2, 42 sect. 3, 43 sect. 3, 45 sect. 2) the considerable quantity element which, as has been mentioned, is the constitutive element of aggravated offences. At first glance, one may say that in Polish legislation we deal with three legally relevant quantities of narcotic drugs or psychotropic substances, known to many other legislations. They include: small quantity, "average" quantity (which is not referred to by this name in the law, but functions *de facto* as the constitutive element of the basic offences) and considerable quantity. This would also mean that designing the notions of small and considerable quantities (irrespective of the way in which this goal is reached) automatically leads to the designation of "average" quantity.

The situation becomes still further complex due to the fact that the discussed law includes also cases of minor importance as mitigated forms of offences (Articles: 42 sect. 2, 43 sect. 2, 46 sect. 3). This refers particularly to the case provided by Art. 48 sect. 3 (possession of narcotic drugs or psychotropic substance that constitute a case of minor importance). It is believed correctly that admissibility to qualify the forbidden act as a case of minor importance should depend on both objective and subjective circumstances.[26] It is, however, also true when we say that in practice objective circumstances frequently become determinative. This, in particular, refers to acts in whose

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first instance. Decisions of the appellate chambers of the Voivodeship Courts remain usually unpublished, and have very little influence on lower courts. Cases concerning the possession of drugs belong to the jurisdiction of the district courts, and eventual appeals are heard by the mentioned appellate chambers. The situation may be different in cases of aggravated offences when considerable quantity is involved. Such cases, on account of higher penalties, both threatened and imposed, have greater chances to reach even the Supreme Court, and, as a result, may be more formative for judicial practice. Simultaneously, it is worth noting that what is at stake in interpreting the phrase "considerable quantity" is the boundary between the basic and aggravated form of offences. The phrase "small quantity", on the other hand, delimits the more important boundary between punishable and non-punishable acts.

[25] Germany is a classical example of a country in which enormous interpretative differences relating to the notions of small and considerable quantities (functioning also in German legislation) may be encountered in respective federal states. Practice did not succeed in standardising those notions, despite an unequivocal order issued by the Federal Constitutional Tribunal.

[26] See R. A. S t e f a ń s k i: "Okoliczności uzasadniające przyjęcie wypadku mniejszej wagi" [Circumstances Justifying the Case of Minor Importance], *Prokuratura i Prawo* 1996, no. 12, p.125-131.

case such circumstances are easily "measurable" in objective terms. Art. 199 § 2 of the Criminal Code of 1969 may provide a classical example of determining a case of minor importance by means of the value of stolen property.[27] The same holds true for those provisions of the Law Counteractive of Drug Abuse in which, among the objective circumstances of the forbidden act, one will have to classify, above all, the quantity of a narcotic drug or psychotropic substance which is the object of this act, the drug or substance being easily expressible in specific weight units. This becomes particularly significant in view of the fact that in the discussed law objective quantitative features are directly determinative of the existence of aggravating offences. In such a situation, the treatment of objective circumstances as those that are basically determinative also of the admissibility of the acceptance of the mitigated offence in the shape of a case of minor importance, is an inescapable conclusion.

Were it not for the existence of the case of minor importance in the provision criminalising the possession of narcotics, one might assume that in other provisions we might encounter a case of minor importance, usually when a small quantity of narcotics is the object of the prohibited act. However, the fact that the case of minor importance (sect. 2) is provided for in Art. 48 alongside the case of the possession of a small quantity of drugs (sect. 4), as the circumstance excluding punishability, means that those two situations cannot be identical. True, one might assume that within the framework of this provision a case of minor importance is tantamount to the possession of a small quantity of the drug or substance, which are not designed for one's own use, but, for instance, for the purpose of introducing it into drug traffic. The practical value of such an interpretation seems slight for the mere reason that, as has been mentioned, it is most frequently impossible to prove by other means for what purpose the perpetrator possessed the narcotic. One might, at best, deduce such a purpose from the quantity possessed by the offender. This would mean that the new law does not provide for three, but for four legally relevant border quantities: small quantity, quantity determinative of a case of minor importance, the already mentioned "average" quantity, and considerable quantity. The clarification of those four notions may constitute an enormous burden for criminal justice agencies.

The problem might be easily avoided if the legislator resigned from the case of minor importance, found in Art. 48. This would mean that, within the framework of this Article, the notion of small quantity would be determinative of the admissibility of a circumstance that excludes punishability. In other provisions of the discussed law, this notion would function as the constitutive element of a case of minor importance. It is worthwhile to note that such a solution would be also logical from the juridical point of view as well as from that of criminal policy. This is obvious when we remember the assumptions adopted by the law in question: the supply activities with a small quantity of the narcotic as their object, would comprise cases of minor importance, whereas the same activities on the demand side would be left unpunished.

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[27] See for instance J. B a f i a [in:] J. B a f i a, K. M i o d u s k i, M. Siewierski: *Kodeks karny. Komentarz* [Criminal Code. Commentary], second edition, Warszawa 1987, p. 230-231.

The characteristic feature of modem criminal law relating to narcotics consists in such a constructing of the types of offences which criminalises all that what is available in the sphere of the traffic and consumption of narcotic drugs and psychotropic substances. The law discussed here is doubtless exponential of a further "improvement" of this tendency. It is noteworthy, however, that, viewed from this perspective, Polish law still demonstrates two significant gaps. First of all, the purchase of narcotic drugs or psychotropic substances is not criminalised, although the latter is required by Art. 3 sect. 1, item a and Art. 3 sect. 2 of the Vienna Convention of 1988. Of course, cases of purchase may be, in practice, subject to penalties by virtue of the provision that criminalises possession, because the possessor must have first arrived at possession in some manner, for instance, through purchase. This, however, need not always be the case, and many legislations, trying to be prepared for everything that may happen, contain penal provisions including the element of "purchase".[28] Another gap in the discussed law consists in a lack of provisions that would criminalise public inciting or inducing others to use narcotic drugs or psychotropic substances, such criminalising being required by Art. 3 sect. 1, item c of the aforementioned Convention. A project of a suitable provision of that type could be found in one of the versions of the draft law prepared by the Ministry of Health and Social Welfare. The provision in question was deleted when preparations were still in the phase of a ministerial draft; the question of its réintroduction has never been raised again, the major cause being probably the legislator's awareness of enormous difficulties encountered whenever we try to define when public inciting or inducing others to use drugs comes into being. In other countries, such provisions, apart from obvious cases of unequivocal advertising, also result in considerable interpretative problems. This is particularly true of the texts of many rock songs and "subcultural" publications, and sometimes even scientific periodicals.[29] Hence it is a good thing that the final version of the discussed law does not contain provisions of that type.[30] On the other hand, the discussed law might have found room for a much less controversial provision criminalising the advertising of narcotics. In addition, it may be emphasised that, in the light of the discussed law, the mere use of narcotic drugs or psychotropic substances does not constitute an offence. However the criminalising of use is not required by the U.N. Convention. Nor is it considered an offence in most of the European countries.

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[28] This obviously gives rise to the same problem as the one encountered in the case of possession. It concerns the manner in which to treat the purchase of a small quantity of a drug or substance for one's own consumption.

[29] It is characteristic that the commentary to the German law on narcotic drugs, referring to the respective provision (§ 29 sect. 1, item 12), contains numerous examples of songs in whose case elements of the offence specified in this provision are not materialised. Examples of texts that would materialise those elements are absent. Cf. H.-H. K ö r n e r: *op. cit.*, p. 555-559.

[30] The dangers involved in this situation may be illustrated by one of the cases examined in Cracow courts. The author and the publisher of (the rather foolish) *Narcotics - A Guidebook* was convicted (a suspended sentence) on the basis of Art. 32 of the 1985 law, i.e. for facilitating the indulging and the inducing of other persons to indulge in narcotic drugs, although jurisprudence makes it clear that this article criminalized the resumption of such activities only in relation to a specific individual; the publication of a book cannot materialise those elements. The introduction of a provision that would criminalize public incitement or encouragement to the use of narcotics might result in many trials of rock singers which, in fact, would be deprived of any greater sense.

Apart from the provisions defining offences and transgressions related to illegal traffic in narcotic drugs or psychotropic substances, chapter 6 of the law in question contains also provisions concerned with the application of therapeutic measures *vis-à-vis* those drug addicts who commit offences. In this case, the new law in its Art. 56 accepted Art. 34 of the 1985 law. Therefore, it provides for the mandatory imposition on the drug addict of the duty to submit himself to medical treatment in those cases when he is convicted for an offence related to the use of narcotic drugs or psychotropic substances, and sentenced to a deprivation of liberty, which is conditionally suspended. When such a drug addict is convicted to a non-suspended deprivation of liberty, the law provides for his optional placement in a medical institution prior to his serving the sentence. In Art. 57 the new law introduced also a new provision, which makes Polish law finally fulfil the requirements of the principle treatment instead of punishment.[31] The point is that within the framework of Art. 56 (or Art. 34 of the 1985 law) the possibility of the drug addict submitting himself to treatment instead of being punished is conditional, above all, on the type of pronounced penalty (suspended or not), and not on whether the given person expresses the will to undergo such treatment. Art. 57, on the other hand, enables the public prosecutor to suspend the preparatory proceedings if the perpetrator is willing to undergo treatment. In such circumstances, the treatment, though not fully voluntary since it was accepted under the threat of continuing the criminal proceedings, is not strictly compulsory and may provide for better prognosis as to its results.

The possibility of resorting to this provision is wide, since it extends to offences punishable with a penalty not exceeding 5 years of deprivation of liberty. Consequently, it may be applicable to an unquestioned majority of offences, both those contained in the Law Counteractive of Drug Abuse as well as those of common nature (e.g. thefts, forgery of prescriptions, etc.), typical for drug addicts. When the treatment ends, the public prosecutor, having considered its results, either continues the proceedings, or lodges a request with the court that they be conditionally discontinued. Conditional discontinuance may be applied following the pattern established for the suspension of proceedings, i. e. when the offence is threatened with a penalty not exceeding 5 years of the deprivation of liberty.[32] It seems obvious that in order to preserve the sense of this institution (in return for submitting himself to medical treatment the addict obtains concessions relating to his penal liability), in the case of positive results of the treatment, the public prosecutor should be *de facto* obligated to lodge a request with the court for a conditional discontinuance of criminal proceedings.

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[31] Cf. K. K r a j e w s k i: *Problematyka kryminalizacji posiadania środków odurzających i psychotropowych w ustawodawstwie polskim* [On the Question of Criminalizing the Possession of Narcotic Drugs and Psychotropic Substances in Polish Law], Instytut Wymiaru Sprawiedliwości, Warszawa 1994. This publication contains also the project of extended provisions regulating the matter in question.

[32] This means an extension of the admissibility of conditional discontinuance when compared with what is possible under the Art. 66 § 2 of the new Criminal Code), which allows the application of this institution when the offence is threatened with a penalty not exceeding 3 years of deprivation of liberty.

The discussed provision deserves unequivocal positive appraisement. As regards its practical application, however, the interpretation of the phrase: "the perpetrator submits himself to treatment in an appropriate medical institution", constituting a premise of the application of the provision in question, will be of key significance. On the one hand, the mere declaration of the will to be treated will not suffice. The drug addict must resume certain activities showing that he would really submit himself to such treatment. On the other hand, the requirement that he would actually begin the treatment seems to be too far going. A certificate of the medical institution, confirming that this specific person is guaranteed his turn in the process of treatment, although he might wait for it, should suffice.[33] The phrase: "until the treatment is ended" might in practice also give rise to controversies as to its interpretation. It is obvious that physicians and therapists would be the first to decide on whether the treatment ended with positive or negative results. Another problem may emerge when the treatment, although continued for a long time, does not lead to uni vocally positive results. Hence, it seems that the legislator made an error when he left the maximum admissible period, for which the proceedings may be suspended, unspecified, although he might resort to the pattern established in other provisions, e. g. in Art. 17 sect. 2 of the law, and limit the admissibility of such suspension to a period of no more than two years.

One may also wonder why the legislator limited the admissibility of this provision exclusively to the preparatory phase of the proceedings. It seems that the possibility of its application should exist also during the trial. The drug addict may, in fact, become sufficiently mature to make a decision on the treatment as late as this phase of proceedings. Providing him with a chance by the possible suspension of the trial seems to be a better solution than convicting him in order to resort to Art. 56 of the discussed law, the more so that in the case of a non-suspended sentence his treatment is only optional and *de facto* compulsory. The same postulate refers to the extension of the possibility of applying the suspension of proceedings, as set forth in Art. 57, so as to include the executory proceedings. The wording found in Art. 150 of the new Punishment Execution Code, regulating conditions for granting the interruption of the execution of the penalty, do not seem to provide a sufficient basis for using such an interruption in order to facilitate the resumption by the convict of treatment outside the penal institution. It seems highly advisable that the addicted convicts be provided with a chance to resort to this kind of treatment (after they had served part of their sentence), because correctional institutions usually provide limited possibilities for success in this respect.

[33] Those matters are, for instance, regulated in detail in §§ 35-37 of the German law on narcotic drugs. From that point of view, Art. 56 sect. 1 of the law counteractive of drug abuse seems to be formulated too laconically.

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CONSTITUTION DE LA REPUBLIQUE DE POLOGNE

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Soucieux de l'existence et de l'avenir de notre Patrie,

ayant en 1989 recouvré la faculté de décider en toute souverainet é et pleine démocratie de sa destinée,

nous, la nation polonaise - tous les citoyens de la République,

autant ceux qui croient en Dieu,

source de la vérité, de la justice, de la bonté et de la beauté,

que ceux qui ne partagent pas cette foi

et qui puisent ces valeurs universelles dans d'autres sources,

égaux en droits et en devoirs envers la Pologne qui est notre bien commun,

reconnaissants à nos ancêtres de leur travail, de leur lutte pour l'indépendance payée d'immenses sacrifices, de la culture ayant ses racines dans l'héritage chrétien de la Nation et dans les valeurs humaines universelles,

renouant avec les meilleures traditions de la Première et de la Deuxième République,

engagés à transmettre aux générations futures tout ce qu'il y ade précieux dans le patrimoine plus que millénaire,

unis par des liens de communauté avec nos compatriotes dispersés à travers le monde,

conscients du besoin de coopérer avec tous les pays pour le bien de la Famille humaine,

ayant en mémoire les douloureuses épreuves essuyées à l'époque où les libertés et les droits fondamentaux de l'homme étaient violés dans notre Patrie,

souhaitant garantir, pour toujours, les droits civiques et assurer un fonctionnement régulier et efficace des institutions publiques,

conscients de la responsabilité devant Dieu ou devant notre propre conscience,

instituons la Constitution de la République de Pologne

en tant que droit fondamental de l'Etat

fondé sur le respect de la liberté et de la justice, la coopération entre les autorités, le dialogue social et le principe de subsidiarité renforçant les droits des citoyens et de leurs collectivités.

