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THE APRIL 1989 CHANGE OF THE CONSTITUTION

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

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

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

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

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

[17] *Ibidem.*

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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UNDERTAKING ECONOMIC ACTIVITY IN THE LIGHT OF NEW PROVISIONS

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I

1. The Law of December 23, 1988, On Economic Activity [1] is the turning point in the Polish economic law and is worthy of particular attention for this reason.

In its Art. 1, the Law introduced three fundamental principles : of economic freedom, of equality of economic subjects, and of legalism (conformability to law). The first of those principles has been formulated as follows : "The undertaking and pursuing of economic activity is free and permitted for all..." Thus the right to undertake and pursue economic activity is a common right, granted to all by force of the Law. Therefore, the former institution of the "licence to pursue economic activity" no longer comes into consideration today : all citizens have that license without the need to apply for it, to prove their special attributes or qualifications, or to justify the social profitability of the planned activity. If according to the Law economic activity is free, it is for the person who pursues it to define its range, conditions, and ways of pursuit. It is also for him to decide about its abandonment. Any limitations in this sphere (e.g. those related to environment protection, fire control or sanitary regulations, etc.) may only be introduced by statutes or acts based on explicit statutory authorizations.

Like any freedom expressed by law, also the economic freedom has certain limits. Guarding them is the definition of economic activity. It prevents both the excessively narrow and excessively broad interpretation of economic freedom. According to Art. 2 part 1 of the discussed Law, economic activity is distinguished by two traits : 1) it is to yield profit, and 2) it is pursued independently, on one's own account. Thus according to the Law, the term "economic activity" does not designate charity, unpaid propagation of knowledge, skills or opinions, provision of free

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[1] *Journal of Laws*, No. 41, item 324. The Law of December 23, 1988 has been amended in December 1989 ; the amendment will be discussed in one of the next issues of our *Review*.

amusement, etc. Naturally, a person involved in economic activity may contribute to charity or organize unprofitable events. One should bear it in mind, however, that some of such activities may be strictly regulated by law, unlike economic activity.[2] [3] Activity on another person's account is not economic activity, either, even if it yields profit (this concerns e.g. the activities of a commission agent who acts in the name of his orderer and received a commission in return). With the intention to make the denotation of the term "economic activity" as broad as possible, the legislator stresses the variety of forms of that activity, mentioning manufacture, building, trade, and services. Any person who pursues economic activity is interpreted by the Law as an "economic subject." That person may be an individual or legal person, as well as an organizational unit with no legal personality (e.g. a general partnership).

An economic subject is not obliged to restrict himself to one type of activity : he is not attached to it. He may simultaneously undertake activities in various spheres which may sometimes differ greatly from one another (e.g. manufacture and exports of furniture and imports of computers). The specification included in Art. 2 part 1 is not a binding legal classification. This approach makes away with the former organization of national economy, based on vertical divisions into sectors, departments, and branches. Worthy of attention in this context is Art. 6 of the Law which confirms the economic subjects' right to form organizations of such subjects, but at the same time introduces the principle of voluntary association. Thus the pursuit of a certain kind of economic activity cannot depend on membership of a given organization (guild, private transport association, etc.).[3]

The introduction of the principle of economic freedom should radically change the way of thinking—the whole of economic philosophy. The question, "Am I allowed to undertake any activity?," is now replaced by, "What is the most convenient form of activity I could undertake ?" Instead of considering the chances of undertaking a new activity, one should choose one of the many organizational forms possible (e.g. a natural

[2] See e.g. the Law of June 9, 1968, On Licensing Public Artistic Entertainement, and Sports Activities *(Journal of Laws,* No. 12, item 64).

[3] The principle of voluntary association is universal in nature and operative from the moment of entering into force of the Law on Economic Activity. At that moment, members of the then existing associations of craftsmen, private trade and services, and private transport acquired the right to resign from those associations. The principle of cooperatives' voluntary affiliation to unions of cooperatives (including the central ones) has already been introduced at an earlier date. See Art. 4 § 1 and 3 of the Law on cooperatives in the reading determined by the Law of October 23, 1987, On the Change of Certain Provisions Regulating the Principles of Functioning of National Economy *(Journal of Laws,* No. 33, item 181).

person's activity on his own account ; a cooperative ; a partnership ; an initiative to establish a new State enterprise, etc.).

2. Also the principle of equality of economic subjects departs greatly from the former principles. Before, an economic subject's legal status depended on his affiliation to a given sector of the economy. The most fundamental here was the division into units of socialized economy (USE) and units of nonsocialized economy, of which the former were privileged. This was expressed among others by a different tax system, a special system of supplies, differences as regards sales, etc. The revival of the institution of commercial partnership made the crossing of those barriers possible to some extent : the principle was used (which followed from practice rather than provisions) that for a partnership to be included among the USE's, a litle over a half of its opening capital should belong to a USE.

The principle of equality of economic subject, formulated in Art. 1 of the Law on Economic Activity, is explicated in Arts. 7 and 25 which point to some of its aspects. Thus equality is to concern the sphere of public legal liabilities, that is taxes above all. This announcement has been developed in the Law of January 31, 1989, On Income Tax from Legal Persons *(Journal of Laws,* no. 3, item 12). At present, there is a division into legal persons and individuals which seems more natural than the former differentiation of sectors. Further on, Arts. 7 mentions the uniformity of principles of obtaining bank credits and supplies of the means of production. The latter provision is connected with institutions of regulated supply, and will disappear as soon as such institutions are abolished with the development of market economy. It should be added here that the principle of equality is valid also in spheres where licences are obligatory by way of exception. A refusal to grant licence may in no case be grounded by the applicant's affiliation to a certain sector of the economy or by the type of economic subjects concerned. The only admissible grounds for such refusal are the conditions mentioned in Art. 20 part 5 of the discussed Law which will be discussed further on.

The principle of equality of economic subjects is expressed in the fact that economic activities of all types of subjects have been included in one and the same act. The Law concerns not only natural persons who undertake economic activity but also any other subjects, the State enterprises included. As such, it is a common act. Admittedly, it is "exclusive" for natural persons, while legal persons and other organizational units have other statutes "of their own" as well, which define the way of creating an economic subject and its inner structure. Those statutes include the following above all :

1) for State enterprises : the Law of September 25, 1987, On State Enterprises *(Journal of Laws,* No. 35 of 1987, item 201) ; the Law of September 25, 1981, On Self-government of Employees of a State Enterprise *(Journal of Laws,* No. 24, item 123) ; the Law of January 31, 1989, On Financial Economy of State Enterprises *(Journal of Laws,* No. 3, item 10) ; and the Law of June 29, 1983, On Improvement of a State Enterprise's Economy and Its Bankruptcy *(Journal of Laws,* No. 8 of 1986, item 46, and No. 3 of 1989, item 10) ;

2) for cooperatives : the law on cooperative societies ;[4]

3) for partnerships, non-commercial partnerships excluded : the commercial code ; for non-commercial partnerships : Arts. 860—875 of the civil code.

There are separate provisions to regulate the establishment of economic subjects with a foreign capital share : the Law of December 23, 1988, On Economic Activity with Foreign Capital Share *(Journal of Laws,* No. 41, item 325) ; and the Law of July 6, 1982, On the Principles of Economic Activity of Foreign Natural and Legal Persons in the field of small industry on the territory of the Polish People's Republic.[5]

Though it has been clearly formulated in the Law on economic activity and is legally binding, the principle of equality of economic subjects has not been consistently introduced in the entire legal system as yet. This may lead to certain difficulties. Thus provisions of the civil code and the code of civil procedure are still based on the traditional division into the U.S.E.'s and non-socialized subjects. It is therefore indispensable that those provisions should be amended as soon as possible. Until then, their interpretation should have regard to the common principle of equality of economic subjects which follows from Art. 1 of the Law on economic activity.

3. The discussed Law states that the undertaking and pursuit of economic activity is permissible under conditions defined by legal provisions. Its Art. 3 deals with those conditions, not specifying, however, the actual conditions of economic activity. It is, therefore, a regulation referring to another rule. On the other hand, it states explicitly that the conditions in question are only those "provided by law" and "defined by provisions." These formulations prevent a discretionary establishment of conditions by the administrative agencies. All restrictions must be justified

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[4] The Law of September 16, 1982—*Journal of Laws,* No. 30, item 210 ; No. 39 of 1983, item 176 ; No. 39 of 1986, item 172 ; and No. 33 of 1987, item 181.

[5] Due to its specific nature, the problem of those two statutes will not be included in the further discussion.

by an appropriate provision,[6] e.g. of building, sanitary, fire-control or environment protection regulations. The discussed conditions are not universal but related to the type and place of the activity concerned. Thus the provisions of building regulations do not apply to a subject involved in car transport, unless they concern the building and installations of garages, service stations, etc.

The interpretation of Art. 3 part 2 should be analogous. Its provision imposes on an economic subject the duty to employ persons with adequate qualifications. On the other hand, it does not specify the situations where this is indispensable, or the kind of qualifications required, leaving that matter to separate provisions. For instance, the fact that an economic subject involved in car transport may employ as drivers only persons with the adequate category of driving licence, follows not from the provisions of the Act on economic activity but from traffic regulations. It devolves upon that subject to know and observe the relevant provisions.

The economic subjects' direct and principally common duties have been specified in Art. 12 of the Law. There are few of them :

— the duty to put a sign on the outside to mark the seat and place where economic activity is pursued (the firm run), and

— the duty of subjects involved in manufacture to mark the products they put on the market.

The Law provides for no exceptions in this sphere. It defines precisely the contents of marks both on the seat or workshop (Art. 12 part2) and on the product (Art. 12 part 3). It seems, however, that as regards the duty to put a mark "on the product," it is sufficient to mark its wrapping or an enclosed document (specification, operation manual, etc.). It should be added that the signs marking both the seat and the product of an economic subject may arise no doubts whatever as to his identity, and must differ clearly from signs used by other economic subjects.[7]

A supplement of the principle of legalism can be found in Art. 4 of the Law. Its provision declares the widely-known principle according to which everything that is not explicitly prohibited by law is thus permissible. This principle has great difficulties forcing its way into the practice. In relation to economic subjects with legal personality, a certain hindrance

[6] The Law on Economic Activity is part of administrative law. Hence Art. XVI of the executory provisions of the civil code does not apply to it. Thus the notion of a legal provision is limited to statutes and executory acts passed on statutory authorization.

[7] Art. 1 part 1 and Art. 2 part 1 of the Law of August 2, 1926, On Fighting Unjust Competition *(Journal of Laws,* No. 56 of 1930, item 467). See also : S. Janczewski, *Prawo handlowe, wekslowe i czekowe [Commercial Law, Law on Cheques and Bills of Exchange],* Warsaw 1947, pp. 373*ff*.

may result from the second sentence of Art. 36 of the civil code which states that an artificial person's legal capacity does not include the rights and duties not related to that person's competences. Leaving a detailed discussion of that provision's further operation in the light of Art. 4 of the Law on economic activity out of account, it should be mentioned here that many economic subjects, partnerships in particular, protect themselves from the possible consequences of Art. 36 of the civil code, defining a very broad range of their activities.

A further explication of the principle formulated in Art. 4 of the discussed Law has been included in Art. 5. Its provision concerns the question of employment only, and grants a full freedom in this respect to economic subjects. It seems that Art. 5 might also be interpreted as a derogatory clause. It repeals the former limitations as to the number of employees and the duty to use the service of employment agencies. Instead, the actual limitations of increased employment may arise from tax provisions. A voluntary use of various forms of labour exchange has been preserved.

II

1. From the point of view of the range of operation of the Law on economic activity and the kind of formalities necessary to undertake economic activity, its several different groups can be distinguished. Above all, activities that fall under the discussed Law should be distinguished from those to which the Law does not apply at all, the former being the rule and the latter constituting exceptions. In this case, the rule is presumed, and exceptions cannot be extended through interpretation.

The exceptions include the above-mentioned economic activity with a foreign capital share which has a separate statutory regulation. Such regulation also concerns the establishment and running of banks (Banking Law—Law of January 31, 1989, *Journal of Laws*, No. 4, item 000) and of insurance institutions (Law of September 20, 1984, On Property Insurance and Insurance of Persons, *Journal of Laws*, No. 45, item 242). The State's statutory monopoly includes the sphere of post and telecommunications and of radiophony and television of common use (Law of November 15, 1984, On Communication, *Journal of Laws*, No. 54, item 275, and No. 41 of 1988, item 324). A legal monopoly has also been provided for in the field of production and adaptation of films as well as their distribution (Law of July 16, 1987, On Cinematography, *Journal of Laws*, No. 22, item 127). Instead, activities of artistic institutions do not fall under any monopoly. The Law of September 28, 1984, On Artistic Institutions

(Journal of Laws, No. 60, item 304) does not prohibit the establishment of theatres, philharmonic societies, bands etc. according to the priciples of undertaking economic activity, defining only the organizational forms of artistic activity undertaken by the State and local self-governments.

The Law on Economic Activity does not concern the creation and running of schools, and various kinds of educational institutions. They fall under the Law of July 15, 1961, On the Development of the Educational System *(Journal of Laws,* No. 32, item 160 with subsequent changes).

The specification of kinds of activities to which the discussed Law does not apply is not comprehensive and cites a few examples only. As regards economic activity which does fall under the Law, the following three types can be distinguished :

— registered activity which is to be the rule ;
— non-registered activity ;
— licensed activity.

2. Registered activity is the basic type of economic activity. In case of doubts, this very nature of such activity should be presumed. The subject who undertakes such activity has a single and simple duty : to register. According to the Law, registration is to proceed before one agency and in one proceedings.[8] Thus legal persons of various types fulfil the duty to register through the very fact of acquiring legal personality. As a rule, that personality is acquired by means of being entered in a given register (e.g. of State enterprises, cooperatives, a commercial register). In this case, an excerpt from that register is a sufficient authorization and proof that the duty to register has been fulfilled. Any changes in a legal person's economic activity should be reported according to the procedure provided for by the regulations concerning the given type of register. In the case of State enterprises, cooperatives and partnerships with legal capacity, the registration office is the court.

Natural persons and organizational units with no legal personality undertaking economic activity have that fact put on a special record. Considering the large number of economic subjects and planning to make the record as accessible as possible, the legislator turned the task of keeping such records over to local agencies of State administration of the basic level of extraordinary competence. Thus in larger towns and in districts of big cities, the registration agency is the head of the competent

[8] An exception here is a general partnership which is subject to registration in the commercial register (Art. 5 and 6 of the Commercial Code), and also—as a subject with no legal personality—in the record of economic activity (Art. 8 of the Law on Economic Activity).

department of town or city office.[9] In small towns and communes, that role is usually played by the mayor or head of the commune who acts through a commissioned official (Art. 135 parts *2* and 3 of the Law on the System of People's Councils and Local Self-government).

In the case of recording proceedings not regulated by the Law on Economic Activity, the relevant provisions of the code of administrative procedure apply. A notification should be made in writing, telegraphed, teletyped or even oral for the record (Art. 63 § 1 of the code of administrative procedure). It should contain the following :

1) definition of the economic subjects, that is first name and name[10] [11] in the case of a natural person ; first names and names of all partners in the case of a non-commercial partnership ; and the firm meeting the provisions of the commercial code in the case of general partnership. The use of the name of a suppositious or fictitious person is not permissible ; definition of the seat of the economic subject (places of residence) ; first names and names of the appointed plenipotentiaries. Such a plenipotentiary may be e.g. an agent of the economic subject, commissioned by him to run a shop, workshop, etc. in his name ;

2) definition of the object of economic activity ; that definition should be explicit and truthful but not necessarily based on the established systematics ;

3) definition of the place where economic activity is to be pursued, that is e.g. definition of the address of workshop or a statement that the activity will take place "at the customer's" or another similar statement ;[11]

4) definition of the date of starting economic activity.

The economic subject fulfils his duty to report through the fact of making or sending the notification only. He is not obliged to wait for any step whatever on the part of the registration agency before he can actually undertake his activity ; in particular, a "confirmation of notification" is not required.

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[9] The appointment of the head of department of a town office who is to play the role of a recording agency should be made in the office's statute (Art. 135 part 1 and Art. 139 part 4 of the Law of July 20, 1983 On the System of People's Councils and Local Self-government, *Journal of Laws,* No. 26 of 1988, item 183).

[10] In some cases, the designation will probably have to include not only the first name nad name but also additional elements fully to identify the economic subject concerned (Art. 2 part 2 of the Law on Fighting Unjust Competition). There seem to be no obstacles to the use of such additional elements which are part of the economic subject's name also in other cases, e.g. "DIGITAL Music Shop, Piotr Kulesza" (from advertisements in *Życie Warszawy* of 1989, No. 27, p. 9).

[11] The building contractor is not obliged to report the separate building sites as the places where he pursues economic activity. Instead, he must meet all the requirements of building regulations.

The registration agency is obliged to enter the economic subject in the record in the form mentioned in the latter's notification, and then to deliver a certificate of that fact to the subject concerned. Delivery should take place within 14 days after notification. It seems that if an economic subject reports to the office in person, the certificate should be issued off-hand (Arts. 12 § 2, 35 § 2, and 217 § 3 of the Code of Administrative Procedure).