A tous ceux qui, pour le bien de la Troisième République, appliqueront les dispositions de la Constitution,

nous lançons l'appel qu'ils les appliquent dans le respect de la dignité propre à la nature de l'homme, de son droit à la liberté et son devoir de solidarité avec autrui,

et que le respect de ces principes soit pour eux le fondement inébranlable de la République de Pologne.

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Titre I

LA REPUBLIQUE

Article 1

La République de Pologne est le bien commun de tous les citoyens.

Article 2

La République de Pologne est un Etat démocratique de droit mettant en oeuvre les principes de la justice sociale.

Article 3

La République de Pologne est un Etat unitaire.

Article 4

1. Le pouvoir suprême appartient en République de Pologne à la Nation.
2. La Nation exerce le pouvoir par ses représentants ou l'exerce directement.

Article 5

La République de Pologne sauvegarde l'indépendance et l'inviolabilité de son territoire, elle garantit les libertés et les droits de l'homme et du citoyen ainsi que la sécurité des citoyens, elle sauvegarde le patrimoine national et assure la protection de l'environnement s'inspirant du principe du développement durable.

Article 6

1. La République de Pologne assure les conditions à la propagation et à l'accès égal aux biens de la culture étant la source de l'identité de la nation polonaise, de sa durabilité et de son développement.
2. La République de Pologne accorde son aide aux Polonais résidant à l'étranger pour qu'ils puissent entretenir les liens avec le patrimoine national culturel.

Article 7

Les autorités de la puissance publique déploient leurs activités en vertu et dans les limites du droit.

Article 8

1. La Constitution est le droit suprême de la République de Pologne.
2. Les dispositions de la Constitution sont directement applicables, sauf dispositions constitutionnelles contraires.

Article 9

La République de Pologne respecte le droit international par lequel elle est liée.

Article 10

1. Le régime politique de la République de Pologne a pour fondement la séparation et l'équilibre entre les pouvoirs législatif, exécutif et judiciaire.
2. La Diète et le Sénat exercent le pouvoir législatif, le Président de la République et le Conseil des Ministres exercent le pouvoir exécutif, les cours et les tribunaux exercent le pouvoir judiciaire.

Article 11

1. La République de Pologne garantit la liberté de fonder des partis politiques et la liberté de leurs activités. Les partis politiques réunissent, 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.
2. Le financement des partis politiques est rendu public.

Article 12

La République de Pologne garantit la liberté de former des syndicats, des organisations socio-professionnelles d'agriculteurs, des associations, des mouvements civiques et d'autres groupements et fondations basés sur la libre participation et elle garantit la liberté de leurs activités.

Article 13

Sont interdits les partis politiques et les organisations qui ont recours dans leurs programmes aux méthodes et pratiques totalitaires du nazisme, du fascisme et du communisme, également ceux dont le programme ou les activités admettent ou autorisent la manifestation de 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 participation secrètes.

Article 14

La République de Pologne garantit la liberté de la presse et des autres médias.

Article 15

1. Le régime territorial garantit la décentralisation de la puissance publique.
2. La division territoriale de base de l'Etat, tenant compte des liens sociaux, économiques ou culturels et garantissant aux unités territoriales la capacité d'accomplir leurs missions publiques, est définie par une loi.

Article 16

1. L'ensemble des habitants d'un territoire constituant une unité de la division territoriale représente une collectivité territoriale.
2. Les collectivités territoriales participent à l'exercice de la puissance publique. Elles accomplissent en leur propre nom et sous leur propre responsabilité la partie considérable des missions publiques qui leur appartiennent en vertu des lois.

Article 17

1. Peuvent être créées en vertu de la loi des organisations d'autogestion professionnelle représentant les personnes qui exercent des professions fondées sur la confiance du public et veillant au bon exercice de ces professions dans les limites de l'intérêt public et en vue de protéger celui-ci.
2. D'autres organisations d'autogestion peuvent être également créées en vertu de la loi. Elles ne peuvent porter atteinte à la liberté d'exercer la profession ni limiter la liberté d'entreprendre des activités économiques.

Article 18

La République de Pologne sauvegarde et protège le mariage en tant qu'union de la femme et de l'homme, la famille, la maternité et la qualité de parents.

Article 19

La République de Pologne assure une assistance particulière aux vétérans des luttes pour l'indépendance, surtout aux invalides de guerre.

Article 20

L'économie de marché sociale fondée sur la libre activité économique, la propriété privée et la solidarité, le dialogue et la coopération entre les partenaires sociaux constitue le fondement du système économique de la République de Pologne.

Article 21

1. La République de Pologne protège la propriété et le droit de succession.
2. L'expropriation n'est admissible que pour cause d'utilité publique et contre une équitable indemnité.

Article 22

La liberté d'exercer des activités économiques ne peut être limitée qu'en vertu d'une loi et pour cause d'intérêt public important.

Article 23

L'exploitation familiale est le fondement du régime agricole de l'Etat. Ce principe ne porte pas atteinte aux dispositions des articles 21 et 22.

Article 24

La République de Pologne protège le travail. L'Etat exerce la surveillance des conditions de travail.

Article 25

1. Les Eglises et les autres unions confessionnelles jouissent de droits égaux.
2. Les pouvoirs publics en République de Pologne gardent l'impartialité en matière de convictions religieuses, de conception du monde et d'opinions philosophiques, assurant la liberté de leur expression dans la vie publique.
3. Les rapports entre l'Etat et les Eglises et les autres unions confessionnelles se fondent sur les principes du respect de leur autonomie et de leur indépendance mutuelle dans le domaine qui leur appartient, ainsi que sur le principe de la coopération pour le bien de l'homme et pour le bien commun.
4. Les rapports entre la République de Pologne et l'Eglise catholique sont définis par un traité conclu avec le Saint-Siège et par des lois.
5. Les rapports entre la République de Pologne et les autres Eglises et unions confessionnelles sont définis par des lois basées sur des accords conclus par le Conseil des Ministres avec leurs représentants compétents.

Article 26

1. Les Forces armées de la République de Pologne sauvegardent l'indépendance de l'Etat et l'intégrité de son territoire et garantissent la sécurité et l'inviolabilité de ses frontières.
2. Les Forces armées restent politiquement neutres et sont soumises à un contrôle civil et démocratique.

Article 27

La langue polonaise est la langue officielle en République de Pologne. Cette disposition ne porte pas atteinte aux droits des minorités nationales prévus par les traités ratifiés.

Article 28

1. L'emblème de la République de Pologne est l'aigle blanc couronné sur champ rouge.
2. Les couleurs de la République de Pologne sont le blanc et le rouge.

3. L'hymne national de la République de Pologne est la «Mazurka de Dąbrowski».
4. L'emblème, les couleurs et l'hymne de la République de Pologne sont protégés par la loi.
5. Les détails concernant l'emblème, les couleurs et l'hymne sont définis par une loi.

Article 29

La capitale de la République de Pologne est Varsovie.

Titre II

LES LIBERTES, LES DROITS ET LES DEVOIRS DE L'HOMME ET DU CITOYEN

PRINCIPES GENERAUX

Article 30

La dignité inhérente et inaliénable de l'homme constitue la source des libertés et des droits de l'homme et du citoyen. Elle est inviolable et son respect et sa protection sont le devoir des pouvoirs publics.

Article 31

1. La liberté de l'homme est protégée par la loi.
2. Chacun a le devoir de respecter les libertés et les droits d'autrui. Nul ne peut être contraint à accomplir des actes qui ne lui sont pas imposés par la loi.
3. 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 à l'ordre public, à la protection de l'environnement, de la santé et de la moralité publiques ou des libertés et des droits d'autrui. Ces restrictions ne peuvent porter atteinte à l'essence des libertés et des droits.

Article 32

1. Tous sont égaux devant la loi. Tous ont droit à un traitement égal par les pouvoirs publics.
2. Nul ne peut être discriminé dans la vie politique, sociale ou économique pour une raison quelconque.

Article 33

1. La femme et l'homme en République de Pologne ont des droits égaux dans la vie familiale, politique, sociale et économique.
2. La femme et l'homme ont en particulier des droits égaux dans le domaine de la formation, de l'emploi et de l'avancement, à une rémunération égale pour un travail de valeur égale, à la sécurité sociale et à l'accès aux emplois, aux fonctions, aux dignités et aux distinctions.

Article 34

1. La nationalité polonaise est acquise par naissance de parents étant des citoyens polonais. D'autres cas d'acquisition de la nationalité polonaise sont déterminés par la loi.
2. Le citoyen polonais ne peut perdre la nationalité polonaise, à moins qu'il renonce à celle-ci.

Article 35

1. La République de Pologne garantit aux citoyens polonais appartenant à des minorités nationales et ethniques la liberté de conserver et de développer leur propre langue, de conserver les coutumes et les traditions et de développer leur propre culture.
2. Les minorités nationales et ethniques ont le droit de créer leurs propres institutions d'éducation, des institutions culturelles et des institutions servant la protection de leur identité religieuse et la participation à la prise de décisions dans le domaine de leur identité culturelle.

Article 36

Le citoyen polonais en séjour à l'étranger, a le droit de bénéficier de l'assistance de la République de Pologne.

Article 37

1. Tous ceux qui relèvent de la puissance de la République de Pologne bénéficient des libertés et des droits garantis par la Constitution.
2. Les exceptions à cette règle relatives aux étrangers, sont définies par la loi.

LES LIBERTES ET LES DROITS PERSONNELS

Article 38

La République de Pologne garantit à tout homme la protection juridique de la vie.

Article 39

Nul ne peut être soumis à l'expérience scientifique, dont l'expérience médicale, sans son libre consentement.

Article 40

Nul ne peut être soumis à la torture ni à des traitements ou des peines cruels, inhumains ou dégradants. Il est interdit d'infliger des peines corporelles.

Article 41

1. L'inviolabilité et la liberté personnelles sont garanties à chacun. La privation et la limitation de la liberté ne peuvent intervenir que suivant les règles et conformément à la procédure prévue par la loi.
2. Quiconque se trouve privé de la liberté sans sentence judiciaire a le droit d'introduire un recours devant le tribunal afin que celui-ci statue sans délai sur la légalité de cette privation. La famille ou la personne indiquée par la personne privée de liberté sont informées sans délai de la privation.
3. Toute personne retenue en détention doit être informée sans délai et en termes, pour elle, explicites des raisons de la détention. Dans les quarante-huit heures suivant la détention, elle doit être mise à la disposition du tribunal. La personne détenue doit être mise en liberté si la décision du tribunal sur la détention provisoire et la formulation de l'allégation portée contre elle ne lui sont pas signifiées dans les vingt-quatre heures après sa mise à la disposition du tribunal.
4. Toute personne privée de liberté doit être traitée avec humanité.
5. Toute personne victime de privation de liberté illégale a droit à réparation.

Article 42

1. Seul encourt la responsabilité pénale celui qui a commis un acte défendu, sous menace d'une peine, par la loi en vigueur au moment où l'acte a été commis. Cette règle n'est pas un em-

pêchement à la punition d'un acte qui, au moment où il a été commis, constituait une infraction d'après le droit international.

2. Toute personne contre laquelle une procédure pénale est engagée a droit à la défense en tout état de la procédure. Elle a droit à un défenseur de son choix ou à un défenseur d'office établi en vertu des dispositions de la loi.
3. Toute personne est présumée innocente jusqu'à ce que sa culpabilité ait été établie par un jugement ayant force de chose jugée.

Article 43

Les crimes de guerre et les crimes contre l'humanité n'encourent pas la prescription.

Article 44

Le cours de la prescription des infractions commises par les fonctionnaires publics ou sur leur ordre, non poursuivies pour des raisons politiques, est suspendu jusqu'à cessation de ces raisons.

Article 45

1. Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement, sans retard excessif, par un tribunal compétent, indépendant et impartial.
2. Le huis clos peut être prononcé dans l'intérêt des bonnes moeurs, de la sécurité de l'Etat, de l'ordre public, soit pour protéger la vie privée des parties ou des intérêts privés importants. Le jugement rendu est public.

Article 46

La confiscation de choses ne peut intervenir que dans les conditions déterminées par la loi et qu'en vertu d'une décision du tribunal passée en force de chose jugée.

Article 47

Chacun a droit à la protection juridique de la vie privée, familiale, de sa dignité et de sa réputation et de décider de sa vie personnelle.

Article 48

1. Les parents ont le droit d'assurer une éducation à leurs enfants qui soit conforme à leurs convictions. Elle doit tenir compte du développement des capacités de l'enfant ainsi que de sa liberté de conscience, de religion et de ses convictions.
2. Il ne peut y avoir limitation ou privation d'autorité parentale que dans les conditions déterminées par la loi et qu'en vertu d'un jugement ayant force de chose jugée.

Article 49

La liberté et la protection du secret de la communication sont garanties. Elles ne peuvent être limitées que dans les conditions et suivant les modalités déterminées par la loi.

Article 50

L'inviolabilité du domicile est garantie. La perquisition du domicile, d'autres locaux et du véhicule ne peut intervenir que dans les conditions et suivant les modalités prévues par la loi.

Article 51

1. Nul ne peut être engagé autrement qu'en vertu d'une loi de révéler des informations le concernant.
2. Les pouvoirs publics ne peuvent recueillir, assembler et rendre accessibles d'autres informations sur les citoyens que celles qui sont nécessaires dans un Etat démocratique de droit.
3. Chacun a droit à l'accès aux documents officiels qui le concernent et aux bases de données. Les restrictions à ce droit ne peuvent être prévues que par une loi.

4. Chacun a droit d'exiger la rectification et l'élimination d'informations fausses, incomplètes ou recueillies de façon contraire à la loi.
5. Les principes et la procédure du recueil et de l'accès à l'information sont prévus par la loi.

Article 52

1. Chacun a le droit de circuler librement sur le territoire de la République de Pologne et d'y choisir librement le lieu de sa résidence et de son séjour.
2. Toute personne est libre de quitter le territoire de la République de Pologne.
3. Les libertés mentionnées aux premier et deuxième alinéas ne peuvent être l'objet de restrictions que si celles-ci sont prévues par la loi.
4. Le citoyen polonais ne peut être expulsé de son pays, ni privé du droit d'entrer dans son propre pays.
5. La personne dont l'origine polonaise a été constatée conformément à la loi a le droit de s'établir à demeure sur le territoire de la République de Pologne.

Article 53

1. Toute personne a droit à la liberté de conscience et de religion.
2. La liberté de religion implique la liberté d'avoir ou d'adopter la religion de son choix et la liberté de manifester sa religion, individuellement ou en commun, en public ou en privé, par le culte, la prière, l'accomplissement des rites, les pratiques et l'enseignement. La liberté de religion implique aussi la possession de sanctuaires et d'autres lieux de culte suivant les besoins des croyants et le droit de toute personne de bénéficier de l'assistance religieuse dans le lieu où elle se trouve.
3. Les parents ont le droit d'assurer aux enfants l'éducation et l'enseignement moral et religieux conformément à leurs propres convictions. Les dispositions du premier alinéa de l'article 48 sont respectivement applicables.
4. La religion d'une Eglise ou d'une autre union confessionnelle à statut juridique régulier peut être enseignée à l'école, ce qui ne peut porter atteinte à la liberté de conscience et de religion d'autrui.
5. La liberté de manifester sa religion ne peut faire l'objet que des seules restrictions prévues par une loi et qui sont nécessaires à la protection de la sécurité de l'Etat, de l'ordre public et de la santé, de la morale ou des libertés et des droits d'autrui.
6. Nul ne peut subir la contrainte de participer ou de ne pas participer aux pratiques religieuses.
7. Nul ne peut être engagé par les autorités de la puissance publique à révéler sa conception du monde, ses convictions religieuses ou sa confession.

Article 54

1. Toute personne a droit à la liberté d'expression et à la liberté de recevoir et de propager des informations.
2. La censure préventive des médias et la concession de la presse sont interdites. Le devoir d'obtenir une concession en vue de gérer une station de radiodiffusion ou de télévision peut être introduit par une loi.

Article 55

1. L'extradition d'un citoyen polonais est interdite.
2. L'extradition d'une personne soupçonnée d'avoir commis une infraction politique sans recours à la violence est interdite.
3. Le tribunal statue sur l'admissibilité de l'extradition.

Article 56

1. Les ressortissants étrangers peuvent bénéficier du droit d'asile en République de Pologne en vertu des dispositions de la loi.
2. Un ressortissant étranger qui cherche en République de Pologne la protection contre la persécution peut se voir attribuer le statut de réfugié conformément aux traités liant la République de Pologne.

LES LIBERTES ET LES DROITS POLITIQUES

Article 57

La liberté d'organiser des réunions pacifiques et d'y participer est garantie à chacun. Elle peut être l'objet de restrictions prévues par la loi.

Article 58

1. La liberté de s'associer est garantie à toute personne.
2. Sont interdites les associations dont l'objectif ou l'activité sont contraires à la Constitution ou à la loi. Le tribunal statue sur le refus d'enregistrement ou l'interdiction des activités d'une telle association.
3. La loi détermine les genres d'associations soumises à l'enregistrement juridique, la procédure d'enregistrement et les formes de contrôle de celles-ci.

Article 59

1. Est garantie à chacun la liberté de s'affilier aux syndicats, aux organisations socio-professionnelles d'agriculteurs et aux associations d'employeurs.
2. Les syndicats ainsi que les employeurs et leurs associations ont le droit de négociation, surtout en vue de régler les conflits collectifs et de conclure des conventions collectives de travail et d'autres accords.
3. Les syndicats ont le droit d'organiser des grèves et d'autres formes de protestation dans les limites prévues par la loi. Celle-ci peut limiter le droit de grève ou interdire la grève de certaines catégories de travailleurs ou dans des secteurs déterminés, dans l'intérêt du bien public.
4. La liberté de s'affilier aux syndicats et aux associations d'employeurs et les autres libertés syndicales ne peuvent faire l'objet d'autres restrictions que de celles qui, prévues par la loi, sont admissibles en vertu des traités liant la République de Pologne.

Article 60

Les citoyens polonais jouissant de la plénitude des droits publics ont le droit d'accéder, dans des conditions d'égalité, aux fonctions publiques.

Article 61

1. Le citoyen a le droit d'obtenir des informations sur l'activité des autorités de la puissance publique et sur les personnes exerçant des fonctions publiques. Ce droit implique également l'obtention d'informations sur les activités des autorités d'autogestion économiques et professionnelles ainsi que des personnes et des unités d'organisation dans la mesure où celles-ci accomplissent des missions de la puissance publique et gèrent les biens communaux ou appartenant au Fisc.
2. Le droit d'obtenir des informations implique aussi le droit d'accès aux documents et aux réunions des autorités collégiales de la puissance publique élues au suffrage universel, y compris l'enregistrement du son ou de l'image.

3. Les droits mentionnés aux premier et deuxième alinéas ne peuvent être l'objet de restrictions que si celles-ci sont nécessaires à la protection des libertés et des droits d'autres personnes et unités économiques, à la protection de l'ordre public, de la sécurité ou dans l'intérêt économique important de l'Etat prévus par les lois.
4. Les modalités de la communication des informations visées aux premier et deuxième alinéas sont prévues par des lois, et, pour la Diète et le Sénat, par leurs règlements intérieurs.

Article 62

1. Tout citoyen polonais ayant dix-huit ans accomplis au plus tard le jour du vote a le droit de participer au référendum et le droit d'élire le Président de la République, les députés, les sénateurs et les représentants aux autorités des collectivités territoriales.
2. Sont privés du droit de participer au référendum et du droit d'élection les interdits en vertu d'une décision judiciaire passée en force de chose jugée ainsi que les personnes déchues des droits publics ou électoraux.

Article 63

Toute personne a le droit de déposer dans l'intérêt public, dans son propre intérêt ou dans celui d'une autre personne qui y consent, des réclamations, des recours et des plaintes auprès des autorités de la puissance publique, des organisations et des institutions sociales, en rapport avec les missions de l'administration publique que celles-ci accomplissent. La procédure de l'examen des réclamations, des recours et des plaintes est prévue par la loi.

LES LIBERTES ET LES DROITS ECONOMIQUES, SOCIAUX ET CULTURELS

Article 64

1. Toute personne a droit à la propriété, à d'autres droits patrimoniaux, ainsi qu'elle jouit du droit de succession.
2. La propriété et d'autres droits patrimoniaux ainsi que le droit de succession sont juridiquement protégés, dans des conditions d'égalité.
3. La propriété ne peut faire l'objet de restrictions qu'en vertu de la loi, dans la mesure où celle-ci ne porte pas atteinte à la nature du droit à la propriété.

Article 65

1. Toute personne a droit à la liberté de choisir et d'exercer une profession et de choisir le lieu de travail. Les exceptions sont prévues par la loi.
2. L'obligation de travailler ne peut être imposée que par la loi.
3. Il est interdit d'employer les enfants de moins de seize ans à titre permanent. Les formes et le caractère de l'emploi admissible sont définis par la loi.
4. Le montant minimum de la rémunération pour le travail accompli ou la façon d'établir ce montant sont prévus par la loi.
5. Les pouvoirs publics mettent en oeuvre une politique visant le plein emploi productif par la réalisation de programmes de lutte contre le chômage dont l'organisation, et le soutien y accordé, d'activités de conseil, de la formation professionnelle, de travaux d'intérêt public et de travaux subventionnés.

Article 66

1. Chacun a droit à la sécurité et à l'hygiène du travail. Les modalités de l'exercice de ce droit et les devoirs de l'employeur sont prévus par la loi.

2. Le travailleur a droit à des jours fériés et à des congés annuels payés déterminés par la loi; les normes maximales de la durée du travail sont définies par la loi.

Article 67

1. Le citoyen a droit à la sécurité sociale en cas d'incapacité de travail due à la maladie, à l'infirmité ou après avoir atteint Page de la retraite. L'étendue et les formes de sécurité sociale sont prévues par la loi.
2. Un citoyen demeurant sans emploi par suite de circonstances indépendantes de sa volonté et n'ayant aucun autre moyen de subsistance a droit à la sécurité sociale dont l'étendue et les formes sont définies par la loi.

Article 68

1. Chacun a droit à la protection de la santé.
2. Les pouvoirs publics garantissent à tous les citoyens, indépendamment de leur situation matérielle, un accès égal à l'octroi des soins de santé financés des fonds publics. Les modalités et l'étendue de l'octroi des soins sont définis par la loi.
3. Les pouvoirs publics sont engagés à assurer l'assistance médicale particulière aux enfants, aux femmes enceintes, aux personnes handicapées et aux personnes âgées.
4. Les pouvoirs publics sont engagés à combattre les maladies épidémiques et à prendre des mesures préventives contre les effets nuisibles à la santé de la dégradation du milieu naturel.
5. Les pouvoirs publics favorisent le développement de la culture physique, en particulier parmi les enfants et les adolescents.

Article 69

Les pouvoirs publics accordent, en vertu de la loi, une aide aux personnes handicapées en matière de moyens d'existence, de formation professionnelle et de communication sociale.

Article 70

1. Toute personne a droit à l'éducation. L'enseignement est obligatoire jusqu'à l'âge de dix-huit ans. Les modalités de l'exercice de la scolarité obligatoire sont définies par la loi.
2. L'enseignement dans les écoles publiques est gratuit. La loi peut prévoir le paiement pour certains services d'instruction prêtés par les écoles supérieures publiques.
3. Les parents ont la liberté de choisir pour leurs enfants des établissements scolaires autres que ceux publics. Les citoyens et les institutions ont le droit de créer des établissements d'enseignement primaire, secondaire et supérieur ainsi que des établissements d'éducation. Les modalités de l'établissement et du fonctionnement des écoles autres que celles publiques et de la participation des pouvoirs publics à leur financement ainsi que les principes de surveillance pédagogique des écoles et des établissements d'éducation sont définis par la loi.
4. Les pouvoirs publics garantissent aux citoyens un accès général et égal à l'instruction. Acet effet ils créent et soutiennent des systèmes d'aide financière et organisationnelle individuelle aux élèves et aux étudiants. Les modalités de cette aide sont définies par la loi.
5. L'autonomie des écoles supérieures est garantie suivant des principes fixés par la loi.

Article 71

1. Mettant en oeuvre sa politique sociale et économique l'Etat prend en considération le bien de la famille. Les familles qui se trouvent dans une situation matérielle et sociale difficile, surtout les familles nombreuses et les mères ou les pères célibataires, ont droit à une assistance particulière de la part des pouvoirs publics.
2. La mère, avant et après la naissance de l'enfant, a droit à une assistance spéciale de la part des pouvoirs publics dont l'étendue est définie par la loi.

Article 72

1. La République de Pologne garantit la protection des droits de l'enfant. Chacun a le droit d'exiger des autorités de la puissance publique la protection de l'enfant contre la violence, la cruauté, l'exploitation et la démoralisation.
2. L'enfant privé de l'assistance parentale a droit à l'assistance et à l'aide des pouvoirs publics.
3. Les autorités de la puissance publique et les personnes responsables de l'enfant sont tenues, lors de l'établissement des droits de celui-ci, d'entendre l'enfant et de prendre en considération, si possible, son opinion.
4. La loi définit les compétences et les modalités d'instituer le Défenseur des Droits de l'Enfant.

Article 73

La liberté de création artistique, de recherches scientifiques et de publication de leurs résultats, la liberté d'enseigner ainsi que la liberté de bénéficier des biens de la culture sont garanties à toute personne.

Article 74

1. Les pouvoirs publics réalisent une politique garantissant la sécurité écologique aux générations présentes et futures.
2. La protection de l'environnement est le devoir des pouvoirs publics.
3. Chacun a droit à l'information sur la qualité et la protection de l'environnement.
4. Les pouvoirs publics soutiennent les activités des citoyens en faveur de la protection et de l'amélioration de la qualité de l'environnement.

Article 75

1. Les pouvoirs publics mettent en oeuvre une politique favorisant la satisfaction des besoins des citoyens en matière de logement et, en particulier, ils réagissent contre l'existence de sans-abris, accordent leur soutien au développement de logements sociaux et favorisent l'activité des citoyens visant à acquérir un logement.
2. La loi définit la protection des droits des locataires.

Article 76

Les pouvoirs publics protègent les consommateurs, les usagers et les preneurs contre des actions exposant au danger leur santé, leur vie privée, menaçant leur sécurité et contre des pratiques malhonnêtes sur le marché. L'étendue de cette protection est définie par la loi.

LES MESURES DE PROTECTION DES LIBERTES ET DES DROITS

Article 77

1. Chacun a droit à réparation du dommage qu'il asubi à la suite de l'action illégale de l'autorité de la puissance publique.
2. La loi ne peut fermer à personne la voie judiciaire à faire valoir ses libertés et ses droits violés.

Article 78

Chacune des parties a droit de recours contre les jugements et les décisions rendus en première instance. Les exceptions à ce principe et la procédure de recours sont déterminées par la loi.

Article 79

1. Toute personne dont les libertés ou les droits ont été violés, a le droit, conformément aux principes définis par la loi, de porter plainte devant le Tribunal constitutionnel en matière de

conformité avec 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.

2. Les dispositions du premier alinéa ne sont pas applicables aux droits visés à l'article 56.

Article 80

Toute personne a le droit d'adresser au Défenseur des Droits civiques, suivant les principes définis par la loi, une demande d'assistance en matière de protection des libertés et des droits auxquels les autorités de la puissance publique ont porté atteinte.

Article 81

Les droits visés aux quatrième et cinquième alinéas de l'article 65 et aux articles 66,69,71 et 74-76 ne peuvent être poursuivis que dans les limites définies par la loi.

LES DEVOIRS

Article 82

La fidélité à la République de Pologne et le souci du bien commun sont le devoir du citoyen polonais.

Article 83

Chacun est tenu de respecter la loi de la République de Pologne.

Article 84

Chacun est tenu de supporter les contributions et les charges publiques dont les impôts, prévues par la loi.

Article 85

1. La défense de la Patrie est le devoir de tout citoyen.
2. L'étendue du devoir d'accomplissement du service militaire est définie par la loi.
3. Tout citoyen qui, pour des raisons de convictions religieuses ou des raisons de conscience, ne peut accomplir le service militaire, peut être tenu d'accomplir un service de remplacement, conformément aux principes définis par la loi.

Article 86

Chacun est tenu de veiller à la qualité de l'environnement et assume la responsabilité pour la dégradation qu'il aprovoquée. Les modalités de l'engagement de cette responsabilité sont définies par la loi.

Titre III

LES SOURCES DU DROIT

Article 87

1. La Constitution, les lois, les traités ratifiés et les règlements sont les sources de droit en vigueur générale en République de Pologne.
2. Les textes de portée locale sont les sources de droit en vigueur générale en République de Pologne, dans le champ d'activité des autorités qui les ont établis.

Article 88

1. La publication des lois, des règlements et des textes de portée locale est la condition de leur entrée en vigueur.
2. Les principes et la procédure de la publication des actes normatifs sont prévus par la loi.
3. Les traités ratifiés en vertu d'une loi d'autorisation sont publiés suivant la procédure appliquée aux lois. Les principes de la publication des autres traités sont définis par la loi.

Article 89

1. La ratification par la République de Pologne d'un traité et sa dénonciation exige 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 et 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 régies par une loi ou pour lesquelles la Constitution exige une loi.
2. Le Président du Conseil des Ministres informe la Diète de l'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 la conclusion, de la ratification et de la dénonciation des traités sont prévus par la loi.

Article 90

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.

Article 91

1. Le traité 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.
2. 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.
3. Si cela résulte du traité ratifié par la République de Pologne instituant une organisation internationale, le droit qu'il crée est directement applicable et a une autorité supérieure en cas d'incompatibilité avec les lois.

Article 92

1. Les règlements sont édictés par les autorités prévues par la Constitution en vertu des délégations détaillées contenues dans la loi et en vue de l'application de celle-ci. Les délégations doivent déterminer l'autorité compétente pour édicter un règlement et l'étendue des matières à régler ainsi que les directives relatives à son contenu.