A refusal to enter the applicant in the record is possible in definite cases only (Art. 17 of the Law on Economic Activity), that is if the activity concerned does not fall under the provisions of the discussed Law (e.g. activity with a foreign capital share ; a film producer ; a kinder-garten) ; if it is a licensed activity ; or the activity does fall under the Law but not subject to recording. The latter case concerns activities mentioned in Art. 10 point 1 of the Law on Economic Activity, that is agricultural production of plants and animals, horticulture and fruit culture. On the other hand, recording of a side line of profitable activity seems to be possible (Art. 9) : part 1 of that provision states that recording of such kinds of activity is not required, as compared to Art. 10 which states that another kind of activity "is not liable to recording." Also the reasons of expediency speak for recording of a side line of profitable activity, and a natural person involved in such activity may be obviously interested in having his name entered in the record and thus win a greater confidence of his customers. One should bear it in mind that the civil code abolished the institution of a registered merchant. The entering in the record might today be a substitute of that merchant's status.

A refusal to enter an applicant in the record may also result from defects of form of the notification (Art. 17 point 14). What is meant here is an absence of one of that notification's required elements as provided by Art. 16 part 1. For instance, if a natural person plans to run an agency for purchase and sale and contact his customers by means of a P.O. Box only, and gives the number of that P.O.B. as the seat of the economic subject, his notification will be defective. The person concerned must give his own address for the record. A refusal to enter an applicant in the record because of defective form may only take place after that applicant has been summoned to remove the defects but failed to do it in a specified period. The period here is specified by the recording agency.

Finally, a refusal may result from the fact that a given kind of economic activity has been reserved exclusively for cooperatives of the disabled or of the blind (Art. 17 point 5 of the Law on Economic Activity). Such a monopoly may be established by the Council of Ministers by means

of an ordinance passed according to Art. 181a § 4 of the law on cooperative societies.[12]

The Law demands that the record of economic activity should correspond with the reality and be updated. Thus economic subjects are obliged to inform the recording agency of any changes in the data included in the record. The notification should be made within 14 days after the emergence of the circumstance concerned (e.g. the opening of a new shop, starting of a new production). This point is regulated by Art. 18 of the Law on Economic Activity.

Access to the record of economic activity if free (Art. 16 part 2 of the Law). An economic subject may adduce the recorded data. Third parties gathering data about a subject's legal status and actual situation (such as banks) may avail themselves of the record. By force of the relevant provisions, the principle of free access also concerns registers of legal persons, kept by courts.

An economic subject is stricken off the record on his own motion in which he notifies the agency that he has ceased to pursue economic activity (Art. 19 part 1 point 1). Also the transformation of an economic subject into a legal person should have that effect (e.g. if partners of a non-commercial partnership get registered as a limited liability company). There are just two situations in which an economic subject can be stricken off the record against, his will :

1) if a valid judicial decision interdicts a natural person from pursuing economic activity liable to recording (Art. 19 part 1 point 2). The question arises here whether this provision provides the grounds for striking a non-commercial partnership off the record if such a decision concerns one or some of the partners only. It seems that this question might be answered to the affirmative only if the sanction concerns all partners or all but one. In the latter case, the partnership would lose its *raison d'etre* : the partner whom the ban does not concern could immediately apply to be recorded as a new economic subject : a natural person. The very dissolution of partnership and the related settlements between partners constitute a separate problem in this case. But if the above-mentioned ban does not concern at least two of the partners, the partnership may continue to exist and be on the record after the partners whose economic activity was banned have resigned. They should then notice the termination of their participation. Owing to the provisions of Art. 869 § 2 of the Civil Code, it is possible to make no account of the time limits

[12]The provisions regulating this issue have been temporarily maintained in force which were passed on the grounds of Art. 7 part 2 of the repealed Law of January 31, 1985 On Small Industry (Art. 52 of the Law on Economic Activity).

of termination in so doing : thus the resigning partners would save the partnership ;

2) if the recording involves a breach of law (Art. 19 part 2). In this case, the legislator cites the provisions of the code of administrative procedure which concern reopening of proceedings. The conditions of reopening of the general administrative proceedings have been specified in Art. 145 § 1 of the Code of Administrative Procedure. It seems that only some of them may apply in practice to the recording of economic activity. For instance, a possible reason for striking a subject off the record might be his concealment of a valid decision forbidding him to pursue economic activity, or a faulty definition of the nature of partnership (omission of the information that the partnership has legal personality and as such cannot be recorded according to Art. 10 point 1 of the Law on Economic Activity). In both of the above cases, the prerequisite for reopening of proceedings would apply which has been mentioned in Art. 145 § 1 point 5.

The striking off the record always takes place as a result of an administrative decision which should fix the time limit of that step, that is the date on which the activity should be discontinued (Art. 19 part 3 of the discussed Law). After the due course of instances has been exhausted in administrative proceedings, the decision to strike a subject off the record may be appealed against before the Supreme Administrative Court (Art. 196 § 2 point 4 of the Code of Administrative Procedure).

It is today difficult to anticipate the actual range of application of provisions on recording economic activity of subjects with no legal personality. One should bear it in mind that a person who undertakes economic activity individually may also be a legal person. This possibility is opend up by a new institution of a one-man limited liability company (Art. 158 of the Commercial Code, in the reading introduced by the amendment of December 23, 1988, *Journal of Laws*, No. 41, item 326). The chief advantage of this solution is the fact that the investor's property has been divided into personal and economic, and that the latter's liability has been limited. Moreover, a person who undertakes economic activity should analyze the tax regulations. The income tax imposed on natural persons differs from that of legal persons. The duration and costs of proceedings aimed at creating a limited liability company will probably result in this new possibility being used mainly in the case of larger-scale ventures involving considerable means or particular risk.

3. Non-registered activity can be undertaken without any formalities that follow from the discussed Law. It includes the following two spheres :

— side-line profitable activities in the case of which recording is not required (Art. 9) ;

— agricultural production which is not subject to recording (Art. 10 point 1).

For an activity to be recognized as a profitable side line, the following conditions must be met jointly : 1) The subject who pursues that activity may be a natural person only. 2) He must pursue it personally, which however does not seem to exclude the possibility of employing hands (Art. 5 of the Law on Economic Activity). 3) Beside the activity concerned, the person who pursues it must have another permanent source of income (e.g. earned salary, old-age or disability pension, a farm). The Law does not demand that the income from the side-line profitable activity should necessarily be lower than that from the basic source. What matters here is that economic activity should not be such person's only source of income. 4) We now pass to the last condition for the activity to be recognized as a profitable side line : its object must be contained in the specification of activities included in Art. 9 part 1. It is quite an extensive specification which allows a broad interpretation and concerns both manufacture and services. Trade, instead, has been taken into account here to a very narrow extent only (Art. 9 part 2 point 3 of the Law on Economic Activity).

Non-registered activity cannot be undertaken in spheres liable to licensing. A subject involved in non-registered activities—though exempt of the duty to report—is nevertheless liable to other provisions and duties related to the pursuit of economic activity. Thus he must meet the requirements of detailed provisions mentioned in Art. 3 of the discussed Law, and mark both his seat and the place where he pursues the activity, and his products which he puts on the market (Art. 12).

4. The Law mentions eleven spheres where economic activity is licensed, which are however not defined. Therefore, their exact limits must be determined basing on the statutes that concern the separate fields. Hence the spheres in question will presently be mentioned together with the relevant statutes but without their executory acts. Economic activity is licensed in the following spheres :

1) excavation of minerals under the mining law (decree of May 6, 1953 : Mining Law, *Journal of Laws*, No. 4 of 1978, item 12 ; No. 35 of 1984, item 35 ; No. 33 of 1987, item 180 ; and No. 41 of 1988, item 324), and prospective exploration of such minerals (Law of November 16, 1960, On Geological Law, *Journal of Laws*, No. 52, item 303; No. 38 of 1974, item 230 ; and No. 41 of 1988, item 324) ;

2) processing of and trade in precious metals and stones (Law of June 29, 1962 : Law on Assay, *Journal of Laws*, No. 39, item 173) ;

3) manufacture of and trade in explosives, arms and munitions (Law of January 31, 1961 On Arms, Munitions and Explosives, *Journal of Laws*, No. 6, item 43 ; No. 6 of 1983, item 35 ; and No. 41 of 1988, item 324) ;

4) manufacture of pharmaceutical drugs, intoxicants, and psychotropic agents, as well as sanitary articles (Law of January 28, 1987, On Pharmaceutical Drugs, Sanitary Articles, and Pharmacies, *Journal of Laws*, No. 3, item 19 ; and No. 41 of 1988, item 324), and manufacture of poisons (Law of May 21, 1963, On Poisons, *Journal of Laws*, No. 22, item 116 ; and No. 6 of 1983, item 35) ;

5) production, distilling and dehydration of alcohol and isolation of alcohol from other products, as well as production of vodka (Law of April 22, 1959, On Fighting the Illicit Production of Alcohol, *Journal of Laws*, No. 27, item 169 ; and No. 41 of 1988, item 324) ;

6) manufacture of tobacco products (decree of June 24, 1953, On Tobacco Cultivation and Manufacture of Tobacco Products, *Journal of Laws*, No. 34, item 144 ; and No. 41 of 1988, item 324) ;

7) sea transport (the Maritime Code—for the uniform text, see *Journal of Laws*, No. 22 of 1986, item 112), and air transport and other air services (Law of May 31, 1962 : Air Law, *Journal of Laws*, No. 32, item 153 ; No. 52 of 1984, item 272 ; No. 33 of 1987, item 180 ; and No. 41 of 1988, item 324) ;

8) running of pharmacies (see point 4) ;

9) foreign trade in services and articles defined by the ordinance of the Minister for Economic Cooperation with Foreign Countries (ordinance of December 30, 1988, *Journal of Laws*, No. 44, item 355) ;

10) trade in cultural goods created before May 9, 1945 (Law of February 15, 1962, On Protection of Cultural Goods and on Museums, *Journal of Laws*, No. 10, item 48 ; and No. 38 of 1983, item 173) ;

11) services : protection of persons and property, private investigations, and service in the field of passport matters.

The licensing agency is a chief or central agency of State administration competent on account of the given object of economic activity. If an economic subject plans to undertake various forms of activity which fall take activity in non-licensed spheres. Licensed activity is not subject to each of them for separate licences. The licences are not dependent on one another legally. A refusal to grant licence has no direct influence on the existence of the economic subject concerned : he may continue or undertake activity in non-licensed spheres. Licensed activity is not subject to recording as economic activity (Art. 10 point 3 of the Law on Economic Activity).

Licence is granted by way of an administrative decision. The same legal form is also required for a refusal to grant licence ; a limitation of the range or object of a licence granted ; and a withdrawal of licence. In the light of Art. 196 § 2 point 4 of the Code of Administrative Procedure, it may be stated that, the course of administrative proceedings exhausted (Art. 127 § 3 of the Code of Administrative Procedure), all such decisions may be appealed against before the Supreme Administrative Court.

Obtainment of a licence is the condition *since qua non* of the undertaking of the licensed activity. Thus licensed activity may only start on executability of the decision granting the licence.

A question arises whether the decision granting a licence is discretionary or not. Art. 20 part 5 of the discussed Act seems to provide the clue as to the right answer. It specifies three prerequisites for a refusal to grant licence or a grant of a licence to the extent smaller than demanded by the subject concerned. It does not follow from the reading of both that provision and the Law as a whole that any other prerequisites might exist as well. This would speak for treating licence as a non-discretionary decision. On the other hand, however, the above-mentioned prerequisites seem to be rather extensible. They include :

— regard to the State's security ;
— regard to its defence readiness ;
— regard to a danger to an important interest of national economy.

The latter prerequisite deserves a broader discussion. Its range seems to be the most extensive. Speaking of an important interest, it is based on valuation. It may thus be concluded that using this prerequisite, the licensing agency will have to include in the motives for its decision an explanation : which interest is endangered and why it has been found important.[13] Moreover, since the Law mentions the interest of national economy, then the value concerned should pertain to the whole of economy. Therefore the prerequisite is not fulfilled if the danger concerns a partial or local interest only ("departmental interest", interest of inhabitants of a city, etc.). Therefore, the justification should demonstrate that the interest of the entire economy has been threatened. It should be added here that also the notion of interest itself is subject to various interpretations.[14]

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[13] See J. Zimmermann, *Motywy decyzji administracyjnej i jej uzasadnienie [The Motives and Justification of an Administrative Decision],* Warsaw 1981, pp. 116*ff*, 136*ff*.

[14] See M. Wyrzykowski, *Pojęcie interesu społecznego w prawie administracyjnym [The Notion of Social Interest in Administrative Law],* Warsaw 1986.

A licence should answer the contents of the motion (Art. 20 part 4 of the Law on Economic Activity *in principio).* There are, however, some exceptions to this rule. Namely, the licensing agency may :

— firstly, define the object of licence less broadly than has been moved for ;

— secondly, grant a licence for a definite period though the mover has not applied for it. (Licensing for unspecified time is to be a rule.) Such decisions may only be taken by the licensing agency on the grounds of prerequisites analogous as in the case of refusal to grant licence. Thus the above remarks also pertain to this case.

The Law also entitles the licensing agency to define in the licence the basic conditions of pursuing economic activity (Art. 20 part 4 *in fine). A* question arises what underlies this expression. To what extent may the licensing agency define the way of pursuing the licensed economic activity on the grounds of this provision ? The answer is by no means easy due to the lack of experience and decisions. The fact is unquestionable that such "basic conditions" may only be defined in the licence itself and cannot be added in a subsequent decision. This is particularly important for the economic subject concerned who invests considerable means in the activity he undertakes. He should therefore „learn" about the possible conditions before he actually undertakes the activity. The way of organization of economic activity may greatly depend on those conditions.

The conditions of economic activity to be defined in the licence have been termed "basic" in the Law of economic activity. That term might mean "essential" as well as "general." It may thus be concluded that the licensing agency is not entitled to specify the details, and should limit itself to the indispensable statements, and also provide an explanation included in the motives of the grant, informing why it finds the specified conditions to be basic.

The most radical approach to the discussed provision would be to find that it does not constitute independent grounds for the definition of conditions of the licensed activity. It may only be applied together with provisions of other statutes, whether those mentioned in Art. 3, or others related to the nature of the licensed activity.[15] This approach seems most to approximate the general principles of the Law mentioned in its Art. 1, those of freedom and legalism in particular. One cannot tell, however, whether the acceptance of this interpretation will at all be possible, the pressure of tradition and bureaucratic habits considered. Let us therefore try to provide a "negative" interpretation of the discussed Law, indicating

[15] Concerned here are the statutes mentioned above on pages 15 and 16.

the elements which the ‘‘basic conditions” should not define. Firstly, they should not limit the freedoms directly mentioned in the Law, that is the freedom to undertake any activities that are not prohibited by law (Art. 4) ; to employ hands (Art. 5) ; and economic subjects’ freedom to associate (Art. 6) ; secondly, the discussed conditions should not infringe provisions in force, e.g. the anti-monopoly provisions, through the establishment of “directions of supply and sales.”

A licence may only be withdrawn in cases provided by the Law, that is :

— if the economic subject concerned fails to meet the basic conditions specified in the licence (Art. 22 part 1). In that case, the licensing agency may also confine itself to limiting the range or object of economic activity concerned ;

— if a natural person involved in a licensed economic activity has been forbidden to pursue such an activity by a valid judicial decision ;

— if the grant of a licence inolved a breach of law ;

— if the economic subject has notified the agency about his discontinuance of the licensed activity.

The Law provides for the possibility to be granted a promise of a licence (Art. 23). This seems important for persons who only prepare to undertake economic activity but at the same time wish to attain certainty as to the conditions they will have to meet when pursuing it. The promise is binding for the licensing agency in the period specified by that agency. Its validity cannot expire after a period shorter than six months (Art. 23 part 3).

The Law does not mention a transfer of the rights resulting from a licence or promise of license to another subject. This may give rise to many doubts in practice. For example, can the founders of a partnership “resign” the promise of a licence they have obtained to the future partnership ? Does the transformation of the economic subject concerned (e.g. of a State enterprise into a partnership) necessarily involve in the expiration of a licence or promise of licence ? It may be assumed that the above doubts will be dismissed with the passing of the draft statute entitled : General provisions of administrative law. The draft contains a general solution of the problem of legal succession in the field of the rights and duties concerning administrative law.

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POLISH FOREIGN INVESTMENT LAW (THE LAW OF DECEMBER 23, 1988 ON ECONOMIC ACTIVITY WITH THE PARTICIPATION OF FOREIGN PARTIES)*

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Against the backdrop of perennial balance of payment strains, high double-digit inflation, in 1988 well above 70 per cent, and a huge State's indebtness, Polish policy-makers have re-examined the role of foreign direct investment (FDI) to make them more effective factor in modernization of the national economy.