2. L'autorité autorisée à édicter les règlements ne peut déléguer les pouvoirs visés au premier alinéa à une autre autorité.

Article 93

1. Les résolutions du Conseil des Ministres et les arrêtés du Président du Conseil des Ministres ont un caractère interne et ne sont applicables qu'aux unités d'organisation relevant de l'autorité qui les édicte.
2. Les arrêtés ne sont édictés qu'en vertu d'une loi. Ils ne peuvent servir de base juridique aux décisions prises à l'égard des citoyens, des personnes morales et d'autres sujets de droit.
3. Les résolutions et les arrêtés sont soumis au contrôle de leur conformité avec le droit en vigueur générale.

Article 94

Les autorités des collectivités territoriales et les autorités territoriales de l'administration gouvernementale établissent, en vertu et dans les limites des délégations contenues dans la loi, des textes étant en vigueur dans le champ d'activité de ces autorités. Les principes et la procédure, conformément auxquels ces actes sont édictés, sont prévus par la loi.

Titre IV

LA DIETE ET LE SENAT

Article 95

1. La Diète et le Sénat exercent en République de Pologne le pouvoir législatif.
2. La Diète exerce le contrôle des activités du Conseil des Ministres dont l'étendue est définie par les dispositions de la Constitution et des lois.

LES ELECTIONS ET LA LEGISLATURE

Article 96

1. La Diète est composée de 460 députés.
2. Les députés sont élus au suffrage universel, égal, direct, proportionnel, au scrutin secret.

Article 97

1. Le Sénat est composé de 100 sénateurs.
2. Les sénateurs sont élus au suffrage universel, direct, au scrutin secret.

Article 98

1. Les législatures de la Diète et du Sénat durent quatre ans à compter de la date de la réunion de la Diète en première séance. Elles viennent à expiration le jour précédant celui de la première séance de la Diète de la législature suivante.
2. Le Président de la République ordonne les élections à la Diète et au Sénat quatre-vingt dix jours au plus tard avant l'expiration du délai de quatre ans à dater du début de la législature de la Diète et du Sénat, fixant la date de celles-ci à un jour férié tombant au cours des trente jours précédant l'expiration de la période de quatre ans à compter du début de la législature de la Diète et du Sénat.
3. La Diète peut mettre fin à la législature en vertu d'une résolution votée à la majorité des deux tiers des voix au moins du nombre constitutionnel des députés. L'abrégement de la législature de la Diète entraîne l'abrégement de celle du Sénat. Les dispositions du cinquième alinéa sont respectivement applicables.

4. Le Président de la République peut prononcer l'abrégement de la législature de la Diète, sur avis du Président de la Diète et du Président du Sénat et dans les cas prévus par la Constitution. L'abrégement de la législature de la Diète entraîne Γ abrégement de celle du Sénat.
5. Le Président de la République, prononçant l'abrégement de la législature de la Diète, ordonne en même temps les élections à la Diète et au Sénat fixant la date de celles-ci à un jour tombant au cours des quarante-cinq jours à compter de la date à laquelle l'abrégement a été prononcé. Le Président de la République convoque la première séance de la Diète nouvellement élue pour le quinzième jour au plus tard après la date des élections.
6. En cas d'abrégement de la législature de la Dicte, les dispositions du premier alinéa s'appliquent respectivement.

Article 99

1. Peut être élu à la Diète chaque citoyen polonais jouissant du droit d'élection et ayant vingt-et--un ans accomplis au plus tard le jour des élections.
2. Peut être élu au Sénat chaque citoyen polonais jouissant du droit d'élection et ayant trente ans accomplis au plus tard le jour des élections.

Article 100

1. Les candidats aux sièges de députés et de sénateurs peuvent être présentés par les partis politiques et les électeurs.
2. Nul ne peut se porter candidat simultanément à la Diète et au Sénat.
3. Les principes et la procédure de la présentation des candidats, de l'organisation des élections et les conditions de validité des élections sont définis par la loi.

Article 101

1. La Cour suprême statue sur la validité des élections à la Diète et au Sénat.
2. L'électeur a le droit de porter plainte devant la Cour suprême en matière de validité des élections conformément aux principes définis par la loi.

LES DEPUTES ET LES SENATEURS

Article 102

Nul ne peut être en même temps député et sénateur.

Article 103

1. Le mandat de député est incompatible avec la fonction de Président de la Banque nationale de Pologne, de Président de la Chambre suprême de Contrôle, de Défenseur des Droits civiques, de Défenseur des Droits de l'Enfant et de leurs adjoints, de membre du Conseil de la Politique monétaire, de membre du Conseil national de la Radiophonie et de la Télévision, avec l'emploi à la Chancellerie de la Diète, à la Chancellerie du Sénat, à la Chancellerie du Président de la République ou avec l'emploi dans l'administration gouvernementale. Cette restriction ne concerne pas les membres du Conseil des Ministres et les secrétaires d'Etat çmployés dans Γ administration gouvernementale.
2. Le juge, le procureur, le fonctionnaire civil, le militaire accomplissant le service militaire actif, le fonctionnaire de police, le fonctionnaire des services de protection de l'Etat ne peuvent exercer le mandat de député.
3. D'autres cas d'incompatibilité du mandat de député avec des fonctions publiques et d'interdiction de l'exercer peuvent être définis par la loi.

Article 104

1. Les députés sont les représentants de la Nation. Ils ne sont pas liés par les instructions des électeurs.
2. Avant d'entrer en fonction, les députés prêtent le serment suivant:
   «Je jure solennellement d'accomplir honnêtement et consciencieusement les devoirs envers la Nation, de veiller à la souveraineté et aux intérêts de l'Etat, de faire tout pour la prospérité de la Patrie et pour le bien des citoyens, de respecter la Constitution et les autres lois de la République de Pologne».
   Le serment peut être complété par les mots: «Que Dieu me vienne en aide».
3. Le refus de prêter serment vaut renonciation au mandat.

Article 105

1. Le député n'est pas responsable des actes liés à l'exercice de son mandat, ni pendant la durée de celui-ci, ni après son expiration. Pour ces actes, le député n'est responsable que devant la Diète et en cas d'atteinte portée aux droits de tierces personnes, il ne peut encourir la responsabilité devant les tribunaux qu'avec l'autorisation de la Diète.
2. Le député ne peut encourir la responsabilité pénale qu'avec l'autorisation de la Diète, depuis la date de la publication des résultats des élections jusqu'à la date de l'expiration de son mandat.
3. La procédure pénale introduite contre une personne avant la date de son élection au siège de député est suspendue, à la demande de la Diète, jusqu'à l'expiration du mandat. Dans ce cas, le cours de la prescription en procédure pénale est également suspendu.
4. Le député peut consentir à encourir la responsabilité pénale. Dans ce cas, les dispositions des deuxième et troisième alinéas ne sont pas applicables.
5. Le député ne peut être arrêté ou détenu qu'avec l'autorisation de la Diète, sauf le cas de flagrant délit ou lorsque sa détention est indispensable au déroulement convenable de la procédure. Le Président de la Diète en est informé sans délai et peut ordonner la relaxation immédiate du détenu.
6. Une loi définit en détail les principes relatifs à la responsabilité pénale des députés et la procédure.

Article 106

La loi définit les conditions de'l'accomplissement efficace des devoirs de député ainsi que la protection des droits inhérents à l'exercice du mandat.

Article 107

1. Le député ne peut exercer une activité économique en tirant profit des moyens appartenant au Fisc ou aux collectivités territoriales ni en acquérir la propriété, dans les limites définies par la loi.
2. Pour violation des interdictions visées au premier alinéa, le député peut être traduit, en vertu d'une résolution votée à la demande du Président de la Diète, devant le Tribunal d'Etat qui statue sur la déchéance du mandat.

Article 108

Les dispositions des articles 103-107 s'appliquent respectivement aux sénateurs.

L'ORGANISATION ET LE FONCTIONNEMENT

Article 109

1. La Diète et le Sénat délibèrent en séances.

2. Les premières séances de la Diète et du Sénat sont convoquées par le Président de la République au cours des trente jours qui suivent la date des élections, sauf les cas prévus aux troisième et cinquième alinéas de l'article 98.

Article 110

1. La Diète élit en son sein le Président de la Diète et les vice-présidents.
2. Le Président de la Diète préside les débats de la Diète, fait observer les droits de la Diète et représente celle-ci à l'extérieur.
3. La Diète nomme des commissions permanentes et elle peut nommer des commissions spéciales.

Article 111

1. La Diète peut nommer une commission d'enquête chargée d'examiner une affaire concrète.
2. Les modalités des travaux de la commission d'enquête sont prévues par la loi.

Article 112

Le règlement intérieur voté par la Diète définit l'organisation interne, l'ordre des travaux de la Diète, la procédure de la nomination et les modalités du fonctionnement de ses organes, ainsi que les modalités de l'accomplissement des devoirs constitutionnels et légaux des autorités de l'Etat envers la Diète.

Article 113

Les séances de la Diète sont publiques. Lorsque le bien de l'Etat l'exige, la Diète peut voter le comité secret à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents.

Article 114

1. Dans les cas expressément prévus par la Constitution, la Diète et le Sénat délibérant en commun sous la présidence du Président de la Diète ou, en cas de suppléance, sous la présidence du Président du Sénat, forment l'Assemblée nationale.
2. L'Assemblée nationale adopte son propre règlement intérieur.

Article 115

1. Le Président du Conseil des Ministres et les autres membres du Conseil des Ministres sont tenus de répondre aux interpellations et aux questions des députés dans un délai de vingt-et-un jours.
2. Le Président du Conseil des Ministres et les autres membres du Conseil des Ministres sont tenus de répondre aux questions portant sur les affaires courantes à chaque séance de la Diète.

Article 116

1. La Diète décide, au nom de la République de Pologne, de la proclamation de l'état de guerre et de la conclusion de la paix.
2. La Diète ne peut voter une résolution sur l'état de guerre qu'en cas d'agression armée contre la République de Pologne ou lorsque les traités engagent à la défense commune contre l'agression. Si la Diète ne peut se réunir en séance, le Président de la République décide la proclamation de l'état de guerre.

Article 117

Les principes du déploiement des Forces armées hors des frontières de la République de Pologne sont définis par un traité ratifié ou par une loi. Les principes de stationnement des forces armées étrangères sur le territoire de la République de Pologne et les principes de leur déplacement sur ce territoire sont prévus par les traités ratifiés ou par des lois.

Article 118

1. L'initiative legislative appartient aux députés, au Sénat, au Président de la République et au Conseil des Ministres.
2. L'initiative législative appartient également à un groupe de cent mille citoyens au moins jouissant du droit d'élection à la Diète. La procédure en la matière est définie par la loi.
3. Les auteurs du projet de loi soumis à la Diète exposent les conséquences financières de l'application de la loi.

Article 119

1. La Diète examine le projet de loi en trois lectures.
2. Le droit de présenter des amendements au projet de loi lors de son examen par la Diète appartient à l'auteur, aux députés et au Conseil des Ministres.
3. Le Président de la Diète peut refuser de mettre aux voix un amendement qui n'a pas été préalablement soumis à la commission.
4. L'auteur peut retirer le projet de loi au cours de la procédure législative à la Diète avant la fin de la deuxième lecture.

Article 120

La Diète adopte les lois à la majorité simple des voix, la moitié au moins du nombre constitutionnel des députés étant présents, sauf si la Constitution prévoit une autre majorité. Dans les mêmes conditions, la Diète adopte les résolutions si les dispositions de la loi ou de la résolution de la Diète n'en disposent autrement.

Article 121

1. La loi votée par la Diète est transmise par le Président de la Diète au Sénat.
2. Le Sénat peut, dans un délai de trente jours, accepter la loi, l'amender ou la repousser. Si dans le délai de trente jours à compter de la transmission, le Sénat n'adopte pas de résolution en cette matière, la loi est censée acceptée dans la version adoptée par la Diète.
3. La résolution par laquelle le Sénat repousse une loi ou l'amendement proposé dans une résolution du Sénat, sont considérés comme adoptés si la Diète ne les rejette pas à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents.

Article 122

1. A l'issue de la procédure définie à l'article 121, le Président de la Diète soumet la loi adoptée au Président de la République pour signature.
2. Le Président de la République signe la loi dans les vingt-et-un jours à dater de sa transmission et en ordonne la publication au Journal des Lois de la République de Pologne.
3. Avant de signer la loi, le Président de la République peut demander au Tribunal constitutionnel de statuer sur la conformité de celle-ci à la Constitution. Le Président de la République ne peut refuser de signer une loi que le Tribunal constitutionnel aura déclarée conforme à la Constitution.
4. Le Président de la République refuse de signer la loi que le Tribunal constitutionnel aura déclarée non conforme à la Constitution. Si toutefois Γ inconstitutionnalité porte sur des dispositions concrètes de la loi que le Tribunal constitutionnel ne déclarera pas indissolublement liées avec toute la loi, le Président de la République, après avis du Président de la Diète, signe la loi avec omission des dispositions déclarées non conformes à la Constitution soit il la renvoie à la Diète pour élimination de Γ inconstitutionnalité.
5. Le Président de la République peut renvoyer la loi à la Diète, avec avis motivé, pour nouvel examen s'il ne saisit pas le Tribunal constitutionnel pour avis suivant la procédure prévue au troisième alinéa. Le Président de la République signe, dans un délai de sept jours, la loi une nouvelle fois votée par la Diète à la majorité des trois cinquième des voix, la moitié au moins

du nombre constitutionnel des députés étant présents, et en ordonne la publication au Journal des Lois de la République de Pologne. Si la Diète vote la loi une nouvelle fois, le Président de la République n'a plus le droit de demander l'avis du Tribunal constitutionnel suivant la procédure prévue au troisième alinéa.

6. La saisine du Tribunal constitutionnel par le Président de la République pour avis sur la constitutionnalité de la loi ou le renvoi de celle-ci à la Diète pour nouvel examen entraînent la suspension du cours du délai prévu au deuxième alinéa pour la signature de la loi.

Article 123

1. Le Conseil des Ministres peut déclarer l'urgence d'un projet de loi qu'il aintroduit, à l'exception des projets de loi fiscale, des projets de loi relatifs à l'élection du Président de la République, de la Diète, du Sénat et des autorités des collectivités territoriales, des projets de loi sur l'organisation et la compétence des pouvoirs publics, et à l'exception des codes.
2. Le règlement intérieur de la Diète et le règlement intérieur du Sénat définissent les particularités de la procédure législative en cas d'un projet déclaré urgent.
3. Pour la procédure applicable au cas d'un projet de loi déclaré urgent, le délai de son examen par le Sénat est fixé à quatorze jours et celui de la signature de la loi par le Président de la République, à sept jours.

Article 124

Les dispositions des articles 110, 112, 113 et 120 sont respectivement applicables au Sénat.