I. GENERAL LEGAL AND ECONOMIC SETTING

Experiments with FDI encouraged by the authorities since 1976 have been conceived not only as an incremental source of capital to complement the dearth of domestic resources but also as a generator of technology transfer, a vehicle for managerial and marketing skills, as well as the most effective instrument of organic integration of the national economy within international manufacturing and service markets.

Originally, however, FDI was restricted to contractual "joint ventures." This was an intermediate form of capital cooperation between full internationalization characterized by majority or wholly foreign owned enterprises and an arm's length licencing reguiring mereley a weak relationship between technology suppliers and buyers. Then, in mid-seventies, for the first time in a post-war period a door to the Polish economy had been opened to FDI either in a form of a wholly foreign owned or incorporated joint ventures with Polish partners. This, however, was originally confined to FDI by Polish nationals from abroad. In the early eighties the scheme had been extended to all foreign investors without any discrimination because of their nationality. FDI continued, however, confined to the so-called "small business sector" of the economy.

With a lapse of time and experience won, conviction became gaining ground that such a limitation does not fit to the real needs of the economy.

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* The Law of December 23, 1988 has been amended in December 1989 ; this amendment will be discussed in one of the next issues of our *Review*.

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Critically considered were also various other restrictions on FDI ingredient in 1976—1985 legislations. Thus, traditional reservations with respect to FDI in socialized sectors of the national economy were growingly seen in terms of past doctrinal apprehension *vis-à-vis* private ownership in general and a foreign capital in particular. The first tangible result of these transvaluations in the domain under consideration was the Law on FDI of 23rd April, 1986 which allowed foreigners to set-up equity joint venture with economic units belonging to the socialized sector of Polish economy. This half-step forward brought about rather mediocre results. In two and a half years time only 40 companies with foreign participation were established of which 23 have actually started their business operations. Total foreign investment capital input into those companies was also meager. Thus necessity of more fundamental reform of the law on FDI became evident. In late 1987 preparatory works were undertaken with the aim of making Polish offer for foreign investors truly attractive and competitive.

In the meantime, a number of other legislative reforms were undertaken to facilitate a process of remodelling the national economy after the market oriented pattern. In 1982, a new Law on Banks was enacted. This piece of legislation have paved the way for demonopolization of the Polish banking system. Among its novelties were provisions allowing for setting-up banks with foreign capital participation. At the moment, fairly advanced are legislative works aiming at further and more substantial liberalization of the banking system. Also Polish hard currency regulations have, in the eighties, undergone fundamental changes to be better suited to new requirements of much more open than before, newly emerging market economy system. The enactment in 1983 of the Bankruptcy Law, and in 1986 of the Law on Combating Monopolistic Practices in the National Economy should also be mentioned in this context.

Till now, however, perhaps the most spectacular legislative achievement has been the enactment of the Law on Business Activity. It has broken in a radical way with decades old concept consisting in making a conduct of any business activity subject to the issue of a detailed permit combined with rigorous surveillance of its performance. Instead, the Law declares conducting of a business open and free for all Polish legal and natural persons, as well as their organizations subject to registration. Permits in a form of concession are required only with respect to limited domains of business activity such as manufacturing of explosives, pharmaceuticals, alcohols and spirits, tobacco and the like. At the same time, the Law has guaranteed to all Polish citizens, their companies and all other economic units an open access to foreign trade. Again, like in most market economy countries, licences are required only with respect to

limited number of items which are subject to quantitative restrictions. These have already won to the Law a nick-name of "The Constitution of Economic Liberties." The enactment by Sejm on 23rd December, 1988 of the new Foreign Investment Law (FIL) should be assessed against this wider legal and economic environment.

II. THE FOREIGN INVESTMENT LAW

The 1988 FIL is distinguished for its comprehensiveness and transparency of administration. A freedom of entry is conditional. The establishment of the company requires a permit. Thus, short of adopting simple rules that either promote or discourage investment indiscriminately, project-by-project screening has been adopted to extract all the potential benefits from each prospective investment on the one hand, and to determine what is required to attract a desired investor on the other. The Law determines only some qualitative criteria of entry of a general character.

To secure the achievement of the above ends, authority to negotiate with the investor (foreign or foreign and his Polish partner alike) is concentrated in one organization that has the full authority to accept or reject an applicant, and to conclude the terms that will govern the investor's sojourn in the country. This organization is the President of the Foreign Investment Agency, having a status of the central administrative authority.

Consequently, the potential costs for the firm considering entry are likely to be low because the adopted approach facilitates quick negotiations and predictable pattern of outcomes. At the same time, concentration of powers in the hands of the President of the Agency should assure the uniformity of public policy toward FDI, contribute to greater transparency of relations between investors and public authorities, as well as reduce a scope of undesirable meddling into business activity of the investor by branch and local authorities. To this end the President of the Agency has been entrusted with coordinative powers which allow for the elimination of most potential strains resulting from the distance between negotiation and implementation of the investment project.

Separate explanation requires "general philosophy" of the Polish FIL. Thus, it is widely assumed that market for foreign investment has many characteristics of goods and service markets. Therefore, just as firms compete for market share of consumers expenditures, so too countries compete for market share of new FDI. As a result, just as firms formulate strategies designed to gain a relative advantage over competitors, governments adopt strategies to attract profitable foreign investment projects.

Again, as in the goods or service markets, some foreign investors, as *sui generis* "buyers", are very sensitive to "price" while the others, to the distinctive features of the "good" represented by the investment site. While the former approach reflects dominant interest in investment oriented toward the worldwide export market, so the latter is characteristic of investments oriented toward recipient, host country's domestic market. Accordingly, governmental strategies are tailored to one of those preferences or represent some combination of the two. Polish FIL aims primarily at attracting foreign investors sensitive mainly to "price" factor, though not exclusively since, "in economically justified cases," it also provides for special incentives in favour of "good" interested investors. Thus, the Polish offer should be seen as fairly open and resilient one.

The FIL subjects companies to which it refers to regulations of the Polish Commercial Code (Article 2, Paragraph 2), with few exceptions resulting from the provisions of Articles 16, Paragraph 7, Article 17, Articles 33—34 and to some extent Article 18.

At the same time, by virtue of Article 36, the regulations pertaining to socialized economic units are not applicable to companies established under the FIL, unless this latter law states otherwise. The above provision aims at securing most favourable treatment for companies with the participation of foreign parties since, on the whole, regulations governing the activity of non-socialized economic units, in private sector of economy, are hitherto more liberal and flexible. In few years to come, however, both sectors are to be treated alike. Thus, the importance of the stipulation of Article 36 is rather of temporary character.

1. Circles of Prospective Investors

1) As for foreign investors who may undertake business in Poland, these are all legal and natural persons domiciled abroad, as well as companies without legal personality domiciled abroad and established by persons referred to above (Article 3, Paragraph 2). Since the Law does not make any difference because of the investor's origin, a Polish citizen permanently domiciled abroad is also a foreign investor within the meaning of this Law.

2) As for Polish partners, who under the Law are entitled to establish companies with foreign investors are the Treasury and other legal persons established under the Polish law, having their seat in Poland, as well as natural persons domiciled in Poland (Article 3, Paragraph 1). Thus, under the FIL actually no category of subjects, both foreign and domestic alike, are excluded from undertaking business activity in Poland, either because of their nationality or legal status and other reasons.

2. *Modes of Business Activity*

1) Two main aspects of the mode of business activity provided for in the FIL may be identified, namely : (a) subjective and (b) organizational ones.

a) As regards subjective aspect, Article 2, Paragraph 1 stipulates that a foreign investor may undertake and conduct business activity in Poland either single-handedly or with other foreign and/or Polish party or parties. Consequently, the FIL stipulates for no maximum foreign equity ceiling. Due, however, to the privileged treatment FDI enjoy, as compared with wholly domestically owned economic units, the contribution of foreign parties (one or more together) to any given undertaking cannot be lower than 20 per cent of equity (Article 2, Paragraph 1) and no less than 25 million zlotys ajdusted accordingly to the changes in the rate of exchange of zloty to the foreign currency in which the contribution is made (Article 16, Paragraph 4). The above requirements are also to prevent the establishment of apparent, faint investments or in a case of joint venture with Polish party to prevent using such investment, at a token price, to control or adversely influence strategies of the latter party.

Separate mentioning deserves reservation made in Article 8, Paragraph 1 of the FIL. It says :

> "The President of the Agency may condition the issuing of a permit upon a foreign party's undertaking business activity jointly with a Polish party and the setting of a specified ratio between the Shareholders' contributions to a company's equity."

As legislative history of the FIL has it, the above serious infringement upon the statutory freedom of choice of prospective investors has been conceived as a special safeguard to be used in exceptional situations only. Among them establishment of a cassino was mentioned. The clause could also be necessary to be applied whenever for reasons listed in Article 6, Paragraph 1 of the FIL issuing of a permit would have otherwise been refused.

b)As for organizational aspect, the FIL provides only for two types of business vehicles from among which a foreign investor who wishes to start business in Poland has to choose. These are (i) limited liability company and (ii) joint stock company (Article 2, Paragraph 1).

Within thus defined limits, a foreign investor has four more specific options to choose from.

— Firstly, in accordance with Article 2, Paragraph 1 of the FIL, a foreign investor can establish a limited liability company in which he will hold 100 per cent of ownership interest (so-called "one-man company").

— Secondly, under Article 2, Paragraph 2 of the FIL, a foreign investor can establish a limited liability or joint stock company, with the equity contributed by the founders jointly with other foreign or/and Polish parties.

— Thirdly, subject to the conditions provided for in Article 8, Paragraph 2 of the FIL, a foreign investor can together with other foreign and/or Polish party or parties, establish a joint stock company, with equity raised through a public subscription of shares.

— Fourthly, under Article 41 of the FIL, a foreign investor can enter business in Poland through the acquisition of shares or stock in the existing Polish limited liability or joint stock companies. If a given company did not have foreign shareholders, a foreign party has through taking up shares or stock to increase an equity of such company.

2) Main characteristics of the Polish limited liability and joint stock companies under Commercial Code of 1934 are typical of the features of classical models of such companies shaped in Continental Europe in the first half of our century. Comparing the Polish regulation with the British one, a distinction made under the former between limited liability and joint stock companies, under the latter basically reflects a difference between "private" and "public" companies according to the Companies Act of 1907 and since EEC directives on companies a distinction drawn between "Limited" and "PLC" companies.

a) A limited liability company can be established by one or more legal or natural persons. The founding contract should have the form of a notarial deed. A company is managed by a Director (or Directors) and the Shareholders Meeting. A Supervisory Board or Committee of Auditors may also be established. The company's equity, through the shares held by all partners, should be raised before the company's registration date. The shareholders are free to determine their mutual obligations as well as the internal relations of the company, the composition and the authority of management, decision-making procedure and the voting rights at the Shareholders Meeting. The partners may also restrict, in the company's founding contract, the right of disposal of the shares of the company.

b) A joint stock company can be established by at least three founders unless the Treasury is one of them. An agreement between the founders on the establishment of a joint stock company is required. The founders also prepare the company articles (Statute). Both documents should have the form of a notarial deed. The founders, or third parties, may take up all the shares of the company or, provided the conditions formulated in the FIL are fulfilled, raise the share capital by public subscribtion. The establishment of a Supervisory Board or alternatively a Committee of Auditors is mandatory. Under the FIL only inscribed shares are allowed.

Shares issued for contribution in money can be paid for in one-fourth of their per value.

3. *The Scope of Economic Activity*

According to Article 1, Paragraph 2 of the FIL, a foreign investor may undertake in Poland manufacturing, production and construction, as well as trade and service activities in any field of the national economy. Thus, as to the principle, there are no statutory exceptions with respect to the kind or branch of business activity opened for foreigners in Poland. In individual cases, however, the President of the Agency may find that particular investment project is undesirable due to : 1) the threat to State economic interests, 2) the requirements of the enviroment protection, 3) State security and defence interests or the protection of State secrets (Article 6, Paragraph 1 of the FIL). A permit shall then be denied unless through consultation between the President of the Agency and the applying party or parties a satisfactory solution was found.

Stipulations of Article 6, Paragraph 1 should be read, in this context, together with the provisions of Article 11, Paragraph 1, Section 3 and, in particular, with Article 8, Paragraph 1 of the FIL. Under the latter, the President of the Agency may condition the issuing of a permit upon a foreign party's undertaking business activity jointly with a Polish party and the setting of a specified ratio between the shareholders' contributions to a company's equity.

The above safeguards should not be interpreted as representing hidden barriers of access to the Polish market. As the legislative history of the FIL suggests, their real purpose has been to provide the legal framework flexible enough to allow for reconciliation of conflicting interests which may arise in practice in the sensitive areas without repelling otherwise interesting and useful investment projects. Thus, the actual function of the above clauses boils down to facilitating rather than hampering an access for FDI to the Polish market. Not without importance for the practical interpretation of the respective provisions is an accelerating pace of liberalization in Polish economy.

4. *Forms of Contribution to the Equity of a Company*

In accordance with Article 16 of the FIL, the contribution to a company's equity may be made both in money and in-kind. The money contribution of the foreign investor should be made in foreign currency or in Polish currency, zlotys, from a documented exchange of a foreign currency. The in-kind contribution may consist of property as well as

rights. The FIL, and the Commercial Code alike, allow the partners to determine the nature of contribution. Thus, these are the investors themselves who are to decide about the character and proportion of various components of a company's founding capital. No one else has a right to intervene in this domain.

In keeping with the accepted interpretation of Articles 163 and 311 of the Polish Commercial Code contribution in-kind may consist of : (a) things like realities, machines, equipment, and other material, as well as (b) rights on non-material assets such as copyrights, patents, licences, etc. and (c) debts.

As in-kind contribution cannot be considered labour or unappraisable assets such as customers (goodwill). There should, however, be no doubt that confidential know-how can be capitalized and contributed by licencing or assignment although the grey area includes such problems as whether the trade secrets can be contributed to a company's equity.

5. *Action to be Taken to Commence Economic Activity*

Since establishment of a company with a foreign participation requires a permit, interested party or parties should apply for one to the President of the Agency. According to Article 10 of the FIL such application should, *inter alia,* have the draft of a company's founding act attached as well as documentary evidence as to the legal status and financial standing of prospective shareholders. In case of a foreign investor such documents may be an extract from his domestic court register, the opinion of a bank or credit institution.

A feasibility study of the proposed company shall also be enclosed. In Poland, such reports are habitually prepared according to the UNIDO methodology formulated in UN Publication 19/206. Specialized consulting agencies, both State controlled and private ones, may assist in the preparation of documents that have to be submitted to obtain a permit.

According to Article 10, Paragraph 4 of the FIL, the decision on whether to issue a permit shall be made within two months from the date of the filing of the application. After the permit is granted, the company shall be registered in court proper for the seat of the company and from that date it may commence its business.

It is worthy of separate stressing that the permit for the establishment of the company is a document to which the Polish authorities attach great importance. This, *inter alia*, is evidenced in Article 15 of the FIL, which provides that if the company engages in activity incompatible with the conditions set forth in the permit, the authority that issued the permit

shall request this to be corrected within a specified period ; otherwise it may restrict the scope or withdraw the permit.

For the above soliciting by the applicant for as flexible formulation of the permit as possible it strongly advisable. Entrusting the President of the Agency with power to issue permits and with a right of general supervision over observance of conditions set forth in the permits should contribute to the stable and reasonable policy in this domain.

6. *Basic Economic Freedoms*

Basic economic freedoms guaranteed under the FIL include : 1) operational freedoms ; 2) freedoms with respect to employment ; 3) rights to acquire land for business purposes and 4) freedom to dispose of profits.

1) A company has the sole authority to decide on the object and volume of output, within the limits set forth in its founding act and in the permit. It may freely choose its trade partners at domestic market and abroad. It is also free to set the price of its goods and services. A company may sell goods and services in the domestic market for convertible currency provided it obtains a foreign exchange licence. A company may also freely purchase goods and services for foreign currency on the domestic market from the licensed entities.

According to Article 22, Paragraph 1 and 2 of the FIL, a company may, after it obtains a foreign exchange licence, open and maintain accounts with foreign banks. No licence is, however, required to obtain foreign credits (Article 22, Paragraph 4 of the FIL).

Companies established under the FIL purchase raw materials, other materials and equipment available in the domestic market on the same principles as other Polish economic units. However, as concerns purchase of the still centrally distributed raw materials they enjoy a privileged treatment accorded to state enterprises. In 1989 on the list of centrally distributed materials were : aluminium, coal, coke, copper, diesel oil, heating oil, silver and tin.

2) A company has the sole authority to decide on its employment policy and actual state of employment. However, a company can employ persons not having a Polish citizenship or a Polish permanent residence card only with the consent of the local State administrative authority. A consent is not required if such a person is only seconded by a foreign investor and is not employed by the company.

The principles for the remuneration of company employees are laid down either in a company's founding act or in the company's resolutions. Thus, a company enjoys unrestrained freedom in this domain, with two reservations, namely : the remuneration of Polish citizens can be set and

[4] Droit... Polish... 3—4/1988

paid only in the domestic currency, zlotys, while as concerns foreign employees their remuneration may be partially paid in foreign currency from the foreign currency revenues of the company (see : Chapter 5 of the FIL).