LE REFERENDUM

Article 125

1. Un référendum national peut être organisé sur les affaires d'une importance particulière pour l'Etat.
2. La Diète, à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents, ou le Président de la République, avec l'accord du Sénat obtenu à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des sénateurs étant présents, ont le droit de proclamer le référendum national.
3. Le résultat du référendum est valable si plus de la moitié des électeurs inscrits y ont participés.
4. La Cour suprême statue sur la validité du référendum national et du référendum visé au sixième alinéa de l'article 235.
5. Une loi définit les principes et la procédure applicable au référendum.

Titre V

LE PRESIDENT DE LA REPUBLIQUE DE POLOGNE

Article 126

1. 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.
2. 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.
3. Le Président de la République exerce ses fonctions dans les limites et selon les principes prévus par la Constitution et par les lois.

Article 127

1. Le President de la République est élu par la Nation au suffrage universel, égal, direct, au scrutin secret.
2. Le Président de la République est élu pour cinq ans et ne peut être réélu qu'une seule fois.
3. Peut être élu Président de la République tout citoyen polonais ayant trente cinq ans accomplis au plus tard le jour des élections et jouissant de la plénitude de ses droits électoraux. Les candidats sont présentés par au moins cent mille citoyens jouissant du droit d'élection à la Diète.
4. Est élu Président de la République le candidat qui a recueilli plus de la moitié des suffrages exprimés. Si aucun des candidats n'obtient la majorité des suffrages exprimés, il est procédé, quatorze jours après le premier scrutin, à un second tour.
5. Au second tour, se présentent les deux candidats qui ont recueilli le plus grand nombre de suffrages au premier tour. Si l'un des candidats retire sa candidature, est déchu du droit de vote ou décède, au second tour est admis le candidat qui a recueilli successivement le plus grand nombre de suffrages au premier tour. Dans ce cas, la date du second tour de scrutin est reportée à quatorze jours.
6. Est élu Président de la République le candidat ayant recueilli au second tour le plus grand nombre de suffrages exprimés.
7. Les principes et la procédure de la présentation des candidatures et de l'organisation des élections ainsi que les conditions de validité de l'élection du Président de la République sont définis par la loi.

Article 128

1. Le mandat du Président de la République commence à courir le jour de son entrée en fonction.
2. Les élections présidentielles sont proclamées par le Président de la Diète à un jour tombant cent jours au plus tôt et soixante-quinze jours au plus tard avant l'expiration des pouvoirs du Président de la République en exercice et, en cas de vacance de la Présidence, le quatorzième jour au plus tard après cette vacance, la date des élections étant fixée à un jour férié tombant au cours des soixante jours à compter de la proclamation des élections.

Article 129

1. La Cour suprême statue sur la validité de l'élection du Président de la République.
2. L'électeur a le droit de déposer devant la Cour suprême une contestation de la validité de l'élection du Président de la République, conformément aux principes prévus par la loi.
3. Si la nullité de l'élection du Président de la République est déclarée, de nouvelles élections sont proclamées en vertu des dispositions prévues au deuxième alinéa de l'article 128 applicables en cas de vacance de la Présidence de la République.

Article 130

Le Président de la République entre en fonction après avoir prêté devant l'Assemblée nationale, le serment suivant:
«Entrant en fonction de Président de la République de Pologne, par la volonté de la Nation, je jure solennellement de rester fidèle aux dispositions de la Constitution, de veiller inflexiblement à la dignité de la Nation, à l'indépendance et à la sécurité de l'Etat et que le bien de la Patrie et la prospérité des citoyens seront toujours mon impératif suprême».
Le serment peut être complété par les mots «Que Dieu me vienne en aide».

Article 131

1. Si le Président de la République est temporairement empêché d'exercer ses fonctions, il en informe le Président de la Diète qui le supplée provisoirement dans ses fonctions. Lorsque le Président de la République n'est pas en mesure d'informer le Président de la Diète de l'empê-

chement, le Tribunal constitutionnel statue, à la demande du Président de la Diète, sur l'empêchement à l'exercice des fonctions par le Président de la République. En cas d'empêchement temporaire constaté par le Tribunal constitutionnel, celui-ci confie au Président de la Diète l'exercice provisoire des fonctions de Président de la République.

2. Le Président de la Diète exerce les fonctions de Président de la République à titre provisoire, jusqu'à l'élection du nouveau Président de la République, en cas de:
   1) décès du Président de la République,
   2) renonciation à l'exercice des fonctions par le Président de la République,
   3) déclaration de nullité de l'élection du Président de la République ou autres empêchements à l'entrée en fonction du Président,
   4) résolution de l'Assemblée nationale reconnaissant l'incapacité permanente d'exercice des fonctions par le Président de la République en raison de son état de santé, adoptée à la majorité des deux tiers des voix au moins du nombre constitutionnel des membres de l'Assemblée nationale,
   5) destitution du Président de la République par décision du Tribunal d'Etat.
3. Si le Président de la Diète est empêché d'exercer les fonctions de Président de la République, il est suppléé par le Président du Sénat.
4. La personne exerçant les fonctions de Président de la République ne peut décider l'abrégement de la législature de la Diète.

Article 132

Le Président de la République ne peut assumer aucune autre charge ni exercer aucune autre fonction publique à l'exclusion de celles qui sont liées à la fonction exercée.

Article 133

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 de Pologne 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.

Article 134

1. Le Président de la République est le chef des Forces armées de la République de Pologne.
2. Le Président de la République exerce le commandement suprême des Forces armées en temps de paix par l'intermédiaire du ministre de la Défense nationale.
3. Le Président de la République nomme le Chef de l'état-major général et les commandants des différentes Forces armées pour une durée limitée. La durée du mandat, la procédure et les modalités de révocation sont prévues par la loi.
4. Pour la période de la guerre, le Président de la République nomme, sur proposition du Président du Conseil des Ministres, le Commandant en chef des Forces armées. Il peut le révoquer suivant la même procédure. Les compétences du Commandant en chef des Forces armées ainsi que les principes de sa subordination aux organes constitutionnels de la République de Pologne sont définis par la loi.
5. Le Président de la République confère, sur proposition du ministre de la Défense nationale, les grades militaires prévus par les lois.

6. Les pouvoirs du Président de la République liés au commandement suprême des Forces armées sont définis en détail par la loi.

Article 135

Le Conseil de Sécurité nationale est l'organe consultatif du Président de la République dans le domaine de la sécurité extérieure et intérieure.

Article 136

En cas de menace extérieure directe pour l'Etat, le Président de la République proclame, sur demande du Président du Conseil des Ministres, une mobilisation générale ou partielle et donne l'ordre d'engagement des Forces armées pour défendre la République de Pologne.

Article 137

Le Président de la République attribue la nationalité polonaise et autorise la renonciation à celle-ci.

Article 138

Le Président de la République attribue les ordres et les distinctions.

Article 139

Le Président de la République exerce le droit de grâce. Le droit de grâce n'est pas applicable aux personnes condamnées par le Tribunal d'Etat.

Article 140

Le Président de la République peut adresser un message à la Diète, au Sénat ou à l'Assemblée nationale. Les messages ne donnent lieu à aucun débat.

Article 141

1. Le Président de la République peut convoquer le Conseil de Cabinet pour délibérer d'affaires d'une importance particulière. Le Conseil de Cabinet est formé du Conseil des Ministres débattant sous la présidence du Président de la République.
2. Le Conseil de Cabinet n'a pas les attributions qui appartiennent au Conseil des Ministres.

Article 142

1. Le Président de la République édicte des règlements et des arrêtés suivant les principes énoncés à l'article 92 et à l'article 93.
2. Le Président de la République édicte des décisions dans les affaires inhérentes à l'exercice de ses autres attributions.

Article 143

La Chancellerie du Président de la République est l'organe auxiliaire du Président de la République. Le Président de la République attribue le statut à la Chancellerie ainsi qu'il nomme et révoque son chef.

Article 144

1. Le Président de la République édicte des actes officiels, dans l'exercice de ses attributions constitutionnelles et légales.
2. Pour être valables, les actes officiels du Président de la République doivent être contresignés par le Président du Conseil des Ministres qui engage ainsi sa responsabilité devant la Diète.
3. Les dispositions du deuxième alinéa ne sont pas applicables dans les cas suivants:
   1) proclamation des élections à la Diète et au Sénat,
   2) convocation de la première séance de la Diète et du Sénat nouvellement élus,

3) abrégement de la législature de la Diète dans les cas prévus par la Constitution,
4) initiative législative,
5) proclamation du référendum national,
6) signature ou refus de signature d'une loi,
7) décision de publier une loi ou un traité au Journal des Lois de la République de Pologne,
8) message adressé à la Diète, au Sénat et à l'Assemblée nationale,
9) saisine du Tribunal constitutionnel,
10) proposition d'effectuer un contrôle par la Chambre suprême de Contrôle,
11) désignation et nomination du Président du Conseil des Ministres,
12) acceptation de la démission du Conseil des Ministres et attribution à celui-ci de l'exercice temporaire de ses pouvoirs,
13) proposition soumise à la Diète d'introduction de l'engagement de la responsabilité d'un membre du Conseil des Ministres devant le Tribunal d'Etat,
14) révocation d'un ministre auquel la Diète a exprimé le vote de défiance,
15) convocation du Conseil de Cabinet,
16) attribution des ordres et des distinctions,
17) nomination des juges,
18) exercice du droit de grâce,
19) attribution de la nationalité polonaise et autorisation à renoncer à celle-ci,
20) nomination du Premier Président de la Cour suprême,
21) nomination du Président et du vice-président du Tribunal constitutionnel,
22) nomination du Président de la Haute Cour administrative,
23) nomination des présidents de la Cour suprême et des vice-présidents de la Haute Cour administrative,
24) proposition de nomination du Président de la Banque nationale de Pologne,
25) nomination des membres du Conseil de la Politique monétaire,
26) nomination et révocation des membres du Conseil de Sécurité nationale,
27) nomination des membres du Conseil national de la Radiophonie et de la Télévision,
28) attribution du statut à la Chancellerie du Président de la République, nomination et révocation du Chef de la Chancellerie du Président de la République,
29) promulgation des arrêtés suivant les principes définis à l'article 93,
30) renonciation aux fonctions de Président de la République.

Article 145

1. Le Président de la République peut être poursuivi devant le Tribunal d'Etat pour avoir violé la Constitution ou les lois ainsi que pour avoir commis une infraction.
2. La mise en état d'accusation du Président de la République peut intervenir par une résolution votée par l'Assemblée nationale à la majorité des deux tiers des voix au moins du nombre constitutionnel de ses membres, sur demande d'au moins cent quarante membres de l'Assemblée.
3. Le Président de la République est suspendu dans l'exercice de ses fonctions le jour de l'adoption de la résolution sur sa mise en accusation devant le Tribunal d'Etat. La disposition de l'article 131 s'applique respectivement.

Titre VI

LE CONSEIL DES MINISTRES ET L'ADMINISTRATION GOUVERNEMENTALE

Article 146

1. Le Conseil des Ministres conduit la politique intérieure et étrangère de la République de Pologne.

2. 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.
3. Le Conseil des Ministres dirige l'administration gouvernementale.
4. Dans les limites et suivant les principes prévus par la Constitution et par les lois, le Conseil des Ministres, en particulier:
   1) assure l'exécution des lois,
   2) édicte des règlements,
   3) coordonne et contrôle l'activité de toutes les autorités de l'administration gouvernementale,
   4) protège les intérêts du Fisc,
   5) adopte le projet de budget de l'Etat,
   6) dirige l'exécution du budget de l'Etat et adopte la clôture des comptes publics et le compte-rendu de l'exécution du budget,
   7) assure la sécurité intérieure de l'Etat et l'ordre public,
   8) assure la sécurité extérieure de l'Etat,
   9) exerce la direction générale dans le domaine des relations avec les pays étrangers et les organisations internationales,
   10) conclut des traités demandant la ratification, approuve et dénonce les autres traités,
   11) exerce la direction générale dans le domaine de la défense nationale et définit chaque année le nombre des citoyens appelés à effectuer leur service militaire actif,
   12) définit l'organisation et la procédure de ses travaux.

Article 147

1. Le Conseil des Ministres est composé du Président du Conseil et des ministres.
2. Les vice-présidents du Conseil des Ministres peuvent être appelés à faire partie du Conseil des Ministres.
3. Le Président du Conseil des Ministres et les vice-présidents peuvent exercer également les fonctions de ministres.
4. Les présidents des comités prévus par les lois peuvent également être appelés à faire partie du Conseil des Ministres.

Article 148

Le Président du Conseil des Ministres:

1) représente le Conseil des Ministres,
2) dirige les travaux du Conseil des Ministres,
3) édicte des règlements,
4) assure la mise en oeuvre de la politique du Conseil des Ministres et définit le mode de sa réalisation,
5) coordonne et exerce le contrôle de l'activité des membres du Conseil des Ministres,
6) exerce, dans les limites et dans les formes définies par la Constitution et par les lois, la surveillance des collectivités territoriales,
7) est le supérieur hiérarchique de tous les fonctionnaires de l'administration gouvernementale.

Article 149

1. Les ministres dirigent les départements déterminés de l'administration gouvernementale ou accomplissent les missions qui leur sont confiées par le Président du Conseil des Ministres. Des lois définissent le domaine de l'activité du ministre dirigeant un département de l'administration gouvernementale.
2. Le ministre dirigeant un département de l'administration gouvernementale édicte des règlements. Le Conseil des Ministres, sur proposition du Président du Conseil des Ministres, peut abroger le règlement ou l'arrêté du ministre.

3. Les dispositions relatives au ministre dirigeant un département de l'administration gouvernementale sont respectivement applicables au président du comité visé au quatrième alinéa de l'article 147.

Article 150

Le membre du Conseil des Ministres ne peut exercer des activités contraires à ses devoirs publics.

Article 151

Le Président du Conseil des Ministres, les vice-présidents du Conseil des Ministres et les ministres prêtent le serment suivant devant le Président de la République:
«Entrant en fonction de Président du Conseil des Ministres (de vice-président du Conseil des Ministres, de ministre), je jure solennellement de rester fidèle aux dispositions de la Constitution et à d'autres lois de la République de Pologne et que le bien de la Patrie et la prospérité des citoyens seront toujours mon impératif suprême».
Le serment peut être complété par les mots: «Que Dieu me vienne en aide».

Article 152

1. Le voïvode est le représentant du Conseil des Ministres dans la voïvodie.
2. La procédure de nomination et de révocation ainsi que le champ d'activité des voïvodes sont définis par une loi.

Article 153

1. En vue de garantir une exécution professionnelle, honnête, impartiale et politiquement neutre des missions de l'Etat, il existe un corps de fonctionnaires civils dans les offices de l'administration gouvernementale.
2. Le Président du Conseil des Ministres est le supérieur du corps des fonctionnaires civils.