3) According to Article 26, Paragraph 1 of the FIL, a company may acquire and lease land and other real estate not owned by the State. However, if the foreign party or parties own at least 50 per cent share in the company, the purchase of real estate by the company requires the consent of the Minister of Internal Affairs (Article 46 of the FIL introducing changes in the Law of March 24, 1920 On Acquisition of the Real Estate by Foreigners, and in particular in Article 1, Paragraph 3 of the latter Law).

State land may be made available to the companies with foreign capital participation either (a) under a perpetual lease in accordance with the regulations applicable to the administration of such land or (b) under lease (Article 26, Paragraph 1 of the FIL).

4) A company is free to pay dividends to its shareholders from the company's after-tax profit. The foreign currency dividend may, as to the principle, be paid only from the surplus of export earnings over import outlays. A foreign shareholder has the right to transfer abroad this part of a dividend without a separate foreign exchange permit. However, upon the application of the company, the Minister of Finance may allow to transfer abroad a dividend due to a foreign shareholder in excess of the above amount. Such entitlement may either take the form of separate permit or may constitute part of the permit for the establishment of the company (Article 20, Paragraph 4 of the FIL).

In the light of the legislative history of the FIL, foreign shareholders may count for receiving the above permit when a company is engaged in capital intensive investment in preferred branches of the national economy and/or is manufacturing goods or rendering services in short supply for the needs of the domestic market.

As concerns part of the profit in zlotys, a foreign shareholder is free to use one, according to his own preference, in the domestic market (Article 20, Paragraph 1 of the FIL).

Separately, according to Article 21, Paragraph 1 of the FIL, shareholders have also the right to use their part of the profit, both in convertible currency and in zlotys, to increase a company's equity.

7. *Taxes and Other Burdens*

Article 27, Paragraph 1 of the FIL, gives the complete list of taxes which are due to be paid by a company. In business terms, the most.

important of those taxes is corporate income tax, which the FIL sets at 40 per cent of taxable income. Investment outlays—as defined in the decree of the Council of Ministers—and donations for socially beneficial purposes up to 10 per cent of the income are deduced from the taxable income. Moreover, the company will only pay the maximum rate of the corporate income tax if all its sales were on the domestic market. The tax rate is decreased by 0.4 per cent for each one per cent of the share of export sales in total sales. However, the corporate income tax, after deductions, cannot be lower than 10 per cent of the taxable income. At the same time, a company is exempted from corporate income tax during the first three years of its business activity. The date of the commencement of business is the date of the first invoice. This statutory tax holiday may be extended for additional three years if the company enters one of the preferred sectors of the national economy (Articles 27 and 28 of the FIL).

As it has already been mentioned, a company may freely distribute the after-tax profit. It has, however, to deposit 8 per cent of the after-tax profit with the reserve fund, for loses coverage. The company may cease to make such contribution when the reserve fund reaches 4 per cent of company's costs in a fiscal year (Article 17, Paragraph 4 of the FIL).

As concerns personal income tax, including tax on dividends, foreign shareholders and employees domiciled in a country with which Poland has no agreement on the avoidance of double taxation, the rate of income tax is 30 per cent (Articles 29 and 32, Paragraph 4 of the FIL respectively). In other cases the tax will vary from 5 to 15 per cent, according to the Convention. Tax Conventions have been concluded by Poland with 21 countries : Austria, Belgium, Czechoslovakia, Denmark, the Federal Republic of Germany, Finland, France, the GDR, Great Britain, Holland, Hungary, Japan, Malaysia, Norway, Pakistan, Spain, Sri Lanka, Sweden, Thailand, the USA and Yugoslavia. Separate mentioning deserves obligation stipulated in Article 19, Paragraph 1 of the FIL. According to the above provision, a company has to sell 15 per cent of its foreign currency export proceeds to a Polish foreign exchange bank. Proceeds from the sale abroad of the replaced fixed assets of the company are exempt from this obligation. Moreover, upon an application of the company, the President of the Agency may set in the permit a lower rate of sale.

This rather unusual obligation is justified on the ground of a strain Polish balance of payment situation and the ensuing from it great demand for convertible currency. Since, however, every company needs domestic currency for current local payments, the above obligation is not a great burden, in particular, when a company exports extensively. On the other hand, a company can buy much more zlotys for the same amount of

foreign currency by selling this currency at the voluntary foreign exchange auctions conducted in Poland on the basis of separate regulations (Article 23, Paragraph 3 of the FIL).

There is a need, in this context, to mention that wholly domestically owned economic units sell to Polish foreign exchange banks, on average, some 80 per cent of their export proceeds.

8. *Special Custom Privileges*

By virtue of Article 30 of the FIL, companies with the participation of foreign parties enjoy a number of custom privileges. Firstly, they are exempt from custom duties and other fees of a similar effect on imported machinery, equipment as well as other items required for the conduct of business activity, within three years of their establishment.

Secondly, they are entitled to refund import duty on export sales in accordance with the privileged principles applicable to State-owned enterprises.

Thirdly, foreign shareholders are exempt from the above burdens on imported items constituting their in-kind contribution to a company's equity.

Fourthly, exempt from the export duty are items falling to the foreign shareholder upon the dissolution of the company.

All above privileges but the latter one, along with the income tax exemptions and deductions should encourage foreign investor to invest heavily, particularily in the course of the first three years since establishment of a company. It has been the intention of the Polish legislator and of the administrative authorities of the State to attract sound foreign investors interested in a long-term business activity in Poland.

9. *Special Guarantees*

According to Article 22, Paragraph 6 of the FIL, the Minister of Finance, upon the application of a foreign shareholder, issues him with a compensation payment guarantee to the amount equal to the value of the company's assets due to him, in the event of a loss resulting from a decision of any State authorities in respect of nationalization, expropriation, or from measures having effect equivalent to nationalization or expropriation.

In this context worth of separate stressing are much further going obligations assumed by Poland in favour of foreign investors under bilateral investment protection treaties to which Poland is a party. Currently such treaties with the United Kingdom and China are in force,

and investment protection treaties have been signed, but are not yet ratified, with Belgium and Luxemburg as well as with Austria. Quite advanced negotiations are with France, Italy and the FRG.

Characteristic to those treaties are clauses like one contained in Article ,5 of the Polish-United Kingdom Treaty of December 8, 1987. It states *inter alia :*

"1. Investments of investors of either Contracting Party shall not be nationalized, expropriated or subject to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose which is not discriminatory and against prompt, adequate and effective compensation. Such compensation shall amount to the real value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, and shall be paid within three months of the expropriation, be effectively realizable and be freely transferable...

2. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph 1 of this Article are applied to the extent necessary to gaurantee prompt, adequate and effective compensation in respect of their investment to such investors of the other Contracting Party who are owners of those shares."

Needless to argue that such a guarantee patterned after the so-called "Hull-clause" represents the strongest possible safeguard for foreign investor against adverse effects of nationalization, no matter how remote such a possibility might have been. Thus, it is in the common interests of all those concerned, investors, host and recipient countries to have such treaties concluded.

As for the FIL itself, not without importance is the declaration of intention of Polish legislator contained in the Preamble to the Law, which states :

"In order to create stable environment for future development of mutually advantageous capital cooperation between Poland and foreign parties, to guarantee the foreign parties the protection of their property, income and other rights the following is proclaimed

10. *Dissolution* of *a Company*

In case of the dissolution of a company, its assets are subject to liquidation. The amounts remaining after the payment of debts and recovery of outstanding liabilities are distributed between the partners. In case of amounts in foreign currencies their transfer abroad by a foreign party does not require a separate foreign exchange permit. However, in case

of amounts received in zlotys their transfer abroad may take place 10 years from the registration date of a company, unless a permission of the Minister of Finance is obtained for an earlier transfer.

If a company is dissolved during the corporate income tax exemption period or within three years after such period has expired, the company shall pay tax for the exemption period. In such case tax liability arises upon the notification of the dissolution of the company (Chapter 6 of the FIL).

The above regulations aim at achieving three main purposes : to guarantee foreign investors undisturbed transfer abroad of their dues, to prevent using dissolution of the company for income tax evasion and to secure in a balanced manner the balance of payment interests of the State. Again, bilateral investment protection treaties may play constructive role in the sound resolution of relevant problems.

Certainly, the FIL is a piece of legislation which is not free of shortcomings or even faults. Still, it seems to represent quite reasonable and competitive offer for foreign investors who wish to establish their business in Poland.

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LA PRODUCTION ET LA COMMERCIALISATION DES PRODUITS FLORICOLES ET DES AUTRES CULTURES VEGETALES SPECIALISEES DANS LE SYSTEME JURIDIQUE POLONAIS

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1. L'agriculture ne constituant pas en Pologne comme dans d'autres pays socialistes une forte maille dans l'économie nationale comparable avec le niveau de l'agriculture des pays membres de la C.E.E., la production floricole très développée ainsi que la production végétale spécialisée, surtout celle des fruits à baies (fraises, groseilles et framboises), des légumes cultivés en serre et à ciel ouvert et des champignons en grotte, sont des phénomènes polonais particuliers. Ces produits occupent une place remarquable dans l'exportation polonaise des denrées alimentaires agricoles à de nombreux pays européens, les pays membres de la C.E.E. et les Etats-Unis y compris.

Tous les types de la production végétale spécialisée mentionnés ci-dessus sont considérés dans le système juridique polonais comme une partie intégrante de l'agriculture, et, par conséquent, ils sont soumis à un régime juridique général réglant la totalité des problèmes de l'agriculture. La production de chacun de ces secteurs spécialisés, même celle des champignons, est traitée par le droit polonais comme une exploitation agricole basée sur les mêmes principes juridiques généraux que les exploitations agricoles générales réalisant la production végétale (céréales) et animale. En conséquence, toutes les dispositions générales du droit rural réglant, par exemple, l'exploitation agricole des terres et leur protection, la protection des plantes cultivables contre les maladies et les insectes nuisibles, la culture des plantes et des semences, le système de l'impôt agricole, etc. s'appliquent à de telles exploitations spécialisées. Même dans ces dispositions générales du droit rural on trouve pourtant des normes juridiques particulières se rapportant à la production végétale spécialisée présentée ici.

Ainsi, par exemple, dans la loi du 15 novembre 1984 sur l'impôt

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agricole[1] à côté de l'impôt foncier payé par toutes les exploitations agricoles il y a un deuxième type de l'impôt agricole sur les bénéfices des secteurs spécialisés de la production agricole énumérés dans l'art. 1 pt 4. Aussi dans la loi du 10 octobre 1987 sur la culture des semences[2] existe une disposition spéciale de l'art. 40 concernant la production des champignons cultivables à la lumière de laquelle la production du mycélium de tels champignons en tant qu'équivalent des semences sélectionnées des plantes, exige une concession de l'organe local de l'administration agricole du degré de voïvodie. Ces dispositions fragmentaires des lois générales en commun avec les dispositions détaillées réglant les affaires de cette production spécialisée, créent un régime juridique de la production et de la commercialisation des cultures végétales spécialisées.

La division de l'agriculture polonaise en trois secteurs, où à côté du secteur paysan individuel qui domine (englobant 75 % de superficie des terres agricoles) il y a des secteurs d'Etat et coopératif, exige enfin de remarquer que la production des cultures végétales spécialisées est en effet le domaine de l'agriculture individuelle. Il existe à peine quelques entreprises agricoles d'Etat spécialisées en une telle production, surtout celle des fleurs en serre ainsi qu'une « usine » des champignons construite par les spécialistes français et avec la licence française dont l'entière production est destinée au marché hollandais. Aussi les coopératives agricoles d'exploitation en commun, d'ailleurs peu nombreuses en Pologne, s'occupent dans les limites restreintes d'une telle production spécialisée. Il paraît qu'une telle production spécialisée n'a pas tout simplement de conditions de développement dans les grandes exploitations d'Etat et coopératives, ce qui est confirmé par les expériences de l'agriculture nationalisée en U.R.S.S. ainsi que celles de l'agriculture collectivisée des pays socialistes où la majorité d'une telle production spécialisée provient des jardins familiaux. Dans cette situation, l'agriculture individuelle polonaise est un singulier potentat et un important exportateur des ces produits agricoles, surtout des produits maraîchers, parmi les pays socialistes.

2. Un régime juridique particulier de la production et de la commercialisation des produits floricoles et d'autres cultures végétales spécialisées est créé par l'ensemble de dispositions juridiques qui, eu égard à l'objet de réglementation juridique, peuvent être divisées en quatre sections :

a) réglementation juridique de la reproduction des plantes cultivables et des champignons ;

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[1] Dziennik Ustaw [Journal des Lois], cité ci-après J. des L., n° 52, texte 268,

[2] J. des L., n° 31, texte 166.

b) spécialisation des exploitations agricoles dans la production des cultures végétales spécialisées ;

c) commercialisation des produits végétaux spécialisés ;

d) système d'imposition des secteurs spécialisés de la production végétale.

Le premier secteur, englobant la réglementation juridique de la reproduction des plantes et des champignons, est le plus modeste parmi ces quatre secteurs. Quant aux plantes, il comprend la production du matériel de pépinière (destiné à la fondation de nouvelles plantations), des plantes à baies, à l'exclusion des fraises des bois, donc des framboises, des groseilles, des groseilles à maquereau et des fraises, et quant aux champignons — celle du mycélium de toutes les trois espèces cultivées en Pologne, parmi lesquelles le champignon de couche (nom latin *Agaricus Psalliota)* occupe la place principale.

La production du matériel de pépinière de ces plantes et des mycéliums des champignons énumérés ci-dessus est soumise au contrôle de l'administration agricole d'Etat et exige la concession de l'organe local de l'administration. En ce qui concerne le caractère juridique, une telle concession est une décision administrative à la lumière du Code de procédure administrative. L'exigence de la concession est garantie par les sanctions juridiques. Conformément à l'art. 73 de la loi, celui qui produit le matériel de pépinière de telles plantes ou le mycélium des champignons cultivables, est passible d'une peine de détention, d'une peine restrictive de liberté ou d'amende et leur application se fait selon le mode défini par les dispositions concernant la procédure en matière de contraventions, donc par une procédure de répression administrative.

La production des cultures végétales spécialisées peut être effectuée sans limitations dans toutes les exploitations agricoles. Si pourtant elle est une production dominante ou exclusive dans l'exploitation, une telle exploitation peut obtenir le statut juridique de l'entreprise agricole spécialisée en acquérant à ce titre les privilèges définis par la loi. Le statut juridique de telles exploitations spécialisées est réglé par la résolution n° 107 du Conseil des Ministres du 4 août 1978 concernant la spécialisation des exploitations agricoles individuelles et des ensembles des agriculteurs ainsi que la coopération dans l'agriculture[3]. Une exploitation peut être considérée comme une exploitation agricole spécialisée dans toutes les branches de production des cultures végétales spécialisées (les champignons inclus) mentionnées ici si elle remplit deux conditions juridiquement définies, et notamment :

1° si elle dispose d'un plan de la production agricole spécialisée, élaboré

[8] Monitor Polski [Moniteur Polonais], cité ci-après Mon. Pol., n° 30, texte 108.

par le propriétaire (possesseur) avec le service agricole communal et approuvé par l'organe local de l'administration du degré fondamental, à savoir le chef de la commune ;

2° son propriétaire (ou possesseur) fournit les produits agricoles d'une branche donnée de la spécialisation aux unités de l'économie socialisée (commerciales ou agricoles et industrielles) en vertu des contrats de fourniture des produits agricoles de plusieurs années[4].

La décision administrative rendue en première instance par le chef de la commune constitue une forme juridique de la reconnaissance de l'exploitation pour spécialisée. L'agriculteur dispose des moyens de recours de la décision négative refusant une telle reconnaissance : à l'organe de deuxième instance administrative ainsi qu'à la Haute Cour Administrative. L'inscription de l'exploitation au registre communal des exploitations spécialisées est l'expression juridique de la reconnaissance, et la carte de l'exploitation agricole spécialisée délivrée à l'agriculteur et ayant un caractère du document public donnant le droit de profiter des privilèges accordés à de telles exploitations, est une légitimation juridique de ce fait. Ces privilèges ce sont surtout : le crédit agricole à intérêt faible, l'amortissement d'une partie d'un tel crédit, la priorité d'équipement en moyens techniques de production, etc.

Le rôle principal dans l'organisation de la production et de la commercialisation des produits floricoles et d'autres cultures végétales spécialisées appartient au coopératisme horticole et apicole spécialisé. Du point de vue de son organisation, il est distingué en tant que coopératisme autonome de branche, à coté du coopératisme général agricole d'achat et de vente ainsi que du coopératisme laitier. Le régime juridique de ce coopératisme pour les affaires générales est défini par la loi du 16 septembre 1982 — droit coopératif[5] [6], en revanche, son régime juridique particulier est créé dans ses limites par les statuts internes de ce coopératisme. Le coopératisme horticole et apicole remplit avant tout d'importantes fonctions d'organisation dans le développement de la production dans les exploitations de ses membres en lès munissant entre autres des moyens de production et des outils de travail ainsi que des semences sélectionnées[6].