Article 154

1. Le Président de la République désigne le Président du Conseil des Ministres qui propose les membres du Conseil des Ministres. Le Président de la République nomme le Président du Conseil des Ministres et les autres membres du Conseil dans un délai de quatorze jours à dater de la première séance de la Diète ou de l'acceptation de la démission du précédent Conseil et il reçoit le serment des membres du Conseil des Ministres nouvellement nommés.
2. Le Président du Conseil des Ministres, dans les quatorze jours à dater de sa nomination par le Président de la République, présente devant la Diète le programme de l'activité du Conseil des Ministres et pose la question de confiance. La Diète accorde le vote de confiance à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents.
3. Si la nomination du Conseil des Ministres n'a pas lieu suivant la procédure prévue au premier alinéa ou le vote de confiance ne lui est pas accordé suivant la procédure prévue au deuxième alinéa, la Diète élit, durant les quatorze jours à dater de l'expiration des délais fixés au premier ou au deuxième alinéa, à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents, le Président du Conseil des Ministres et les membres du Conseil des Ministres qu'il aproposés. Le Président de la République nomme le Conseil des Ministres ainsi élu et reçoit le serment des membres de celui-ci.

Article 155

1. Si la nomination du Conseil des Ministres n'a pas lieu suivant la procédure prévue au troisième alinéa de l'article 154, le Président de la République nomme, dans un délai de quatorze jours, le Président du Conseil des Ministres et, sur proposition de celui-ci, les autres membres du Conseil des Ministres et reçoit leur serment. La Diète accorde au Conseil des Ministres, dans un délai de quatorze jours à dater de la nomination de celui-ci par le Président de la République, le vote de confiance à la majorité des voix, la moitié au moins du nombre constitutionnel des députés étant présents.

2. Si le vote de confiance n'est pas accordé au Conseil des Ministres suivant la procédure prévue au premier alinéa, le Président de la République abrège la législature de la Diète et ordonne les élections.

Article 156

1. Les membres du Conseil des Ministres sont poursuivis devant le Tribunal d'Etat pour avoir violé la Constitution ou les lois et pour les délits commis dans l'accomplissement de leurs fonctions.
2. La Diète vote, sur proposition du Président de la République ou sur celle d'au moins cent quinze députés, la résolution sur l'engagement de la responsabilité devant le Tribunal d'Etat contre un membre du Conseil des Ministres, à la majorité des trois cinquième du nombre constitutionnel des députés.

Article 157

1. Les membres du Conseil des Ministres sont solidairement responsables de l'activité du Conseil des Ministres devant la Diète.
2. Les membres du Conseil des Ministres sont individuellement responsables devant la Diète des affaires relevant de leurs compétences ou des affaires qui leur ont été confiées par le Président du Conseil des Ministres.

Article 158

1. La Diète vote la motion de censure à l'égard du Conseil des Ministres à la majorité du nombre constitutionnel des députés, sur la demande de quarante-six députés au moins, la motion indiquant le nom du candidat aux fonctions de Président du Conseil des Ministres. Si la motion de censure est adoptée par la Diète, le Président de la République accepte la démission du Conseil des Ministres et nomme le Président du Conseil des Ministres nouvellement élu par la Diète. Il nomme les autres membres du Conseil sur la proposition du Président du Conseil des Ministres et reçoit leur serment.
2. La motion de censure visée au premier alinéa peut être mise aux voix au plus tôt après l'expiration d'un délai de sept jours à compter de la date de son dépôt. Une nouvelle motion de censure peut être déposée au plus tôt après l'expiration d'un délai de trois mois à compter de la date de dépôt de la première motion. Une nouvelle motion peut être déposée avant l'expiration du délai de trois mois, si elle est formée par cent quinze députés au moins.

Article 159

1. La Diète peut voter la motion de censure à l'égard d'un ministre. La motion doit être formée par soixante-neuf députés au moins. Les dispositions du deuxième alinéa de l'article 158 sont respectivement applicables.
2. Le Président de la République révoque le ministre à l'égard duquel la Diète avoté la motion de censure à la majorité du nombre constitutionnel des députés.

Article 160

Le Président du Conseil des Ministres peut poser la question de confiance devant la Diète. La Diète accorde le vote de confiance au Conseil des Ministres à la majorité des voix, la moitié au moins du nombre constitutionnel des députés étant présents.

Article 161

Le Président de la République procède à des remplacements au sein du Conseil des Ministres, sur proposition du Président du Conseil.

Article 162

1. Le Président du Conseil des Ministres présente la démission du Conseil à la première séance de la Diète nouvellement élue.

2. Le Président du Conseil des Ministres présente la démission du Conseil des Ministres également au cas où:
   1) la Diète n'accorde pas le vote de confiance au Conseil des Ministres,
   2) la Diète vote la motion de censure,
   3) le Président du Conseil des Ministres renonce à l'exercice de ses fonctions.
3. Acceptant la démission du Conseil des Ministres, le Président de la République lui confie l'exercice de ses fonctions jusqu'à ce que soit nommé le nouveau Conseil des Ministres.
4. Le Président de la République peut refuser d'accepter la démission du Conseil des Ministres dans le cas prévu au troisième point du deuxième alinéa.

Titre VU

LES COLLECTIVITES TERRITORIALES

Article 163

Les collectivités territoriales accomplissent les missions publiques qui ne sont pas réservées par la Constitution ou par les lois aux autorités des autres pouvoirs publics.

Article 164

1. La commune est la collectivité territoriale de base.
2. Les autres collectivités régionales soit locales et régionales sont définies par la loi.
3. La commune accomplit toutes les missions des collectivités territoriales qui ne sont pas réservées à d'autres collectivités territoriales.

Article 165

1. Les collectivités territoriales ont la personnalité morale. Elles bénéficient du droit de propriété et des autres droits patrimoniaux.
2. L'autonomie de la collectivité territoriale bénéficie de la protection judiciaire.

Article 166

1. La collectivité territoriale accomplit, en tant que mission propre, les missions publiques dont le but est de satisfaire les besoins de la collectivité.
2. Les collectivités territoriales peuvent accomplir d'autres missions publiques en vertu d'une délégation de la loi, si tels sont les besoins de l'Etat. La loi définit la procédure de la transmission et les modalités de l'accomplissement des missions déléguées.
3. Les cours administratives tranchent les conflits de compétence entre les autorités des collectivités territoriales et celles de l'administration gouvernementale.

Article 167

1. La participation à la répartition des recettes publiques est garantie aux collectivités territoriales proportionnellement aux missions qui leur appartiennent.
2. Les revenus propres, les subventions générales et les dotations du budget de l'Etat à affectation spéciale constituent les ressources des collectivités territoriales.
3. Les sources de revenus des collectivités territoriales sont définies par la loi.
4. Les changements dans le domaine des missions et des attributions des collectivités territoriales entraînent des modifications dans la répartition des recettes publiques.

Article 168

Les collectivités territoriales ont le droit de fixer le montant des impôts et des taxes locales dans les limites prévues par la loi.

Article 169

1. Les collectivités territoriales accomplissent leurs missions par l'intermédiaire d'autorités délibérantes et exécutives.
2. Les autorités délibérantes sont élues au suffrage universel, égal, direct et au scrutin secret. Les principes et la procédure de présentation des candidats et du déroulement des élections ainsi que les conditions de validité de l'élection sont prévus par la loi.
3. Les principes et la procédure de l'élection et de la révocation des autorités exécutives des collectivités territoriales sont définis par la loi.
4. Les autorités délibérantes déterminent, dans les limites prévues par les lois, l'organisation intérieure des collectivités territoriales.

Article 170

Les membres de la collectivité territoriale peuvent décider, par voie de référendum, des questions relatives à cette collectivité dont la révocation de l'autorité de la collectivité territoriale élue au suffrage direct. Les principes et la procédure du référendum local sont définis par la loi.

Article 171

1. L'activité des collectivités territoriales fait l'objet de contrôle du point de vue de la légalité.
2. Le Président du Conseil des Ministres et les voïvodes ainsi que les chambres des comptes régionales dans le domaine des finances, sont les organes de contrôle de l'activité des collectivités territoriales.
3. La Diète peut dissoudre, à la demande du Président du Conseil des Ministres, l'autorité délibérante d'une collectivité territoriale si celle-ci porte une flagrante atteinte à la Constitution ou à la loi.

Article 172

1. Les collectivités territoriales peuvent s'associer.
2. Les collectivités territoriales ont le droit d'adhérer aux associations internationales de collectivités locales et régionales et de coopérer avec les collectivités locales et régionales des autres pays.
3. Les principes relatifs à l'exercice des droits visés au premier et au deuxième alinéas par les collectivités territoriales sont prévus par la loi.

Titre VIII

LES COURS ET LES TRIBUNAUX

Article 173

Les cours et les tribunaux exercent un pouvoir séparé et indépendant des autres pouvoirs.

Article 174

Les cours et les tribunaux rendent la justice au nom de la République de Pologne.

Article 175

1. En République de Pologne, la justice est rendue par la Cour suprême, les tribunaux de droit commun, les cours administratives et les tribunaux militaires.
2. Le tribunal d'exception ou la procédure sommaire ne peuvent être institués qu'en temps de guerre.

Article 176

1. La procédure judiciaire alieu en deux instances au moins.

2. L'organisation et la compétence des cours de justice ainsi que la procédure devant les cours sont définies par la loi.

Article 177

Les tribunaux de droit commun administrent la justice dans toutes les affaires à l'exception de celles réservées à la juridiction d'autres tribunaux.

Article 178

1. Les juges sont indépendants dans l'exercice de leurs fonctions et ne sont soumis qu'à la Constitution et aux lois.
2. Les juges ont des conditions d'emploi et de salaire garanties correspondant à la dignité des fonctions qu'ils remplissent et à l'étendue de leurs devoirs.
3. Les juges ne peuvent être affiliés à aucun parti politique, à aucun syndicat ni exercer une activité publique incompatible avec les principes d'indépendance des tribunaux et des juges.

Article 179

Les juges sont nommés par le Président de la République, sur proposition du Conseil national de Magistrature, pour une durée illimitée.

Article 180

1. Les juges sont inamovibles.
2. Le juge ne peut être révoqué, suspendu dans ses fonctions, déplacé dans un autre siège ou aune autre fonction contre sa volonté qu'en vertu d'une décision judiciaire et uniquement dans les cas prévus par la loi.
3. Le juge peut être retraité à la suite de maladie ou d'infirmité le rendant incapable d'exercer ses fonctions. La procédure et le mode de recours à la justice sont prévus par la loi.
4. Une loi définit les limites d'âge entraînant la retraite.
5. En cas de modification de l'organisation des tribunaux ou du ressort d'un tribunal, le juge ne peut être déplacé dans un autre tribunal ou retraité que s'il conserve sa pleine rémunération.

Article 181

Le juge ne peut encourir la responsabilité pénale ni être privé de liberté, qu'avec l'autorisation préalable du tribunal indiqué par la loi. Le juge ne peut être détenu ou arrêté, sauf le cas de flagrant délit, si sa détention est indispensable au déroulement régulier de la procédure. Le président du tribunal compétent est informé sans délai de la détention et il peut ordonner la mise en liberté immédiate du détenu.

Article 182

Une loi définie la participation des citoyens à l'exercice de la justice.

Article 183

1. La Cour suprême exerce la surveillance de l'activité des tribunaux de droit commun et des tribunaux militaires dans le domaine des décisions judiciaires.
2. La Cour suprême accomplit également d'autres actes définis par la Constitution et par les lois.
3. Le Président de la République nomme pour six ans le Premier Président de la Cour suprême parmi les candidats présentés par l'Assemblée générale des Juges de la Cour suprême.

Article 184

La Haute Cour administrative et les autres cours administratives exercent, dans les limites prévues par la loi, la surveillance de l'activité de l'administration publique. Cette surveillance consiste également à statuer sur la conformité aux lois des résolutions des autorités des collectivités

territoriales et des actes normatifs des autorités territoriales de l'administration gouvernementale.

Article 185

Le Président de la Haute Cour administrative est nommé pour six ans par le Président de la République, parmi les candidats présentés par l'Assemblée générale des Juges de la Haute Cour administrative.

Article 186

1. Le Conseil national de Magistrature veille à l'indépendance des cours de justice et des juges.
2. Le Conseil national de Magistrature peut demander au Tribunal constitutionnel de statuer sur la conformité à la Constitution des actes normatifs dans la mesure où ils concernent l'indépendance des cours de justice et des juges.

Article 187

1. Le Conseil national de Magistrature est composé:
   1) du Premier Président de la Cour suprême, du ministre de la Justice, du Président de la Haute Cour administrative et d'une personne nommée par le Président de la République,
   2) de quinze membres élus parmi les juges de la Cour suprême, des tribunaux de droit commun, des cours administratives et des tribunaux militaires,
   3) de quatre membres élus par la Diète parmi les députés et de deux membres élus par le Sénat parmi les sénateurs.
2. Le Conseil national de Magistrature élit parmi ses membres le président et deux vice-présidents.
3. Le mandat des membres élus du Conseil national de Magistrature dure quatre ans.
4. L'organisation, le champ d'activité et la procédure du Conseil national de Magistrature ainsi que les modalités de l'élection de ses membres sont définis par la loi.

LE TRIBUNAL CONSTITUTIONNEL

Article 188

Le Tribunal constitutionnel statue sur:
1) la conformité à la Constitution des lois et des traités,
2) la conformité des lois aux traités ratifiés dont la ratification exigeait l'autorisation préalable d'une loi,
3) la conformité des dispositions juridiques émanant des autorités centrales de l'Etat à la Constitution, aux traités ratifiés et aux lois,
4) la conformité à la Constitution des objectifs ou de l'activité des partis politiques,
5) la plainte portée devant ce Tribunal, visée au premier alinéa de l'article 79.

Article 189

Le Tribunal constitutionnel tranche les conflits de compétence entre les autorités centrales constitutionnelles de l'Etat.

Article 190

1. Les arrêts du Tribunal constitutionnel sont généralement obligatoires et définitifs.
2. Les arrêts du Tribunal constitutionnel relatifs aux affaires visées à l'article 188 sont publiés sans délai dans l'organe officiel dans lequel l'acte normatif a été publié. Si l'acte n'a pas été publié, l'arrêt est publié au Journal officiel de la République de Pologne «Monitor Polski».

3. L'arrêt du Tribunal constitutionnel entre en vigueur le jour de sa publication, toutefois le Tribunal peut fixer une autre date de l'extinction de la force obligatoire de l'acte normatif. Ce délai*jie* peut dépasser dix-huit mois pour une loi et douze mois pour d'autres actes normatifs. Dans le cas d'arrêts entraînant des charges financières non prévues par la loi budgétaire, le Tribunal constitutionnel fixe la date de la perte de la force obligatoire après avoir pris connaissance de l'avis du Conseil des Ministres.
4. L'arrêt du Tribunal constitutionnel déclarant la non conformité à la Constitution, au traité ou à la loi de l'acte normatif en vertu duquel a été rendue une décision judiciaire définitive, une décision administrative définitive ou une décision portant sur une autre affaire, donne lieu à la reprise de la procédure, à l'annulation de la décision ou à une autre solution, suivant les principes et le mode prévus par les dispositions appropriées à la procédure engagée.
5. Les arrêts du Tribunal constitutionnel sont rendus à la majorité des voix.

Article 191

1. Les requêtes portant sur les questions visées à l'article 188 peuvent être déposées devant le Tribunal constitutionnel:
   1) par le Président de la République, le Président de la Diète, le Président du Sénat, le Président du Conseil des Ministres, cinquante députés, trente sénateurs, le Premier Président de la Cour suprême, le Président de la Haute Cour administrative, le Procureur général, le Président de la Chambre suprême de Contrôle, le Défenseur des Droits civiques,
   2) par le Conseil national de Magistrature dans le domaine visé au deuxième alinéa de l'article 186,
   3) par les autorités délibérantes des collectivités territoriales,
   4) par les autorités nationales des syndicats et les autorités nationales des organisations d'employeurs et des organisations professionnelles,
   5) par les Eglises et les autres unions confessionnelles,
   6) par les personnes visées à l'article 79 dans les limites qui y sont fixées.
2. Les organismes visés aux troisième, quatrième et cinquième point du premier alinéa peuvent déposer une telle requête, si l'acte normatif concerne les questions relevant de leur domaine d'activité.

Article 192

La requête portant sur les questions visées à l'article 189 peut être déposée devant le Tribunal constitutionnel 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.

Article 193

Toute juridiction peut adresser au Tribunal constitutionnel une question juridique portant sur la conformité de l'acte normatif à la Constitution, aux traités ratifiés ou à une loi, lorsque de la réponse à cette question dépend la solution de l'affaire en instance.

Article 194

1. Le Tribunal constitutionnel est composé de quinze juges individuellement élus par la Diète pour neuf ans parmi les personnes se distinguant par leur connaissance du droit. Leur réélection au Tribunal est inadmissible.
2. Le Président et le vice-président du Tribunal constitutionnel sont nommés par le Président de la République parmi les candidats présentés par l'Assemblée générale des Juges du Tribunal constitutionnel.

Article 195

1. Les juges du Tribunal constitutionnel sont indépendants dans l'exercice de leurs fonctions et ne sont soumis qu'à la Constitution.

2. Les juges ont des conditions d'emploi et de rémunération garanties correspondant à la dignité des fonctions qu'ils remplissent et à leurs attributions.
3. Les juges du Tribunal constitutionnel ne peuvent, pendant l'exercice de leurs fonctions, s'affilier à aucun parti politique, à aucun syndicat ni exercer une activité publique incompatible avec les principes d'indépendance des cours de justice et des juges.

Article 196

Le juge du Tribunal constitutionnel ne peut encourir la responsabilité pénale ni être privé de liberté, qu'avec l'autorisation préalable du Tribunal. Le juge ne peut être détenu ou arrêté, sauf le cas de flagrant délit, si sa détention est indispensable au déroulement régulier de la procédure. Le Président du Tribunal constitutionnel est informé sans délai de la détention et il peut ordonner la relaxation immédiate du détenu.

Article 197

L'organisation du Tribunal constitutionnel et la procédure devant celui-ci sont déterminées par une loi.

LE TRIBUNAL D'ETAT

Article 198

1. Le Président de la République, le Président et les membres du Conseil des Ministres, le Président de la Banque nationale de Pologne, le Président de la Chambre suprême de Contrôle, les membres du Conseil national de la Radiophonie et de la Télévision, les personnes auxquelles le Président du Conseil des Ministres a confié la mission de diriger un ministère ainsi que le Commandant en chef des Forces armées sont constitutionnellement responsables devant le Tribunal d'Etat pour avoir violé la Constitution ou les lois dans l'exercice de leurs fonctions.
2. Les députés et les sénateurs sont constitutionnellement responsables devant le Tribunal d'Etat dans le domaine défini à l'article 107.
3. Une loi définie les peines prononcées par le Tribunal d'Etat.

Article 199

1. Le Tribunal d'Etat se compose d'un président, de deux vice-présidents et de seize membres élus par la Diète d'en dehors des députés et des sénateurs pour la durée de la législature de la Diète. Les vice-présidents du Tribunal et la moitié au moins des membres du Tribunal d'Etat doivent avoir les qualifications requises pour être juge.
2. Le Premier Président de la Cour suprême est Président du Tribunal d'Etat.
3. Les membres du Tribunal d'Etat sont indépendants dans l'exercice de leurs fonctions déjugés du Tribunal et ne sont soumis qu'à la Constitution et aux lois.

Article 200

Le membre du Tribunal d'Etat ne peut encourir la responsabilité pénale ni être privé de liberté, qu'avec l'autorisation préalable du Tribunal. Il ne peut être détenu ou arrêté, sauf le cas de flagrant délit, si sa détention est indispensable au déroulement régulier de la procédure. Le Président du Tribunal d'Etat est informé sans délai de la détention et il peut ordonner la relaxation immédiate du détenu.

Article 201

L'organisation du Tribunal d'Etat et la procédure devant celui-ci sont déterminées par une loi.

Titre IX

LES ORGANES DE CONTROLE DE L'ETAT ET DE LA PROTECTION DU DROIT

LA CHAMBRE SUPREME DE CONTROLE

Article 202

1. La Chambre suprême de Contrôle est l'organe suprême du contrôle de l'Etat.
2. La Chambre suprême de Contrôle relève de la Diète.
3. La Chambre suprême de Contrôle fonctionne en collégialité.

Article 203

1. La Chambre suprême de Contrôle est appelée à contrôler l'activité des autorités de l'administration gouvernementale, de la Banque nationale de Pologne, des personnes morales d'Etat et d'autres organismes d'Etat du point de vue de la légalité, de la bonne gestion, de l'opportunité et de la probité.
2. La Chambre suprême de Contrôle peut contrôler l'activité des autorités des collectivités territoriales, des personnes morales communales et d'autres organismes communaux du point de vue de la légalité, de la bonne gestion et de la probité.
3. La Chambre suprême de Contrôle peut également contrôler, du point de vue de la légalité et de la bonne gestion, l'activité d'autres organismes et unités économiques dans la mesure où ceux-ci mettent à profit des biens ou des ressources de l'Etat ou communaux et acquittent leurs engagements financiers envers l'Etat.

Article 204

1. La Chambre suprême de Contrôle présente à la Diète:
   1) l'analyse de la réalisation du budget de l'Etat et des principes de la politique monétaire,
   2) un avis en matière de quitus à donner au Conseil des Ministres,
   3) une information sur les résultats du contrôle, les conclusions et les interventions déterminées par la loi.
2. La Chambre suprême de Contrôle présente chaque année à la Diète un compte rendu de ses activités.

Article 205

1. Le Président de la Chambre suprême de Contrôle est nommé par la Diète avec l'accord du Sénat pour six ans et son mandat n'est renouvelable qu'une seule fois.
2. Le Président de la Chambre suprême de Contrôle ne peut exercer aucune autre fonction, sauf celle de professeur universitaire, ni exercer aucune autre activité professionnelle.
3. Le Président de la Chambre suprême de Contrôle ne peut appartenir à aucun parti politique, aucun syndicat ni exercer une activité publique incompatible avec la dignité des fonctions accomplies.

Article 206

Le Président de la Chambre suprême de Contrôle ne peut encourir la responsabilité pénale ni être privé de liberté, qu'avec l'autorisation préalable de la Diète. Il ne peut être détenu ou arrêté, sauf le cas de flagrant délit, si sa détention est indispensable au déroulement régulier de la procédure. Le Président de la Diète est informé sans délai de la détention et il peut ordonner la relaxation immédiate du détenu.

Article 207

Une loi définit l'organisation et la procédure de la Chambre suprême de Contrôle.

LE DEFENSEUR DES DROITS CIVIQUES

Article 208

1. Le Défenseur des Droits civiques sauvegarde les libertés et les droits de l'homme et du citoyen définis par la Constitution et par d'autres actes normatifs.
2. Le champ d'activité et la procédure appliquée par le Défenseur des Droits civiques sont déterminés par la loi.

Article 209

1. Le Défenseur des Droits civiques est nommé par la Diète, avec l'accord du Sénat, pour une période de cinq ans.
2. Le Défenseur des Droits civiques ne peut exercer aucune autre fonction, sauf celle de professeur universitaire, ni exercer aucune autre activité professionnelle.
3. Le Défenseur des Droits civiques ne peut appartenir à aucun parti politique, à aucun syndicat, ni exercer une activité publique incompatible avec la dignité des fonctions accomplies.

Article 210

Le Défenseur des Droits civiques est indépendant, dans l'exercice de ses fonctions, des autres autorités de l'Etat et n'est responsable que devant la Diète, conformément aux principes définis par la loi.

Article 211

Le Défenseur des Droits civiques ne peut encourir la responsabilité pénale ni être privé de liberté, qu'avec l'autorisation préalable de la Diète. Il ne peut être détenu ou arrêté, sauf le cas de flagrant délit, si sa détention est indispensable au déroulement régulier de la procédure. Le Président de la Diète est informé sans délai de la détention et il peut ordonner la relaxation immédiate du détenu.

Article 212

Le Défenseur des Droits civiques informe chaque année la Diète et le Sénat sur ses activités et sur l'état du respect des libertés et des droits de l'homme et du citoyen.

LE CONSEIL NATIONAL DE LA RADIOPHONIE ET DE LA TELEVISION

Article 213

1. Le Conseil national de la Radiophonie et de la Télévision sauvegarde la liberté d'expression, l'exercice du droit à l'information, l'intérêt public dans le domaine de la radiophonie et de la télévision.
2. Le Conseil national de la Radiophonie et de la Télévision émet des règlements et, en matière d'affaires individuelles, il vote des résolutions.

Article 214

1. Les membres du Conseil national de la Radiophonie et de la Télévision sont nommés par la Diète, le Sénat et le Président de la République.
2. Un membre du Conseil national de la Radiophonie et de la Télévision ne peut appartenir à aucun parti politique, à aucun syndicat, ni exercer une activité publique incompatible avec la dignité des fonctions accomplies.

Article 215

Une loi définit les principes d'activité et la procédure du Conseil national de la Radiophonie et de la Télévision, son organisation et les principes détaillés de la nomination de ses membres.

Titre X

LES FINANCES PUBLIQUES

Article 216

1. Les ressources financières affectées à des fins publiques sont accumulées et dépensées suivant les modalités prévues par une loi.
2. L'acquisition, l'aliénation et la charge d'immeubles, de participations ou d'actions ainsi que l'émission des valeurs par le Fisc, par la Banque nationale de Pologne ou par d'autres personnes morales d'Etat interviennent conformément aux principes et suivant la procédure définis par la loi.
3. Le monopole est institué par une loi.
4. L'émission d'emprunts et l'octroi de garanties et de cautionnements par l'Etat interviennent conformément aux principes et suivant la procédure définis par la loi.
5. Ne peuvent être émis des emprunts ou octroyés des garanties ou cautionnements à la suite desquels la dette publique de l'Etat dépasserait les trois cinquième du produit intérieur brut annuel. Une loi définit le mode de calcul de la valeur du produit intérieur brut annuel et de la dette publique de l'Etat.

Article 217

Une loi détermine l'assujettissement aux impôts et à d'autres contributions ainsi qu'elle détermine les assujettis et les assiettes de l'imposition, les taux de l'impôt, les principes de l'octroi d'allègements et d'amortissements et les catégories d'assujettis exempts d'impôt.

Article 218

L'organisation du Fisc et les modalités de gestion des ressources de celui-ci sont définies par la loi.

Article 219

1. La Diète adopte le budget de l'Etat pour l'année budgétaire sous forme de loi budgétaire.
2. Les principes et la procédure de l'élaboration du projet de budget de l'Etat, le degré de sa précision, les exigences auxquelles doit répondre le projet de loi budgétaire ainsi que les principes et la procédure de l'exécution de la loi budgétaire sont prévus par la loi.
3. A titre exceptionnel, une loi sur le budget provisionnel peut définir les ressources et les charges de l'Etat pendant une période inférieure à une année. Les dispositions relatives au projet de loi budgétaire sont respectivement applicables au projet de loi de budget provisionnel.
4. Si la loi budgétaire ou la loi de budget provisionnel ne sont pas entrées en vigueur le jour ouvrant l'année budgétaire le Conseil des Ministres assure la gestion financière conformément au projet de loi qu'il a soumis.

Article 220

1. L'augmentation des dépenses ou la limitation des recettes prévues par le Conseil des Ministres ne peuvent donner lieu à l'adoption par la Diète d'un déficit budgétaire supérieur à celui prévu par le projet de loi budgétaire.
2. La loi budgétaire ne peut prévoir la couverture du déficit budgétaire par l'engagement de crédits à la banque centrale de l'Etat.

Article 221

L'initiative de la loi budgétaire, de la loi de budget provisionnel, de la modification de la loi budgétaire, de la loi sur la dette publique et de la loi sur l'octroi de garanties financières par l'Etat n'appartient qu'au Conseil des Ministres.

Article 222

Le Conseil des Ministres est tenu de soumettre à la Diète le projet de loi budgétaire pour l'année suivante trois mois au plus tard avant le début de l'année budgétaire. Atitre exceptionnel, le projet peut être déposé dans un délai ultérieur.

Article 223

Le Sénat peut adopter des modifications de la loi budgétaire dans un délai de vingt jours à partir de la date de sa transmission au Sénat.

Article 224

1. Le Président de la République signe, dans un délai de sept jours, la loi budgétaire ou la loi de budget provisionnel soumise par le Président de la Diète. Les dispositions du cinquième alinéa de l'article 122 ne sont pas applicables à la loi budgétaire et à la loi de budget provisionnel.
2. Si le Président de la République demande au Tribunal constitutionnel de statuer sur la conformité à la Constitution de la loi budgétaire ou de la loi de budget provisionnel avant de signer celle-ci, le Tribunal se prononce dans un délai de deux mois au plus tard à compter du jour du dépôt de la requête devant le Tribunal.

Article 225

Si la loi budgétaire n'est pas soumise à la signature du Président de la République dans un délai de quatre mois à dater du dépôt du projet de loi budgétaire devant la Diète, le Président de la République peut ordonner, durant les quatorze jours, l'abrégement de la législature de la Diète.

Article 226

1. Le Conseil des Ministres soumet à la Diète, dans un délai de cinq mois à compter de la fin de l'année budgétaire, un rapport sur l'exécution de la loi budgétaire ainsi qu'une information sur l'endettement de l'Etat.
2. La Diète examine le rapport présenté et adopte, dans un délai de quatre-vingt-dix jours à dater du jour de la réception du rapport et après avoir entendu l'avis de la Chambre suprême de Contrôle, une résolution accordant ou refusant le quitus au Conseil des Ministres.