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[4] Une exploitation agricole peut être considérée comme spécialisée si elle se spécialise aussi en d'autres secteurs de la production agricole végétale et animale, comme, p. ex., culture de la betterave sucrière, élevage du bétail laitier, production des oeufs et d'autres domaines.

[5] J. des L., n° 30, texte 210, avec des amendements postérieurs.

[6] La loi compte parmi les secteurs spéciaux des productions agricoles en plus encore d'autres domaines de la production, et notamment : a) les pépinières des arbres fruitiers, b) les vergers de pommiers, c) l'élevage à la ferme et l'élevage de

Le régime juridique particulier de la production spécialisée en question trouve son expression aussi dans le système de l'impôt agricole. La loi du 15 novembre 1984 sur l'impôt agricole a établi deux types de l'impôt agricole, et notamment : 1° l'impôt agricole foncier, 2° l'impôt agricole sur les bénéfices des secteurs spécialisés de la production agricole. La loi a admis pour de tels secteurs spécialisés de la production agricole qui nous intéressent ici : a) les cultures en serre, en tunnels de feuille plastique et en cave ainsi que les cultures des champignons et de leurs mycéliums, b) les cultures des fleurs à ciel ouvert et de leurs semences, c) les cultures des arbustes fruitiers et des plantes herbacées fructifiantes, d) les pépinières des arbres et des arbustes d'ornement. Cet impôt a le caractère de l'impôt sur le revenu et le taux de l'impôt progressif.

3. La nature juridique des serres est différenciée en fonction de leur construction technique. Les serres se divisent du point de vue de leur construction technique en installations durables (construites du béton, du métal et du verre) et les installations périodiques (construites des cadres de métal ou de bois couverts d'une couche en plastique), n'ayant pas de dispositifs de chauffage ou bien munies des dispositifs de chauffage primitifs du point de vue de leur construction.

Les premières sont des objets de construction à la lumière du droit de la construction, et leur construction exige une autorisation de construction et une décision de localisation de l'organe de l'administration. Du point de vue de leur caractère juridique, ce sont donc des biens immobiliers ruraux. En revanche, les deuxièmes en tant qu'installations provisoires qui portent le nom de tunnels de feuille plastique dans l'agriculture polonaise n'exigent pas d'actions de légalisation, elles peuvent donc être construites à volonté aussi bien sur les terres constituant la propriété de l'agriculteur que sur les terres prises à ferme. Ce sont donc du point de vue de leur caractère juridique les biens mobiliers.

4. Dans l'organisation du marché des produits floricoles et d'autres cultures végétales il faut distinguer ses trois segments, et notamment : a) le commerce en gros, b) le commerce en détail, c) l'exportation aux marchés extérieurs.

Le commerce en gros englobant l'achat organisé des cultures végétales spécialisées dans le cadre des contrats de fournitures contractées[7] ainsi que leur livraison au marché de détail, appartient au coopératisme horti-

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la volaille de boucherie et pondeuse, d) les couvoirs de la volaille ainsi que e) l'élevage des animaux à fourrure.

[7] Le caractère juridique de ces contrats sera présenté dans la suite (pt 5).

cole et apicole déjà mentionné. Les producteurs agricoles peuvent pourtant livrer leurs produits eux-mêmes directement au marché de détail en omettant ces coopératives, ce qui, en réalité, se produit aux alentours des grandes villes où ils sont vendus aux marchands en détail aux bourses spéciales selon les prix fixés librement.

Dans le commerce en détail il existe une distinction nette entre le marché des produits floricoles et d'autres cultures végétales spécialisées. La vente des fleurs se fait dans des magasins coopératifs et individuels spécialisés, sans ingérence juridique quelconque dans le fonctionnement de ce marché. Il n'en est pas de même pour d'autres cultures végétales spécialisées. Leur vente est effectuée aussi bien dans les magasins de branche spécialisés appartenant au coopératisme horticole et apicole ainsi que dans les magasins de branche similaires privés, que dans des magasins alimentaires généraux appartenant au coopératisme des consommateurs « Społem »[8] *et* aux personnes privées. La vente aux bazars publics et aux étalages de rue est une forme supplémentaire. Les prix de detail sur ce marché sont fixés librement selon le principe de l'offre et de la demande, avec la concurrence évidente du secteur coopératif et privé de ce marché. L'ingérence juridique de l'agent public se limite à l'établissement et à la mise à exécution des conditions sanitaires de la vente de ces produits agricoles et des principes d'ordre du marché.

L'exportation aux marchés étrangers repose sur deux organisations : les centrales des coopératives horticoles et apicoles mentionnées ci-dessus et l'Entreprise d'Etat « Hortex ». D'autres organisations commerciales de caractère coopératif et corporatif participent aussi à l'exportation des produits agricoles dans les limites plus restreintes.

5. Comme on l'a déjà mentionné, les produits agricoles en question peuvent être vendus par le producteur même aux marchés directement aux consommateurs ou bien aux petits commerçants privés, ou bien par les marchands disposant des licences commerciales respectives (celles d'exportation) — en vertu des contrats d'achat et de vente ordinaires, ou ils peuvent être vendus aux grandes organisations d'Etat, coopératives et sociales, d'habitude en vertu des contrats de fournitures contractées (contrats types agricoles) spéciaux.

La majorité des produits agricoles est vendue notamment en vertu de ces contrats, bien que, surtout dans les années de bonne récolte, l'achat libre puisse jouer le rôle considérable. En tout cas, on peut dire que les grands producteurs spécialisés vendent à peu près toute leur

[8] Le nom traditionnel en Pologne de la coopérative des consommateurs ou le mot « Społem » intraduisible en d'autres langues exprime une idée sociale de l'action en commun.

production en vertu des contrats de fournitures contractées, c'est pourquoi on va s'occuper de plus près de ce type de contrats.

Les dispositions juridiques réglant les contrats de ce type forment un système assez compliqué. Le cadre le plus général est créé par le Code civil. Il définit le contrat de fournitures contractées de manière suivante : « L'art. 613. Par le contrat de fournitures contractées celui qui tient une exploitation agricole, horticole ou d'élevage (producteur) s'engage à produire et à livrer à l'unité de l'économie socialisée (contractant) la quantité définie de produits agricoles ou d'élevage de genre précisé, et le contractant s'engage à prendre livraison à la date fixée, à payer le prix fixé et à exécuter les prestations supplémentaires déterminées si le contrat ou les dispositions spéciales prévoient le devoir d'effectuer de telles prestations ».

Le Code énumère à titre d'exemple en qualité de prestations supplémentaires (dans l'art. 615) :

— la garantie de la possibilité d'acheter les moyens de production déterminés et de l'aide financière au producteur,

— l'aide technique agricole et zootechnique,

— les primes pécuniaires,

— les primes en choses.

Le Code prévoit aussi la possibilité de définir dans le contrat la quantité de produits agricoles par la délimitation du terrain dont ces produits doivent être récoltés.

Parmi les dispositions du Code qui ont la plus grande importance pratique on peut énumérer :

a) la réserve que l'unité contractante a le droit de surveillance et de contrôle de l'exécution du contrat par le producteur,

b) la disposition que le contrat type agricole est efficace aussi envers chaque acquéreur de l'exploitation agricole (avec certaines exceptions),

c) la disposition imposant le risque de l'impossibilité de s'acquitter du contrat qui s'est produite sans faute en principe au producteur (art. 622).

Cette dernière disposition était souvent critiquée dans la littérature juridique comme désavantageuse pour les agriculteurs.

Les dispositions du Code sont complétées par la résolution n° 124 du Conseil des Ministres du 23 août 1978 concernant les principes généraux des fournitures contractées des produits agricoles[9]. Généralement, cette résolution introduit le contrat type agricole au système de l'économie planifiée. Elle charge les ministres respectifs de nombreux devoirs pour qu'au moment de la conclusion du contrat le système de l'équipement des producteurs en moyens de production nécessaires, en

[9] Mon. Pol., n° 27, texte 97.

crédits bancaires, etc. soit assuré. La résolution prévoit aussi la publication des conditions détaillées des fournitures contractées par les ministres surveillant les organisations autorisées à conclure les contrats type agricoles. Il faut y mentionner que le Code civil prévoit (dans l'art. 384) la possibilité de publier les contrats types par les organes principaux de l'administration d'Etat, mais ils peuvent être, en entier ou en partie, *ius cogens* pour la partie du contrat. En effet, pendant quelques dizaines d'années de tels contrats type étaient employés. Il est vrai qu'en ce qui concerne les légumes, les fruits et les fleurs existait une certaine élasticité se rapportant au domaine très important, celui des prix. Notamment, on appliquait en principe les prix du jour et de lieu (prix du marché) sous réserve que les contrats de fournitures contractées auraient dû prévoir le minimum du prix (prix minimums garantis). Parfois, on appliquait immédiatement aussi les prix maximums, mais ils avaient le caractère des prix saisonniers (les décisions en matière de prix étaient rendues par les organes locaux de l'administration d'Etat compétents).

En rapport avec le programme des réformes économiques conçu sur un plan très large dans les années 80, on a introduit d'importants changements. Notamment, il a paru un arrêté n° 21 du ministre de l'Agriculture et de l'Economie de Ravitaillement du 1er mars 1983 concernant les principes des fournitures contractées des produits agricoles (Journal Officiel du ministre de l'Agriculture et de l'Economie de Ravitaillement, n° 1, texte 3) qui a abandonné le système précédent des contrats types établis par les ministres. Les contrats types doivent continuer à être employés, mais on l'a laissé aux organisations effectuant l'achat et les fournitures contractées. Leur force juridique est donc un peu différente. Ce sont les contrats d'adhésion connus dans la pratique des pays de l'Europe occidentale. La doctrine juridique polonaise les considère comme règlements (prévus dans l'art. 385 du C.c.).

C'est seulement sur ce fond qu'on peut réfléchir en détail sur les problèmes des contrats de fournitures contractées des légumes et des fruits. Le rôle principal appartient ici décidément aux unités de l'économie socialisée autorisées à l'achat (mais aussi les marchands privés constituent une concurrence dans la sphère de l'achat en libre marché). Elles ont souvent (mais pas toujours) la position de monopoleur. Cela résulte des dispositions de l'arrêté n° 21 de 1983 cité ci-dessus conformément auxquelles les régions des fournitures contractées des produits agricoles sont fixées par les organes de l'administration d'Etat du degré de voïvodie à la demande des unités contractantes. Il peut donc arriver que dans une région donnée fonctionne une seule organisation contractante autorisée et, en réalité, les producteurs n'ont pas le choix du contractant. Néan-

moins, en pratique, dans les régions où il y a des cultures concentrées des légumes et des fleurs et aussi là où les vergers sont concentrés, fonctionnent quelques unités contractantes. Les preneurs les plus sérieux ce sont les établissements transformateurs d'Etat, éventuellement les entrepôts frigorifiques d'Etat ainsi que les coopératives horticoles associées à la Centrale des Coopératives Horticoles et Apicoles. La Centrale mentionnée exerce une grande influence sur la formation du marché des légumes et des fruits, car les coopératives y associées fonctionnent sur le territoire du pays entier (les établissements transformateurs d'Etat et les entrepôts frigorifiques fonctionnent dans les régions de leurs bases des matières premières). C'est pourquoi les actes normatifs internes des coopératives revêtent une grande importance.

Concrètement, le Conseil et la Direction de la Centrale des Coopératives Horticoles et Apicoles ont adopté une résolution commune n° 2/85 du 11 décembre 1985 concernant la sphère réelle et les principes d'effectuer les fournitures contractées (Bulletin de la Centrale des Coopératives Horticoles et Apicoles, n° 8, texte 17). Cette résolution prévoit l'exercice des fournitures contractées suivantes par les coopératives associées : 1° des produits horticoles (par lesquels on entend les fruits, les légumes des cultures à ciel ouvert et en serre, les champignons de couche et d'autres champignons cultivables, les fleurs et les pommes de terre hâtives), 2° des pommes de terre tardives, 3° des produits apicoles, 4° des fruits secs ainsi que des légumes marinés et séchés, 5° du matériel de pépinière, des plants ainsi que des boutures des légumes et des fleurs, 6° d'autres produits végétaux dont elles ont besoin dans leur activité à l'exclusion de ceux dont les fournitures contractées ont été réservées pour d'autres unités indiquées par le ministre de l'Agriculture, de l'Economie forestière et de l'Economie de Ravitaillement.

Les coopératives devraient exercer les fournitures contractées en vertu de leurs plans quinquennaux votés par l'assemblée générale d'une coopérative donnée ou par son conseil d'administration (en fonction des dispositions du statut). Les prémisses du vote de ces plans ce sont :

1° le programme du développement de l'exportation dans les années 1986 - 1990 ainsi que dans la décennie suivante voté par le Conseil de la Centrale le 5 septembre 1985,

2° le programme du développement de l'agrotechnie propre et du commerce en détail des fruits et des légumes,

3° les contrats de vente de plusieurs années conclus avec les preneurs en gros du pays.

La base du plan des fournitures contractées des produits horticoles pour l'exportation à l'état frais est constituée par les contrats d'exportation de plusieurs années conclus par les coopératives avec l'Entreprise d'Expor-

tation et d'importation « Hortex ». Ces contrats devraient définir les devoirs de l'Entreprise en matière de promotion de la production soumise aux fournitures contractées pour les coopératives destinée à l'exportation.

Sur le champ d'activité défini par le statut, les coopératives devraient exercer les fournitures contractées exclusivement chez leurs membres et chez les producteurs, membres des autres coopératives associées à la Centrale, uniquement avec le consentement du conseil d'administration de la coopérative territorialement compétente.

En ce qui concerne les prix, la résolution n° 2/85 citée prévoit quelques principes généraux, et notamment :

1° les prix des produits faisant l'objet des fournitures contractées devraient être d'au moins 10 % plus élevés que les prix du marché libre,

2° les conseils d'administration devraient déterminer les prix minimums garantis pour chaque année.

La fourniture des produits avec 10 % de tolérance dans les deux sens est estimée comme une bonne exécution du contrat. Il est donc exécuté si on a fourni au moins 90 % des produits prévus dans le contrat. Si on a fourni plus de produits que le contrat prévoyait, la coopérative devrait prendre les produits, mais à condition que l'excédent ne dépasse pas 10 %. Quand cette limite a été dépassée, la coopérative n'est pas obligée de prendre les produits ; elle peut le faire dans la mesure des possibilités de les aménager, mais aux prix du libre marché (et ceux-ci, comme on l'a déjà mentionné, sont au moins de 10 % plus bas).

En cas de manquer à la livraison des produits contractés (moins de 90 %), le producteur devrait payer la peine contractuelle non inférieure à l'équivalent de 30 % des produits non fournis. La même peine est payée par la coopérative en cas de ne pas prendre les produits contractés.

En se basant sur les principes susmentionnés, la Direction de la Centrale a élaboré les contrats types agricoles ; on « conseillait » aux coopératives associées de les employer. En pratique, ces contrats types sont largement employés, quoiqu'ils ne soient pas obligatoires du point de vue juridique pour les coopératives associées.

Ces contrats types prévoient la conclusion des contrats pour les périodes de plusieurs années (d'habitude celles de 5 ans), mais on prend en considération la nécessité de les rendre plus élastiques et de les adapter aux conditions changeantes. En particulier, les parties ont le droit d'introduire les changements concernant la quantité de produits contractés (et des terrains de contrôle de la plantation), mais pas plus tard que : 1° jusqu'au 30 novembre de l'année qui précède la récolte pour les légumes en serre, les fleurs, les champignons de couche et d'autres champignons cultivables, 2° jusqu'au 31 mars de l'année de la récolte en ce qui concerne d'autres produits agricoles. La quantité de produits contractés particuliers

(et la détermination du terrain duquel ils doivent être récoltés) sont inscrites au tableau spécial faisant la partie intégrante du contrat.

Les produits horticoles fournis par le producteur doivent répondre aux exigences qualitatives du choix Extra et I prévues par les normes en vigueur (la Norme Polonaise ou la Norme de Branche), et si la norme prévoit aussi le choix II, la part de ce choix dans la totalité des livraisons annuelles ne peut pas dépasser 10 %. Les produits doivent être fournis dans l'emballage propre à l'espèce fournie.

Les termes d'orientation des livraisons des produits horticoles fixés dans l'index des fournitures contractées peuvent être changés dans les années respectives de la durée du contrat en fonction des conditions climatiques et de leur influence sur la végétation des plantes. Les harmonogrammes périodiques des livraisons sont établis par une organisation contractante après avoir conféré avec le producteur, permettant à l'avance l'exécution du contrat à terme.

Le transport au dépôt de l'institution contractante se fait aux frais et aux soins du producteur, mais les parties des produits agricoles remplissant les camions entiers dirigées aux autres destinations sont prises par l'institution contractante de l'exploitation du producteur par les moyens et aux frais de l'institution contractante.