Article 227

1. La Banque nationale de Pologne est la banque centrale de l'Etat. Elle a le droit exclusif d'émettre la monnaie, de fixer et de mettre en oeuvre la politique monétaire. La Banque nationale de Pologne est responsable de la valeur de la monnaie polonaise.
2. Le Président de la Banque nationale de Pologne, le Conseil de la Politique monétaire et le Comité directeur de la Banque sont les organes de la Banque nationale de Pologne.
3. Le Président de la Banque nationale de Pologne est élu par la Diète, sur proposition du Président de la République, pour une période de six ans.
4. Le Président de la Banque nationale de Pologne ne peut être membre d'un parti politique, d'un syndicat ni exercer une activité publique incompatible avec la dignité des fonctions accomplies.
5. Le Conseil de la Politique monétaire est composé du Président de la Banque nationale de Pologne en tant que son président, ainsi que des personnes se distinguant par leurs connaissances dans le domaine des finances, nommées pour une période de six ans en nombre égal par le Président de la République, la Diète et le Sénat.

6. Le Conseil de la Politique monétaire fixe chaque année les principes de la politique monétaire qu'il présente à la Diète avec le dépôt du projet de loi budgétaire par le Conseil des Ministres. Le Conseil de la Politique monétaire soumet à la Diète, dans un délai de cinq mois à compter de la fin de l'année budgétaire, un rapport sur la mise en oeuvre des principes de la politique monétaire.
7. Une loi définit l'organisation et les principes d'activité de la Banque nationale de Pologne ainsi que les modalités de la nomination et de la révocation de ses organes.

Titre XI

LES MESURES D'EXCEPTION

Article 228

1. En cas de menace exceptionnelle, lorsque les mesures constitutionnelles ordinaires sont insuffisantes, un des états suivants peut être proclamé: l'état de siège, l'état d'urgence ou l'état de sinistre.
2. Des mesures d'exception ne peuvent être prises qu'en vertu d'une loi, par la voie d'un règlement qui est supplémentairement porté à la connaissance du public.
3. Les principes d'activité des autorités de la puissance publique et la portée de la limitation des libertés et des droits de l'homme et du citoyen à la suite de l'introduction des différentes mesures d'exception sont déterminés par une loi.
4. Une loi peut définir les fondements, le domaine et le mode de compensation des dommages patrimoniaux dus à la limitation des libertés et des droits de l'homme et du citoyen à la suite de l'introduction de mesures d'exception.
5. Les actions engagées à la suite de l'introduction des mesures d'exception doivent correspondre au degré de menace et doivent viser le rétablissement rapide du fonctionnement normal de l'Etat.
6. La Constitution, les lois régissant les élections à la Diète, au Sénat et aux autorités des collectivités territoriales, la loi sur l'élection du Président de la République ainsi que les lois portant sur les mesures d'exception ne peuvent être modifiées pendant la période de l'application de ces mesures.
7. La législature de la Diète ne peut être abrégée et le référendum national, les élections à la Diète, au Sénat et aux autorités des collectivités territoriales, les élections présidentielles ne peuvent être organisées pendant la période de l'application des mesures d'exception et au cours de quatre-vingt-dix jours après leur levée, les législatures et les mandats étant respectivement prolongés. Les élections aux autorités des collectivités territoriales ne peuvent avoir lieu que dans les collectivités où les mesures d'exception n'ont pas été introduites.

Article 229

En cas de menace extérieure de l'Etat, d'agression armée contre la République de Pologne ou lorsque les traités engagent à la défense commune contre l'agression, le Président de la République peut proclamer, sur demande du Conseil des Ministres, l'état de siège sur une partie ou sur l'ensemble du territoire du pays.

Article 230

1. Si le régime constitutionnel de l'Etat, la sécurité des citoyens ou l'ordre public sont menacés, le Président de la République peut proclamer pour une période déterminée, de quatre-vingt--dix jours au plus, et sur demande du Conseil des Ministres, l'état d'urgence sur une partie ou sur l'ensemble du territoire du pays.

2. La prolongation de l'état d'urgence ne peut intervenir, avec l'autorisation de la Diète, qu'une seule fois pour une période de soixante jours au plus.

Article 231

Le Président de la République présente à la Diète le règlement sur la proclamation de l'état de siège ou de l'état d'urgence dans un délai de quarante-huit heures à compter de la signature du règlement. La Diète examine sans délai le règlement du Président de la République. Elle peut l'abroger à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des députés étant présents.

Article 232

En vue de prévenir les conséquences des sinistres ou des accidents technologiques ayant un caractère de sinistre et en vue de les supprimer, le Conseil des Ministres peut proclamer pour une période déterminée, de trente jours au plus, l'état de sinistre sur une partie ou sur l'ensemble du territoire de l'Etat. L'état de sinistre peut être prolongé avec l'accord de la Diète.

Article 233

1. La loi définissant l'étendue de la restriction des libertés et des droits de l'homme et du citoyen pendant l'état de siège et l'état d'urgence ne peut limiter les libertés et les droits prévus à l'article 30 (dignité de l'homme), aux articles 34 et 36 (nationalité), à l'article 38 (protection de la vie), aux articles 39,40 et au quatrième alinéa de l'article 41 (traitement humanitaire), à l'article 42 (engagement de la responsabilité pénale), à l'article 45 (accès aux tribunaux), à l'article 47 (les biens personnels), à l'article 53 (conscience et religion), à l'article 63 (plaintes et réclamations) et aux articles 48 et 72 (famille et enfant).
2. Il est inadmissible de limiter les libertés et les droits de l'homme et du citoyen uniquement en raison de sa race, de son sexe, de sa langue, de sa religion ou de son incroyance, de son origine sociale, de ses ancêtres et de sa fortune.
3. La loi définissant l'étendue de la restriction des libertés et des droits de l'homme et du citoyen pendant l'état de sinistre peut limiter les libertés et les droits prévus à l'article 22 (liberté des activités économiques), aux premier, troisième et cinquième alinéas de l'article 41 (les libertés personnelles), au premier alinéa de l'article 52 (la liberté de circuler et de séjourner sur le territoire de la République de Pologne), au troisième alinéa de l'article 59 (le droit à la grève), à l'article 64 (le droit à la propriété), au premier alinéa de l'article 65 (la liberté de travailler), au premier alinéa de l'article 66 (le droit à la sécurité et à l'hygiène dans le lieu de travail) et au deuxième alinéa de l'article 66 (le droit au repos).

Article 234

1. Si, pendant l'état de siège, la Diète ne peut se réunir en séance, le Président de la République édicte, sur proposition du Conseil des Ministres, des règlements ayant force de loi dans le domaine et dans les limites définis aux troisième, quatrième et cinquième alinéas de l'article 228. Ces règlements sont soumis à l'approbation de la Diète à la séance la plus proche.
2. Les règlements visés au premier alinéa ont le caractère de sources du droit généralement obligatoires.

Titre XII

LA REVISION DE LA CONSTITUTION

Article 235

1. Le projet de loi portant révision de la Constitution peut être présenté par un cinquième au moins du nombre constitutionnel des députés, par le Sénat ou par le Président de la République.

2. La Constitution est révisée en vertu d'une loi adoptée en termes identiques par la Diète et, dans un délai de soixante jours au plus, par le Sénat.
3. La première lecture du projet de loi portant révision de la Constitution peut avoir lieu le trentième jour au plus tôt à compter de la date du dépôt du projet de la loi devant la Diète.
4. La loi portant révision de la Constitution est votée par la Diète à la majorité des deux tiers des voix au moins, la moitié au moins du nombre constitutionnel des députés étant présents et par le Sénat, à la majorité absolue des voix, la moitié au moins du nombre constitutionnel des sénateurs étant présents.
5. La Diète ne peut adopter la loi portant révision des titres I, II ou XII de la Constitution que le soixantième jour au plus tôt après la première lecture du projet de loi.
6. Si la loi portant révision de la Constitution concerne les titres I, II ou XII, les sujets visés au premier alinéa peuvent demander, dans un délai de quarante-cinq jours à compter de la date de l'adoption de la loi par le Sénat, un référendum approbatif. La demande est adressée au Président de la Diète qui ordonne sans délai l'organisation d'un référendum dans un délai de soixante jours à compter de la date de dépôt de la demande. La révision de la Constitution est approuvée si elle a recueilli les suffrages de la majorité des votants.
7. A l'issue de la procédure prévue aux quatrième et sixième alinéa, le Président de la Diète soumet la loi adoptée au Président de la République pour signature. Celui-ci signe la loi dans un délai de vingt-et-un jours à dater de sa transmission et en ordonne la publication au Journal des Lois de la République de Pologne.

Titre XIII

LES DISPOSITIONS TRANSITOIRES ET FINALES

Article 236

1. Le Conseil des Ministres est tenu de présenter à la Diète, dans un délai de deux ans à compter de la date de l'entrée en vigueur de la Constitution, les projets de lois d'application de la Constitution.
2. Les lois d'application du premier alinéa de l'article 176 dans le domaine relatif à la procédure devant les cours administratives doivent être adoptées avant l'expiration du délai de cinq ans à compter de la date de l'entrée en vigueur de la Constitution. Avant l'entrée en vigueur de ces lois, les dispositions relatives à la révision extraordinaire des jugements de la Haute Cour administrative sont maintenues en vigueur.

Article 237

1. Au cours d'une période de quatre ans à compter de la date de l'entrée en vigueur de la Constitution, les contraventions sont soumises à la juridiction des commissions chargées des contraventions auprès des tribunaux de district, la peine de détention étant prononcée par le tribunal.
2. Le tribunal connaît des appels des jugements prononcés par la commission.

Article 238

1. Le mandat des autorités constitutionnelles de la puissance publique et celui des personnes les composant, élues ou nommées avant l'entrée en vigueur de la Constitution, prend fin avec l'expiration du délai prévu par les dispositions en vigueur avant la date de l'entrée en vigueur de la Constitution.
2. Si les dispositions en vigueur avant l'entrée en vigueur de la Constitution ne prévoient pas la durée de ce mandat et la période écoulée à dater de l'élection ou de la nomination dépasse le

délai prévu par la Constitution, le mandat constitutionnel des autorités de la puissance publique ou des personnes les composant expire un an après l'entrée en vigueur de la Constitution.

3. Si les dispositions en vigueur avant l'entrée en vigueur de la Constitution, ne définissent pas la durée de ce mandat et la période écoulée à dater de l'élection ou de la nomination ne dépasse pas le délai prévu par la Constitution pour les autorités constitutionnelles de la puissance publique ou les personnes les composant, la période pendant laquelle ces autorités ou personnes ont exercé leurs fonctions en vertu des dispositions en vigueur, est comprise dans la durée du mandat prévue par la Constitution.

Article 239

1. Les arrêts du Tribunal constitutionnel déclarant la non conformité à la Constitution des lois adoptées avant la date de l'entrée en vigueur de celle-ci ne sont pas définitifs, pendant une période de deux ans à compter de la date de l'entrée en vigueur de la Constitution, et sont soumis à l'examen de la Diète qui peut les rejeter à la majorité des deux tiers des voix, la moitié au moins du nombre constitutionnel des députés étant présents. Cette disposition n'est pas applicable aux arrêts prononcés en réponse aux questions juridiques adressées au Tribunal constitutionnel.
2. Si la procédure devant le Tribunal constitutionnel relative à l'interprétation généralement obligatoire des lois a été engagée avant l'entrée en vigueur de la Constitution, l'arrêt de non-lieu est prononcé.
3. A la date de l'entrée en vigueur de la Constitution, les arrêts du Tribunal constitutionnel relatifs à l'interprétation des lois cessent d'être obligatoires. Sont maintenus en force les jugements prononcés par les tribunaux et d'autres décisions ayant la force de la chose jugée émanant des autorités de la puissance publique, prises compte tenu du sens des dispositions établi par le Tribunal constitutionnel par la voie de l'interprétation des lois généralement obligatoire.

Article 240

Pendant une année à compter de la date de l'entrée en vigueur de la Constitution, la loi budgétaire peut prévoir la couverture du déficit budgétaire par la prise d'engagements à la banque centrale de l'Etat.

Article 241

1. Les traités ratifiés jusqu'à présent par la République de Pologne en vertu des dispositions constitutionnelles en vigueur lors de la ratification et publiés au Journal des Lois, sont censés être ratifiés en vertu d'une loi d'autorisation préalablement adoptée et leur sont applicables les dispositions de l'article 91 de la Constitution, s'il résulte du contenu du traité qu'il porte sur les affaires visées au premier alinéa de l'article 89 de la Constitution.
2. Le Conseil des Ministres présentera à la Diète, au cours de deux années à compter de l'entrée en vigueur de la Constitution, la liste des traités contenant des dispositions non conformes à la Constitution.
3. Les sénateurs, élus avant la date de l'entrée en vigueur de la Constitution et qui n'ont pas trente ans accomplis, exercent leur mandat jusqu'à la fin de la législature pour laquelle ils ont été élus.
4. Le cumul du mandat de député ou de sénateur avec la fonction ou l'emploi faisant l'objet de l'interdiction prévue à l'article 103, entraîne l'extinction du mandat un mois après la date de l'entrée en vigueur de la Constitution, à moins que le député ou le sénateur renonce auparavant à la fonction ou que l'emploi cesse.
5. Les affaires faisant l'objet de la procédure budgétaire ou d'une procédure devant le Tribunal constitutionnel ou le Tribunal d'Etat engagée avant l'entrée en vigueur de la Constitution, sont poursuivies conformément aux dispositions constitutionnelles en vigueur le jour de l'ouverture de la procédure.

6. Pendant une période de deux années à compter de la date de l'entrée en vigueur de la Constitution, le Conseil des Ministres indiquera les résolutions du Conseil des Ministres et les arrêtés des ministres ou des autres autorités de l'administration gouvernementale pris ou édictés avant la date de l'entrée en vigueur de la Constitution et qui demandent, conformément aux conditions prévues au premier alinéa de l'article 87 et à l'article 92 de la Constutiton, d'être remplacés par des règlements édictés en vertu des délégations de la loi dont le projet sera présenté à la Diète, en temps utile, par le Conseil des Ministres. Pendant cette même période, le Conseil des Ministres présentera à la Diète un projet de loi indiquant les actes normatifs édictés par les autorités de l'administration gouvernementale avant la date de l'entrée en vigueur de la Constitution qui deviennent résolutions ou arrêtés au sens de l'article 93 de la Constitution.
7. Les textes de portée locale et les dispositions communales en vigueur à la date de l'entrée en vigueur de la Constitution deviennent des textes de portée locale au sens du deuxième alinéa de l'article 87 de la Constitution.

Article 242

Cessent d'être en vigueur:

1) la loi constitutionnelle du 17 octobre 1992 sur les rapports entre les pouvoirs législatif et exécutif de la République de Pologne et sur les collectivités territoriales (Journal des Lois de 1992: n° 84, texte 426; de 1995: n° 38, texte 184, n° 150, texte 729; de 1996: n° 106, texte 488),
2) la loi constitutionnelle du 23 avril 1992 sur la procédure de l'élaboration et de l'adoption de la Constitution de la République de Pologne (Journal des Lois de 1992, n° 67, texte 336 et de 1994: n° 61, texte 251).

Article 243

La Constitution de la République de Pologne entre en vigueur à l'expiration d'un délai de trois mois à compter du jour de sa publication.

Le Président
de la République de Pologne
Aleksander Kwaśniewski