La coopérative contractante assure l'aide technique agricole et économique et on peut diviser ses obligations en deux catégories :

1° créant l'obligation qui fait naître une pleine responsabilité juridique,

2° consistant en une aide uniquement, en soins sans obligation du résultat.

A la première catégorie appartient surtout la fourniture du matériel de semence et de pépinière qualifié (mycélium) ; cela est lié à l'obligation du producteur de n'employer que ce matériel dans le but d'assurer l'homogénéité d'espèce du produit final. A la même catégorie appartiennent certains moyens industriels de production tels que : feuille plastique, moyens de protection des plantes, tourbe, engrais spécial.

A la deuxième catégorie appartient l'aide à acheter des quantités définies de combustible, à obtenir le crédit bancaire, à acheter les machines accessibles, les installations et les outils jardiniers. Le problème consiste en ce que les prestations dans ce domaine sont assurées par d'autres institutions, donc la question largement discutée dans la littérature juridique se pose en ce qui concerne les résultats du manquement à l'exécution de l'obligation de ce genre. Il y a de nombreuses propositions de traiter les obligations de ce type comme *pactum in favorem tertii,* ce qui renforcerait la position du producteur. L'embarras apparaît quand la pénurie des moyens donnés provoque leur réglementation administrative. En plus, les coopératives contractantes assurent l'aide d'instruction en

matière de culture des plantes données et de préparation des produits horticoles aux transactions commerciales. Parfois, on organise les cours professionnels sous formes variées. Enfin, les coopératives prêtent un emballage spécial si on l'exige dans les échanges commerciaux.

Comme les fournitures contractées sont liées à la qualité de membre, on déduit une cotisation de planteurs des redevances pour les produits horticoles (c'est d'habitude 1 % de la valeur des produits fournis), éventuellement les taxes destinées aux investissements si l'assemblée générale de la coopérative les a votées.

Si les produits horticoles contractés sont destinés à l'exportation, on ajoute au contrat une annexe spéciale précisant les devoirs supplémentaires des parties. Quant au producteur, il doit s'adapter aux conditions concernant la qualité des produits et remplir les exigences de préparation spéciale et d'emballage spécial de ces produits (la coopérative contractante devrait lui présenter les exigences de préparation deux semaines avant la date de la livraison au plus tard). En échange, le producteur reçoit un spécial supplément d'exportation au prix fixé.

En ce qui concerne les prix, dans les conditions polonaises l'emploi des prix de marché au marché des légumes et des fruits (réglés par l'offre et la demande) est une particularité et cela les distingue essentiellement des prix concernant les produits agricoles de base (ces derniers sont d'habitude vendus aux prix officiels établis de manière administrative). Dans le groupe de produits dont nous parlons, seulement les pommes de terre tardives sont soumises aux rigueurs des prix. Cela résulte de l'arrêté n° 68 du ministre des Finances du 29 août 1986 en matière de marges commerciales et de prix réglementés employés dans le commerce des pommes de terre[10].

Les conditions des fournitures contractées mentionnées ci-dessus sont typiques des relations basées sur le lien coopératif, donc ayant un caractère de liens durables et stabilisés. Dans d'autres cas, ces contrats ont un caractère plus « commercial », avec la sphère de l'aide de production de la part de l'institution contractante plus restreinte. A titre d'exemple, on peut citer le contrat type élaboré par l'Association Polonaise d'Horticulture. C'est une organisation sociale associant les horticulteurs. Comme ces derniers se plaignaient que dans les années de bonne récolte les preneurs ne s'appliquaient pas suffisamment à ménager le surplus des produits horticoles, l'Association Polonaise d'Horticulture a décidé de commencer sa propre activité économique en fondant une entreprise portant actuellement le nom de « Gartimpex ». Cette entreprise s'occupe de l'exportation et de l'approvisionnement du marché intérieur.

[10] Dziennik Urzędowy Cen [Journal Officiel des Prix], n° 8, texte 57.

Formellement, le contrat des fournitures contractées est aussi dans ce cas-là un contrat de plusieurs années, le lien contractuel est pourtant plus faible qu'au cas précédent. Seulement au cours de la première année, les dispositions du contrat sont strictement précisées. Quant aux années suivantes, le contrat est chaque fois actualisé par la détermination du volume des livraisons. De plus, le contrat peut être dénoncé par chacune des parties 3 mois à l'avance avec le résultat : 1° pour le 30 septembre de l'année précédant les récoltes des cultures à ciel ouvert, 2° pour le 30 mars pour d'autres cultures.

Indépendamment des dates de livraisons fixées dans le contrat, on les précise à 7 jours au plus tard avant la réalisation de la livraison.

La détermination des prix se produit selon les conditions pareilles à celles prévues dans le contrat type susmentionné, et seulement le paiement des produits fournis aura lieu après la réception de la redevance par l'exportateur ou bien par le preneur national (jusqu'à ce moment-là, le producteur ne peut recevoir que des acomptes). C'est probablement par suite de cela que le montant des peines contractuelles est beaucoup plus bas que précédemment ; elles ne font que 10 % de la valeur de la partie de marchandise non fournie par le producteur ou non prise par l'institution contractante.

Aussi la sphère d'aide technique agricole de la part de l'organisation contractante est plus restreinte. A côte de l'instruction, l'institution contractante assure « dans la mesure du possible » les moyens de production réglementés attribués selon le plan de répartition. Comme on le voit bien, ce type de contrat a un caractère plus commercial. Néanmoins, aussi dans ce cas (comme dans le précédent) il y a une certaine ingérence de l'institution contractante dans le processus de production, car la possibilité de contrôle de la plantation avant l'exécution de la fourniture et de faire les recommandations après l'inspection, est assurée.

6. En Pologne, les nouvelles espèces des plantes trouvent leur réglementation relativement de fraîche date, notamment dans la loi déjà citée du 10 octobre 1987 sur la culture des semences. Cette loi réglemente les problèmes : 1° de la culture et de l'appréciation des espèces des plantes cultivables, 2° des droits et des devoirs des cultivateurs des espèces des plantes cultivables ainsi que des auteurs des espèces originales et des personnes cultivant les espèces, 3° de la production, de l'application, du commerce, de l'appréciation et du contrôle du matériel des semences.

La loi distingue trois catégories de personnes dont les droits sont protégés en rapport avec la production (la découverte) de nouvelles espèces des plantes :

1° le cultivateur (d'habitude la personne morale, rarement la personne

physique) qui est le propriétaire des matériaux de culture végétale et de la documentation concernant cette espèce et qui cultive cette espèce,

2° Fauteur d'une espèce originale, étant une personne physique qui a mené de manière créatrice à la production d'une espèce originale,

3° la personne cultivant l'espèce, étant une personne physique qui dirige les travaux liés à la culture de conservation de l'espèce.

Cette distinction a autant d'importance que les nouvelles espèces dans l'agriculture sont généralement une oeuvre des ensembles de personnes employées dans les institutions scientifiques ou spécialisées. C'est à ces institutions qu'on attribue les droits appartenant à la catégorie appelée « propriété intellectuelle ». Très rarement une nouvelle espèce est l'oeuvre d'un « libre cultivateur » cultivant l'exploitation agricole à son propre compte ; en Pologne, cela concerne exclusivement les fleurs.

C'est pourquoi donc il est important de créer les stimulants pour les personnes physiques, le plus souvent employés des institutions et instituts scientifiques mentionnés, qui sont créateurs des nouvelles espèces. Pour cette raison, on les a distinguées en créant une catégorie séparée. Ce sont enfin les personnes qui mènent une culture de conservation extrêmement importante pour le maintien et la reproduction de la nouvelle espèce. Ce sont généralement les auteurs des espèces, mais aussi d'autres personnes ou ensembles de personnes. La loi mentionne aussi les personnes qui ont « prêté leur concours » aux auteurs ou aux personnes menant une culture de conservation.

Le droit spécial à une nouvelle espèce naît au moment de l'inscription au « registre des espèces » ou à un « livre ». Le registre est un index officiel des espèces dont le matériel des semences peut être introduit au commerce, le livre protège les droits exclusifs du cultivateur de l'espèce originale. Aussi bien le registre que le livre sont tenus par le Centre de Recherches sur les Plantes Cultivables.

Dans le livre sont révélées uniquement les espèces originales répondant aux conditions prévues dans les conventions internationales, en particulier dans la convention pour la Protection des Nouvelles Espèces des Plantes signée à Paris le 2 décembre 1961. Il est vrai que la Pologne n'a pas encore ratifié cette convention, mais les préparations en cette matière sont en cours. En particulier, la nouvelle loi de 1987 a été votée dans le but de faciliter l'accès de la Pologne à l'organisation internationale spécialisée (U.P.O.V.). C'est pour cette raison qu'on a abandonné la conception législative précédemment réalisée conformément à laquelle la nationalisation automatique des droits aux nouvelles espèces des plantes se produisait au moment de l'inscription au registre. Actuellement, le droit à la nouvelle espèce d'une plante appartient au « cultivateur » et il est protégé pendant 20 ans. Le droit exclusif du cultivateur comprend :

1° l'exercise de la culture de conservation de l'espèce, 2° la production du matériel des semences qualifié de l'espèce dans le but de le vendre, 3° l'offre de vente et la vente du matériel des semences qualifié de l'espèce, 4° l'emploi de l'espèce à la production répétable du matériel des semences de l'autre espèce (hybride).

En revanche, le registre comprend les espèces dont le matériel des semences est admis au commerce (par le « matériel des semences » on entend non seulement les graines, mais aussi les plantes ou leurs parties destinées au semis, à la plantation, au greffage). A côté des espèces originales, on inscrit au registre aussi les espèces sélectionnées (ce sont le plus souvent les espèces étrangères cultivées en Pologne) et les espèces locales (produites sans participation de l'auteur en résultat d'une longue action des facteurs naturels). Outre les espèces polonaises, on y inscrit aussi les espèces étrangères.

En ce qui concerne les espèces originales, à côté des données exigées pour la révélation dans le livre, on demande en plus que l'espèce ait une valeur économique respective (d'ailleurs aussi les espèces sélectionnées et locales doivent se distinguer par cette valeur). Cette exigence soulève des doutes en ce qui concerne les plantes d'ornement.

Les auteurs des espèces originales ont le droit personnel (héréditaire) au certificat d'auteur et à la prime d'auteur payée pendant la période d'utilisation du matériel qualifié, mais pas plus longtemps que pendant 20 ans. Les personnes qui ont prêté leur concours à la production de la nouvelle espèce, et qui ne sont ni travailleurs ni mandataires du cultivateur, ont le droit à la prime auxiliaire d'auteur payée pendant 6 ans. Ces primes sont payées par le Centre tenant le registre et le livre.

Les personnes menant une culture de conservation reçoivent les primes de culture (éventuellement les primes auxiliaires de culture) payées par le cultivateur.

Le montant des primes d'auteur et de culture (auxiliaires aussi) dépend de la valeur économique de l'espèce et du niveau de difficulté de sa production.

On omet ici le contrôle du commerce du matériel de semence (l'appréciation et le contrôle de ce matériel sont effectués par une Inspection de Semence spéciale). On omet aussi certaines restrictions concernant la production du matériel de semence (p. ex. la production dans les buts commerciaux du matériel de pépinière des arbres fruitiers et des plantes à baies, à l'exception des fraises des bois, ainsi que celle des mycéliums des champignons cultivables exige la concession de l'organe local de l'administration d'Etat).

7. En Pologne il y a des dispositions générales concernant l'assurance

sociale des agriculteurs individuels et de leurs familles[11] se rapportant à la totalité des agriculteurs. Néanmoins, on peut distinguer les dispositions ayant la valeur surtout pour les cultivateurs des plantes, des fruits et des fleurs. Notamment, on y a synchronisé les dispositions fiscales avec les dispositions réglant les assurances sociales. Comme on l'a déjà mentionné, les dispositions concernant l'imposition de l'agriculture sous le nom commun d'« impôt agricole » cachent en réalité deux impôts : 1° l'impôt sur les fonds (équivalent à l'impôt foncier traditionnel), 2° l'impôt sur les ainsi nommées sections spéciales (étant un type de l'impôt sur les bénéfices).

Dans la loi de 1982 sur l'assurance sociale des agriculteurs, on a adopté le principe de n'assurer que les agriculteurs qui : 1° cultivent une exploitation agricole, 2° mènent les ainsi nommées sections spéciales, si le revenu obtenu de ces secteurs annuellement est d'au amoins 50 q. En ce qui concerne les exploitations agricoles (pour lesquelles sont prises en Pologne même les étendues des fonds relativement pas très grandes, mais qui dépassent 0,5 ha) il y a un principe général qu'elles doivent apporter la production de marchandises d'au moins 5 q/ha. Quant aux secteurs spéciaux, ils peuvent englober même une étendue plus restreinte pourvu qu'ils donnent la production minimale (de marchandises) de 50 q. Les dispositions d'exécution[12] ont simplifié la chose en classant parmi les secteurs spéciaux toutes les exploitations agricoles qui sont soumises à l'impôt des secteurs spéciaux, indépendamment du fait si leur production de marchandises est effectivement de 50 q, en revanche, elle doit répondre aux normes fiscales définies.

On en parle ici parce que dans la pratique, en ce qui se rapporte à la culture végétale, on compte parmi les secteurs spéciaux exclusivement la culture maraîchère, l'arboriculture fruitière et la culture floricole. En réalité, cela signifie que les possesseurs des petites parcelles (non considérées comme exploitations agricoles) ne sont soumis à l'assurance sociale qu'au cas où ils seraient producteurs des fruits, des légumes (aussi des champignons) et des fleurs.

Les prestations à titre des assurances sociales sont fournies selon les mêmes principes aux agriculteurs cultivant une exploitation agricole « ordinaire » et aux agriculteurs travaillant dans les « secteurs spéciaux ». Alors, entre autres, les retraites et les pensions d'invalidité

[11] La loi du 14 décembre 1982 sur l'assurance des agriculteurs individuels et des membres de leurs familles, J. des L., n° 40, texte 268.

[12] L'arrêté du Conseil des Ministres du 28 mars 1983 en matière d'exécution de certaines dispositions de la loi sur l'assurance sociale des agriculteurs individuels et des membres de leurs familles avec des amendements postérieurs, texte unique, J. des L., 1988, n° 3, texte 10.

appartiennent à la partie « sociale » (égale pour tous) et à une partie qui dépend de la valeur des produits agricoles vendus aux unités de l'économie socialisée. Cette dernière réserve peut provoquer une certaine différence dans la situation des agriculteurs de deux catégories en question. Notamment, les produits de base sont généralement vendus aux unités de l'économie socialisée (il suffit de rappeler le monopole public d'achat des céréales), en revanche pour les légumes, les fruits et les fleurs il existe le marché libre considérable (les fleurs sont en majorité vendues en privé, sans participation du réseau du commerce socialisé). Comme la vente aux preneurs privés « ne compte pas » pour la base du calcul des retraites et des pensions, les bénéfices moyens plus élevés des cultivateurs des légumes, des arboriculteurs et des floriculteurs n'ont pas le reflet dans les retraites et les pensions plus élevées.

8. Les limitations particulières de production concernent les cultures du pavot et du chanvre. Ces limitations ne sont pas pourtant provoquées par des égards économiques mais sociaux. La base juridique de ces réglementations spéciales est constituée par la loi sur la prévention de la narcomanie[13]. Conformément aux dispositions de cette loi il y a une interdiction générale de la culture du pavot et du chanvre. En plus, les cultures illégales du pavot et du chanvre sont officiellement détruites[14].

Les plantations du pavot et du chanvre contractées par les unités autorisées de l'économie socialisée dans les régions déterminées du pays et dans le cadre des contingents définis, font exception à cette interdiction générale. Par exemple pour l'année 1988, on a prévu pour tout le pays les plantations du pavot sur le terrain de 4200 ha ainsi que les plantations du chanvre sur le terrain de 5055 ha.

Ces restrictions font partie d'une action générale de prévention de la toxicomanie ; car il s'est avéré que les jeunes drogués préparent, suivant une simple recette, une ainsi appelée « compote » qu'ilś emploient ensuite en qualité de stupéfiant, en se servant du pavot ou du chanvre. Un danger social particulier consiste en ce que le procédé mentionné est beaucoup moins cher que les stupéfiants importés. [18]

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[13] La loi du 31 janvier 1985 sur la prévention de la toxicomanie, J. des L., n° 4, texte 15.

[14] Cf. l'arrêté du ministre de l'Agriculture, de l'Economie forestière et de l'Economie de Ravitaillement du 12 novembre 1987 en matière de superficie destinée à la culture du pavot et du chanvre en 1988 basée sur les contrats des fournitures contractées ainsi qu'en matière de disposition régionale de ces cultures, J. des L., n° 35, texte 198.

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MUSEUMS AND PUBLIC LAW

*Jan Pruszyński**

GENERAL REMARKS

Changing patterns in policy, national economy and public administration cause the changes in attitude to the problems of culture, its goods and their protection. Said objects : monuments and sites, cultural landscape and historic immovables are taken into consideration more often than museum treasures, that seem to be properly saved.[1] The general legal act—The Law on the Protection of the Goods of Culture and Museums if 19 62[2] is partly novelized, but the attention is paid to the organization of local administration, its duties and rights, and some doubts concerning definitions—not always legible—such as "evident culture goods." Most problems had been caused by the years of the supremacy of state economy over cultural functions of powers. The majority of historic objects became, due to nationalization acts since 1946, a state property and were being used without observing their cultural values. As to museum pieces—due to post-war changes most of them, previously the property of private persons, had been deposited in museums—but the problems of their organization, employment of the staff and responsibility of the State for this part of cultural heritage stored in public museums had never been solved.

The common attitude to museums is limited to their functions in exposition, while storage of goods, their conservation and forms of evaluation treated as inner problems of museums, are not often discussed. Only a small group of specialists know the dangers threatening the bulk of treasures stored in museums—not only theft or fire, but also natural destruction. Legal problems, such as responsibility for this part of national property, forms of evaluation, procedure of inscription and safe-keeping of goods in storerooms are laying in a shadow. These problems worthy of talking about, are only in small part legally regulated. The museum

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[1] About 9.5 million of museum pieces in above six hundred museums and public collections.

[2] *The Journal of Laws* (Dziennik Ustaw) 1962, No. 10/48.

of the future has an important role to play in social education and therefore some of traditional forms of its activity should be changed, some obligations confirmed, and some actions promoted.

Museum visitors often think only about a rich collection of specimens, antiquities, curiosities and art objects[3] put together in buildings known once as temples of art, and being store-houses both of treasures and relics of the past. Their creation depended on rich collectors of "rarities," the glimpse of their richness, the spoil of voyages. Their foundation in a form of contract caused certain duties controlled by boards of trustees. Some of the museums have been financed through benevolent donations or local spends. Individuality of directors—usually eminent experts—put the whole power to organize the activity of inner museum in their hands. Hence, organization, forms of work, rights and duties of the employees of museum institutions are not better known to the public, as bread production to eaters. How the contents of the word museum has been changed since foundation of the first public institution, how broad is its activity, how many employees of various specializations—not only art historians—are being engaged to form the final product : the exposition, is still unknown to the majority of users. Some parts of activity of the museum have been up to now regulated in the form of orders or instructions, and we can mention two significant moments : the accession by purchase, or owing to noble generosity of a collector, and the visible exposition, while the remaining doings rest in a shadow of common ignorance.

The history of museums in Poland since the 18th century deserves profound research,[4] difficult, however, because of lack of sources. No museum or collection founded then exists at present.[5] All of them have been destroyed, robbed, deplaced, again organized in reborn Poland, and once again destroyed, almost completely during World War II. The political changes, and the necessity to preserve many valuable objects acquisited to reorganized museums made the political rulers visualize the museum as an immense unit of valuable objects, "university of culture," owned by the whole nation, financed from budgetary funds, thus becoming a part of public administration.

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[3] About 1 to 10% of the whole collection.

[4] See S. Komornicki, T. Dobrowolski, *Museology [Muzealnictwo]* Cracow 1947; K. Malinowski, *Forerunners of the Polish Museology*, Poznań 1970 ; W. Gluziński, *U podstaw muzeologii* [An *Introduction to Museology],* Warsaw 1980.

[5] See E. Chwalewik, *Zabytki polskie w Ojczyźnie i na obczyźnie [The Polish Relics of the Past at Home and Abroad. Museums, Galleries],* Warsaw—Cracow 1927, vols I—II.

CONTEMPORARY REGULATION

As stated in the Law, "Museum—the institution assembling, preserving and displaying objects of art, technology and science, as well as natural curiosities—leads research and promotes education according to its statute, in cooperation with other institutions, organizations and societies having the similar aims."[6] The definition only slightly different from pre-war regulation[7] does not stress profound changes in the position of the museum.

Each of three main duties — assembling, preserving and opening access of the collection, has the same importance. When fulfilling their functions according to the Law, museums as parts of public service realize the State policy in promoting culture, and the trust of national property gathered in their storerooms. Created by a legal act like a public enterprise, having statute, rights and duties, a museum belongs to the group of public institutions, like schools and universities. It is, therefore, distinguished by :

1. Individualization of organization ;
2. Denomination and qualification of organs (keepers and councils) ;
3. Non-profit activity ;
4. Material substrate and clearing of budgetary resources ;
5. The power to define rights and duties of users (visitors, research workers).

The general forms of activity, common to all the museums owned by the State and its agencies, substantial and planned, cannot be replaced by any other organization. The protection of museum pieces depends on the fact that they are being stored in the public museum. Within a legal definition[8] its main tasks are :

1. collecting of goods of culture and the documentation referring to them;
2. inventorying, catalogueing and elaborating museum objects;
3. storage of objects in a safe way, and rendering them accessible to researchers ;
4. protecting museum objects and archaeological sites ;
5. organizing exhibitions (permanent and temporary) ;
6. leading educational activity ;
7. promoting researches, expeditions and excavations ;
8. opening collections for scientific-educational purposes ;
9. publishing inventories, catalogues, guides and informatory books.

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[6] The Law of 1962 (see 2.), Art. 45.
[7] The Law of March 28, 1933 on Museums, Dz. U. 1933, No. 32/279.
[8] See art. 45 (footnote 6) and 46 of the Law of 1962.

Upon general regulations of the Labour Law, all the employees, staff and workers, as well as the persons doing their duties in the museum according to its statutory activity (guides, researchers) ought to follow the regulations and orders of the director. The director's responsibility is to conform all the forms of protection, research and exposition of goods, planned (and confirmed by superior organ), to financial resources. The character of activity and qualifications of employees with the titles of keepers, curators, conservators and cataloguers (responsible for inventorying and very often having scientific degrees) makes the museum an advisory board for the local administration responsible for the protection of the monuments and sites. Each museum has in its organization a scientific council with the competences almost similar to that of university faculties.

The National Culture Law of 1984[9] provides that museums should "take part in cultural education, promotion of folklore and regional activities, recognizing and fulfilling cultural interests of local community" by expositions, lectures, films and panels for school children. The broad activity foreseen by lawmaker causes many problems concerning sources, usable floor area both for exposition and storage of museum objects. The high qualifications required are not always adequate to salary, causing troubles for managing persons.

Some questions to be solved in the future regulations, should have been realized in previous legal acts. The pattern of great-hearted men, doing their duties in spite of difficulties made the state administration blind to the needs of the museum employees. At present, when insufficiently paid, they do not want to engage themselves even in the most interesting work.

The position of museum and its management depends on the kind and quality of museums. From over 600 museums, less than 10% has sufficient area of exposition, almost all have the storage and conservation problems. Even the biggest National Museums in Warsaw and Cracow have a permanent exposition of no more than 1,5% of their collections. The number of visitors in 20 of them[9] [10] exceed all limits, when the small local museums have no guests. Some of district museums subordinated to local authorities,[11] or central museums of technology,[12] army[13] and leading

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[9] The Law of April, 26, 1984, Dz. U. 1984, No. 26 (129). Now novelized.

[10] The National Museums in Warsaw, Cracow and Poznań, the castles of Wawel, Łańcut, Nieborów, palace in Wilanów.

[11] Above 50—mainly town museums, but with the reform of selfgovernment the said number will increase.

[12] Submitted to the Chief Technical Organization (NOT).

[13] The Museum of the Army in Warsaw and the local branches.

museums[14] have at present better situation than those subordinated to the Ministry of Culture and Art.[15] Most of local autonomous museums have been centralized after World War II, and depended on Ministry or have been incorporated as branch museums into the National Museum in Warsaw.[16] Coming back to the system of local activities, the museums of towns, local associations[17] and societies[18] created independently from central budget may be the solution in safe-keeping of goods.

MUSEUM OBJECTS—DOCUMENTATION

The main, however unobserved duty of utmost importance, is storage of information concerning museum objects together with them. The full documentation about makers, owners, users, founders, technology, material together with the bibliography makes an object more valuable. General statistics tell about 9,5 million of objects in the Polish museums[19] which is doubtful in light of research. Inventorying, catalogueing and gathering documentation is still not finished, even in the national museums. The wording "object in museum"[20] as an equivalent of inventoried one cannot be used, and the criteria of subdivision of museum pieces and their value depend on the quality of employees.

The Law of 1962[21] says that legally protected are the goods of culture, when registred as monuments, the objects in museum, and—what is doubtful—"evident" objects bearing historic character. Independently of their kind (movable, immovable), age and form of storage, all objects defined as goods of culture are worth to be protected. The list of the Art. 5 of the mentioned Law of 1962 exemplifies certain art objects such as "sculpture, painting, decorative objects, handicrafts, weapons, robes, coins," "folklore objects," "referring to progress in technology and material

[14] Royal Castle in Cracow—for museums in residences, the Museum of the Army—for military collections, the Museum of Archaeology in Warsaw—for all archaeological museums.

[15] Above 47 central, leading and specialized museums.

[16] As branches of the National Museum in Warsaw are organized : palaces in Łazienki, Krośniewice, Królikarnia (museum of sculpture), Nieborów (residence) and Wilanów (royal palace)—now criticized for too heavy system of administration.

[17] i.e. associations of promotion of science and culture of the local level (Płock, Cracow, Poznań, Toruń, Gdańsk).

[18] Moniuszko Museum, Chopin Museum in Żelazowa Wola, Artisanal Museum, Scout Museum in Katowice, the museums of the Polish Tourist Society.

[19] Saying nothing about ten church provincial museums, memorials and private collections.

[20] Art. 4 of the Law of 1962 does not mention "registred" goods.

[21] Art. 4 of the Law of 1962.

culture" as well as relating to important personalities, dates and facts of history, but the protection of them is obligatory when they are registered.

The state register kept by local administrative officer (called : conservator) does not mention museum objects. The fact of inscribing them in the repertory of a museum equalize the object with registered one. The wording of the Art. 64 of the Law of 1962 is clear : "Objects in the property of museums should, be inventoried" and means the duty of inscription in a repertory not later than 30 days after acquisition. This formal inscription does not mean evaluation of an object, referring to style, authorship, provenience, attribution and scope of preservation. According to Inventory Law of 1964,[22] museums are obliged to keep the books of accession (acquisition), storage, movement of goods, deposits, as well as general inventory and card-index. Each act of taking an object out of storeplace, withdrawal from exposition, lending, depositing or forwarding to anybody for any purposes should be notified. The information in the card-index should be sufficient to distinguish an object—which is very important for missing or destroyed objects. No action can be investigated, when the object is not showed in the documents. No object can be cancelled off the inventory book unless the supervisory organ of the museum decides so. The fact of inscription i.e. incorporation of a certain object into the collection is not easy. In the past, when museum collection consisted of art objects and original creations of a defined authorship and provenience such inscription caused less doubts. The modem museum, however, covers the whole human culture. Rapid growth of technology made many things of everyday use museum pieces, causing temptation to expose them or to put them in the museum store-house because of their probable value.

VALUE AS LEGAL FACTOR

Evaluation of an object should be defined according to certain acquirements and criteria. As many foreign laws, the Polish Law of 1962 uses the following touchpoints.[23]

Historic value—an argument basing on age and hence rarity of an object as "testimony of human activity, concepts and customs."[24] On the

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[22] The Order of the Minister of Culture and Art of April 18, 1964, Dz. U. 1964, No. 17/101.

[23] Art. 2—"The good of culture in a wording of law is any movable or immovable object, of the past or present times, having importance for heritage and cultural progress because of its historic, scientific or artistic value."

[24] Art. 1 of the Law of 1962.

other hand, particular links with historical events, places or persons eminent and worthy of our memory[25] are taken into consideration. We may observe, therefore, personal attitudes based on the emotions of a generation that took part in certain events[26] or trends to justify the social policy and political system.

Artistic value strictly connected with the sense of beauty decorativeness, aesthetic value seems to be the most changeable and disputable factor, depending on current artistic trends and modes. For an art historian criteria of style can be helpful, but never decisive. National wealth, life level, number of similar objects may help to evaluate art object as universally or locally important.

Scientific value is an inseparable factor in evaluating almost all the things as potential objects of research. Such research refers to objects, as well as to their creators, technology of production and methods of preservation and usually should precede a verdict of inscription. Raising problems of authenticity depend more and more on using modern technologies and laboratory equipment out of reach of most of the museums.

Cultural value—a factor used most frequently for justification of value of a "good of culture" is the easiest to apply and the most difficult to motivate. "Importance for cultural heritage and social growth"[27] is probably the hardest thing to prove, and as all others, mentioned above, may help only to gather the most important items from the bulk of things and relics of the past. Outside the system of the protection of the goods of culture we find another factor :

Material value, i.e. value measurable in means of payment. Noble assumption of protection make many experts avoid noticing that value. It may grow depending on collection trends, or even investments.. The so called *praetium affectionis*—a special value of an object for his owner changes a priceless object into a real good of culture. Material value could be modest for collectors of the past, but wide access to culture and its goods has changed the perspective, and while talking about goods of culture we cannot ignore it.

Evaluation of museum pieces is not limited to the moment of acquisition. Each of the factors mentioned, however changeable, should be considered in case of such legal actions as insurance, destruction or even burglary—to realize the legal responsibility.

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[25] Art. 5.4 and 5.11 of the Law of 1962.

[26] Memorials of Fight and Martyrdom, prisoners and extermination camps,, places of executions and fights for independence.

[27] Art. 2 of the Law of 1962—see footnote 23.

GOODS IN TRADE

The rules of trade turnover are applicable to the museum pieces and goods of culture in general. When in past times museums have been founded due to collectors' passions, their generosity or snobism, purchase was not only the form of museum acquisition, nor the most important. Lack of legal regulations in many countries, knowledge of value and pecuniar interests of collectors, and limited actions of customs offices made only a small part of them liable to duty. Owing to these, some world museums became extremely rich. At present, the trade of goods of culture in many countries is limited and restricted, to avoid impoverishment and pillage of collections. In Poland the destruction of museums and collections during almost 150 years of foreign rules, in World War II and the first years after the war caused peculiar interest in the protection against exporting goods apparently without value. The Law of 1962 prohibits[28] taking abroad all the objects bearing the values mentioned above, or "museum value,"[29] produced before the 9th of May, 1945—not only listed in the registers. The restriction is caused by the fact that inscription of a private property object is not possible, and the owner's rights in this respect are limited only by export prohibition. The problem of evaluating such goods of culture is difficult because of the fact that only the Minister of Culture and Art is authorized to forward an export licence, and—that the formal evaluation of an object seems to be transmitted into customs office. Neither the Minister, nor the customs officer has the possibility to describe undoubtedly even the age of an object, saying nothing about significance and value. The problem is only partly regulated in the practice of state museums creating so-called purchase commissions for their own purposes. They consist legally[30] of the director, three qualified employees and experts invited. The opinion basing on the material authority in the matter makes it binding for the museum. For the time being, no commission or expert exist doing the similar expertises on request of individual persons, and nobody is certified as an expert within his specialization. It comes out of fact, that expressing opinion of artistic value in general is far more easier than

[28] Art. 41 says : "Taking the goods of culture abroad is prohibited" upon the penal restrictions of Art. 74 of the same Law of 1962. The Order of Minister of Culture and Art of 1973 specifies the general term of prohibition—the date of May 9, 1945.

[29] The Customs Law of 1983, March 18 speaks about "art objects such as furniture, ceramics, glass, metal and tapestry objects, militaria, coins, nature objects of 'museal value'."

[30] The inner regulation for the Ministry of Culture and its museums of January 20 (1959) *Bulletin of the Ministry of Culture,* 1959, No. 3/28.

issuing a document—certificate in legal sense. The procedure of affidavit could be (but is not) applicable to forwarding such certificates of binding character to anybody's request, but only from listed experts of officially recognized authority. The problem seems to be easy to be legally regulated, but causes serious problems of authenticity.

The raising role of experiment in science, and progress in technology betrayed many past opinions. Objects recognized then as authentic, museum treasures of the highest value became in the light of tests—false. Even advanced studies cannot help to nominate an expert whose authority is undoubtful. The problem arises, when by purchase, or selling, the museum or other customer needs to know with certitude that the object bought is authentic. A risk when buying objects on an antiquity market grows because of many objects intentionally and skillfully falsified. The higher price paid by a respected antiquarian could diminish it, but the doubt causes no responsibility in that matter. The expertize, approving and certifying the fact of origin, becomes one of the most important questions to be solved.

Museum and public law—the problem of the utmost importance is not solved yet. The years of centralized rule in regulating all the problems of museums, the so-called nationalization of the private property because of its cultural value, proved that public administration may interfere in culture only in a very limited sphere. Without creation of local museums, promotion of local initiatives and financing collectors' movement, the care of goods of culture locked in museums is helpless. The role of law should be limited to regulation of the problems of management, testing of employees and experts and the responsibility for the treasure owned by public institutions. Thus, the law legal regulation, different from the Law of 1962 upon the Protection of the Goods of Culture and Museums, and new organization of public services in this sector are urgently needed. The problems of goods of culture and museum objects should have been taken into consideration long ago. Now, when talking about new, free and democratic form of ruling and management, we can neither put the protection of our cultural heritage apart for the future, nor unconditionally give goods of culture to the persons or organisms of private Law—without stating responsibility for this part of common treasure. Even when changing patterns of public administration to more active, selfgoverned and conscious, we cannot forget: museums are never enterprises and companies, nor eleemosynary institutions. They are subjects to public Law, and an important part of our culture. Even crisis in economy cannot limit or temporarily suspend their activity and existence without serious losses. The regulation of museums' Law is urgently needed with respect to existing opinions of museal experts and conservators.

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NOTES CRITIQUES ∗CRITICAL NOTES

Leszek Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej* [La *juridiction constitutionnelle en Europe occidentale],* Warszawa 1987, Państwowe Wydawnictwo Naukowe, 335 pages.

La protection judiciaire de la Constitution a toujours suscité un intérêt considérable de la science polonaise du droit. La création, en 1985, du Tribunal Constitutionnel en Pologne a fait qu'elle s'intéresse davantage à des organes semblables dans le monde contemporain. Parmi les ouvrages de droit comparé consacrés aux juridictions constitutionnelles figure celui de L. Garlicki, auteur des publications connues sur la juridiction constitutionnelle aux Etats-Unis.

L'auteur se penche sur les systèmes juridiques, et les conceptions doctrinales qui s'y rattachent, des tribunaux constitutionnels d'Autriche, de R.F.A., d'Italie, d'Espagne, de Portugal et de Turquie ainsi que du Conseil Constitutionnel français. L'auteur juge possible de les englober dans une étude, bien qu'on puisse faire des réserves sur la présence dans ce groupe du tribunal constitutionnel turc et sur l'absence du système suisse de contrôle de la constitutionnalité du droit. Malgré toute la spécificité de ce dernier système, ses traditions et ses liens avec la culture juridique européenne et aussi ses liens fonctionnels avec le système européen des tribunaux sont ici, à mon avis, des facteurs plus décisifs que les ressemblances incontestables, en ce qui concerne l'organisation et la compétence, entre le tribunal turc et les tribunaux européens. L'auteur a délibérément exclu de ses recherches non seulement le modèle américain de *judicial review* mais aussi les divers organes, plus politiques que juridiques, de protection de la constitution en Europe.

Conformément aux intentions expresses de l'auteur (p. 9), son ouvrage relève du droit comparé. Il pose deux questions fortement importantes sur le plan théorique : les institutions examinées présentent-elles un degré d'homogénéité suffisant pour qu'on puisse les envisager dans le cadre d'une seule catégorie de juridiction constitutionnelle sous forme de tribunaux constitutionnels, et, dans l'affirmative, quelle est la fonction politico-constitutionnelle de ces tribunaux dans le groupe d'Etats examiné ?

L'auteur commence la recherche de la réponse à ces questions — et aussi à plusieurs questions qui en dérivent — par exposer les grandes lignes de l'origine et de l'évolution du système européen de protection de la constitution. Dans le premier chapitre, il traite de l'influence de la tradition anglo-saxonne et des expériences américaines sur l'évolution des procédures de protection de la constitution dans les pays européens, des mutations de la doctrine française de la souveraineté du Parlement — si opposée au contrôle judiciaire de la constitutionnalité des lois —, de l'évolution du droit autrichien aboutissant à la mise en place d'un tribunal

constitutionnel après la Première Guerre mondiale, des changements dans le constitutionnalisme ouest-européen après la Seconde Guerre mondiale, conséquences de l'expérience du système fasciste ou autoritaire. Tous ces facteurs de la pensée et de la pratique juridiques européennes ont déterminé le modèle contemporain de protection de la constitution sous forme de tribunaux constitutionnels, l'objet propre de l'analyse comparative de L. Garlicki. Dans les chapitres successifs, cette analyse a pour objet : 1° la position des tribunaux constitutionnels dans le système des organes de l'Etat, l'auteur mettant surtout en relief leurs liens et leur spécificité au regard d'autres organes judiciaires (chapitre II) ; 2° la désignation et la situation juridique du juge au tribunal constitutionnel (chapitre III), et aussi les règles d'organisation de ces organes et les règles de la procédure devant eux (chapitre IV) ; 3° la compétence des tribunaux constitutionnels conçue intégralement, c'est-à-dire en tenant compte de toutes leurs attributions dans le cadre de la typologie choisie par l'auteur (chapitre V) ; 4° le contrôle de la constitutionnalité du droit que l'auteur distingue dans son analyse comme fonction juridique pilote des tribunaux constitutionnels (chapitre V). Les plus importants résultats de ces analyses figurent à la fin de l'ouvrage. Mais attention. Le lecteur qui serait tenté de connaître le riche contenu de l'ouvrage à travers seulement de sa partie finale commettrait une erreur, car il trouvera dans chaque partie des conclusions et des jugements qui sont une contribution originale aux recherches contemporaines sur la juridiction constitutionnelle de l'Europe.

La valuer scientifique de l'ouvrage de L. Garlicki peut être appréciée avant tout sous l'angle de la recherche d'une synthèse politico-constitutionnelle de la juridiction constitutionnelle dans les pays capitalistes.

L'auteur arrive à la conclusion que dans les pays de l'Europe de l'Ouest s'est développé un modèle caractéristique, propre aux pays examinés, de juridiction constitutionnelle (à l'exclusion du Conseil Constitutionnel français), et essentiellement différent du système anglo-saxon de protection de la constitution par les tribunaux de droit commun, bien qu'on observe un certain rapprochement des deux systèmes, ce qui résulte en partie de l'abandon du prototype du tribunal constitutionnel conçu par Kelsen, même en Autriche. L'existence d'un modèle commun de tribunaux constitutionnels ne signifie pas cependant qu'il n'y ait pas de différences entre eux. Elles résultent avant tout du degré différent de stabilité des tribunaux dans les systèmes de gouvernement de différents pays et du style des tribunaux (modèle actif ou modèle modéré des juges).

Ce qui détermine la nature des tribunaux, ce sont les fonctions qu'ils exercent dans le système du pouvoir et qui sont désignées avant tout par leur activité. Ces fonctions, jugées en général positives, ce sont : 1° la fonction d'interprétation créatrice de la constitution, mais non, en règle générale, de la détermination de son contenu (en quoi les tribunaux diffèrent de la Cour Suprême des Etats-Unis) ; 2° la fonction d'intégration du contenu du droit constitutionnel dans les autres branches du droit, principalement par l'examen de la constitutionnalité des lois dans le domaine des droits et libertés du citoyen ; 3° la fonction d'arbitrage des conflits politiques, réalisée par le règlement des conflits de compétence entre les organes de l'Etat, fonction exercée toutefois avec prudence. On ne saurait contester ces jugements de l'auteur ni son opinion qu'à travers ces fonctions seulement apparaît la justesse de la thèse de la science dans les pays socialistes selon laquelle les tribunaux « sont un facteur essentiel de maintien et de renforcement du système existant du pouvoir » des pays capitalistes (p. 287).

Ce qui décide de la valeur scientifique de l'ouvrage de L. Garlicki dans le

domaine des recherches sur le système de protection de la constitution dans les pays européens, c'est aussi la critique de la thèse lancée naguère d'après laquelle le tribunal constitutionnel est, par principe, une institution antidémocratique (antiparlementaire) et réactionnaire. L'auteur cite des arguments convaincants en faveur de la relativité de la première thèse. En particulier, il convient de souligner son observation pertinente selon laquelle on ne peut accepter comme bien fondée l'opinion déclarant que les tribunaux constitutionnels remettent en question la souveraineté du Parlement, puisque ni la doctrine ni les constitutions en vigueur dans les pays examinés n'attribuent pas une telle position au Parlement. Est également entièrement convaincante la polémique de l'auteur avec la thèse du caractère réactionnaire immanent à la juridiction constitutionnelle bourgeoise. L'auteur souligne les éléments positifs de l'activité des tribunaux quand il s'agit de la réalisation de la protection de la constitution avec ses solutions démocratiques, par exemple dans le domaine des droits civiques et, en général, que « l'on ne peut statuer sur le caractère constitutionnel de la juridiction constitutionnelle abstraction faite des réalités politico-juridiques de son fonctionnement dans les différents pays » (p. 310).

Une analyse poussée de différents éléments de la construction juridique des tribunaux constitutionnels permet de saisir plus facilement le sens juridique de quelques solutions de la loi polonaise sur le Tribunal Constitutionnel, tandis que la description de leur fonctionnement peut servir à une meilleure appréciation de l'expérience polonaise, ne seratit-ce qu'en la confrontant avec celle de l'étranger. L'ouvrage de L. Garlicki facilite sans aucun doute aux intéressés la connaissance du système juridique et l'appréciation du fonctionnement du Tribunal Constitutionnel en Pologne, indépendamment de l'importante contribution de l'ouvrage aux recherches sur la juridiction constitutionnelle dans les pays contemporains.

Kazimierz Działocha
Traduit par Maciej Szepietowski

Barbara Kowalska-Ehrlich, *Młodzież nieprzystosowana społecznie a prawo (The Socially Maladjusted Youth and Law)*, Warsaw 1988, Wydawnictwo Prawnicze, pp. 240.

The book—a thesis qualifying for assistant-professorship—deals with the problems of control of social demoralization and delinquency in children and young persons. It concerns, therefore, an issue which is much discussed in the Polish criminological, legal, pedagogical, and psychological literature. It must have been rather difficult to plan an extensive work concerning such problems in a way to avoid quoting all that is very well known and has been presented repeatedly in literature. The authoress succeeded to do that : her book provides a new approach and deals with an analysis of the system of control of social maladjustment in young persons. She is equally interested in the elements of that system's legal structure and in its actual functioning ; in the tasks it has been charged with and in its organizational and infrastructural framework which contributes to its overall shape ; in the needs of its "clients" and in the required qualifications of the staff who are part of its "equipment."

The result is an ambitious work which shows the examined problem from a new perspective. The reconstruction, made by the authoress, of the system of control of social demoralization in young persons demonstrates in sharp outline that system's

strong as well as weak points. The former include the fact that the school has been made a basis of prevention of maladjustment ; a weak point here, instead, is a lack of another such basis in a network of independent social organizations which would contribute to the care and education of children and young persons in close relationship with the population of the separate localities. The concentration of decision-making concerning juveniles and minors in the family court which deals mainly with care and education, is another of the system's strong points ; a weak point in this connection is the preservation of departmental divisions, most evident in some preposterous regulations which prevent the access of various categories of young persons to the existing centres for prevention and resocialization (e.g. to the curators' youth centres).

The detailed discussion of the system starts with a description of the population of "clients" it deals with (Chapter I). Next, the authoress proceeds to discuss its elements involved in guidance, diagnosis and selection of those "clients" (Chapter II), and the functioning of the segment where decisions are taken about resocialization of juveniles and minors in need of such treatment or intervention in their educational environment (Chapter III). In Chapter IV, the forms and means of care, education and resocialization undertaken within the system have been discussed. The work ends with a presentation of State agencies charged with coordination of educational activities aimed at prevention of demoralization in children and young persons (Chapter V). Thus the book's structure is clear and acquaints the reader with the entire system, pointing to all its embranchments, bottle-necks and blind alleys.

The system's framework is made of legal provisions which regulate the organization, competences, and methods of operation of its separate components. The way of analyzing and appraising those provisions is therefore of particular importance. Their vast majority is of a substatutory rank : hence the authoress starts with confronting them with the statutory regulations—provisions of the Act of October 26, 1982, on proceedings in cases of juveniles—in order to find out about their consistence with those provisions. Next, she appraises them in the light of the system's general assumptions and of scientific views, and proceeds to confront them with the practical possiblities. The final opinions include all of the above elements.

This approach is worthy of praise. In many cases, it leads to highly critical remarks directed at some provisions. Such remarks are always well-documented, their reference system explicit : e.g. the so-called preventive activities undertaken by prosecution agencies. Also right is the criticism of some solutions of the Act on proceedings in cases of juveniles, e.g. the provisions on modes or costs of proceedings. The authoress is also absolutely right in pointing to the need for restrictive interpretation of the court's powers to institute proceedings in cases of juveniles who reveal symptoms of maladjustment. The list of such right statements as to the merits contained in the book is too long to be continued here.

Some controversial problems should now be mentioned, as well as the issues where I find it difficult to agree with the authoress.

What is therefore rather unfortunate in my opinion, is the distinguishing of "decisive" and "cognitive" diagnoses. One can hardly expect the former not to be based on cognition, and the latter — to be unsuitable for decision-making. At most, the question here might be what use is actually made of a specific diagnosis , as the authoress rightly observes, those made in the case of socially maladjusted children and young persons are always to help direct the appropriate steps taken towards them.

The authoress is right in postulating that in diagnosing social maladjustment, a multistage procedure should be employed the first stage of which would consist in selection, i.e. would be aimed above all on the separation from among the examined population of subgroups to be submitted to further stages of diagnostic examination. Another right statement is that "a specialistic examination produces additional stress and stigmatizes the child and his family in the eyes of neighbours and peers" and should therefore be limited to the necessary minimum. The authoress also stresses the importance of early detection of disturbed behaviour for effective prevention of social demoralization.

A problem arises here, however, of the way of squaring those two fit postulates to each other. The commendable need for development of prevention prompts a development of diagnostic examination as well, while the justified fear of stigmatization urges the greatest possible limitation of such examination according to the principle *primum non nocere.* This is a complicated problem in so far as the early disturbances are usually unobtrusive, and it is difficult to distinguish between the temporary educational problems of a developmental nature and the symptoms of a beginning process of social demoralization. Hence it would be the more interesting to know the authoress's opinion about this issue and her possible suggestions as to the recommended strategy.

The authoress rightly criticizes the "conception of the home for detained juveniles as a quasi house of detention awaiting trial," adopted in the Act of October 26, 1982 on proceedings in cases of juveniles, and proceeds to state that "this way, that institution's character defined in executory provisions might suffer an unfavourable limitation." The problem is, however, that the Act's settlement of this question, also considered unfavourable, is nevertheless binding, and the inconsistent executory provisions should be adjusted to it.

As we know, there is a variety of conceptions and solutions as regards the agency to decide in cases of juveniles (courts, commissions) and the way of its operation. The paragraph where they have been summed up under the title "The crisis of judging juveniles or of the court ?" (pp. 127—131) leaves the reader somewhat unsatisfied although I do not intend to question any of its contents. What is missing, in my opinion, is a discussion of the attempts at successfully solving the outlined controversies through abandonment of "adjudication" in the operation of family (or juvenile) courts for "conciliation," based on a joint action of the juvenile, his parents and the court in order to get at the sources of evil and to agree upon the way of solving the conflict which underlies the juvenile's behaviour and has resulted in his appearance before the court. This is a most important problem also from the point of view of the postulated changes in the functioning of the Polish family courts.

Similarly, also the presentation of the development of the network of juvenile courts in Poland (from the original 34 to nearly 140 seems unduly brief. The fact should have been mentioned, too, that many years long, the local competence of those courts in criminal cases differed from that in cases concerning guardianship. The statement that "in 1953, their competences were broadened to include cases concerning guardianship" seems insufficient here.

A few trifles to end with : I believe it not exactly appropriate to use, in relation to delinquents, terms such as "isolation institutions ;" "judged cases "criminal demoralization of the youth "discretionary application of temporary measures," while what is actually meant is the freedom of their application ; "guidance [...] institutions moreover, I would hardly call "discernment" a "form of guilt."

The above exemplifying observations concern matters of secondary importance. If we accept the book's convention, its above-mentioned qualifies come fully into view. But first of all, that convention should be defined clearly. The work under review might seem superficial, just touching upon the phenomena and the "real" problems they give rise to. This may be the opinion of a lawyer, used to dogmatic analyses of the contents of provisions on the one hand, and of a criminologist who in turn is accustomed to discussions of the findings of studies of the lives of juvenile delinquents on the other hand. It should therefore be stated quite clearly that it is not such problems that the book deals with. It deals, instead, with a structure : the system of prevention and control of young persons' demoralization, and the interdependences of its components. This very approach is a valuable novelty in the book by B. Kowalska-Ehrlich, LLD.

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63RD CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION
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The International Law Association (ILA) was created in 1873 and is therefore among the oldest international non-governmental organizations. Its basic aim is a broadly interpreted activity for the development and codification of international law. The Association's international prestige is manifested by its status as an UN advisory organization, and by the fact that its standpoint is taken into consideration by the International Court of Justice when formulating the latter's judgements and advisory opinions, and also in arbitration decisions.

The ILA's basic form of activity is an international conference, organized biennally and devoted to an analysis of the most important issues of international law. The effects of proceedings are then formulated as resolutions and distributed to the competent UN agencies and to other specialized organizations. Besides, each consecutive conference yields an extensive report which contains the materials prepared by the separate problem committees as well as the record of discussion.

The organization of the 63rd ILA conference was the privilege of the Polish Branch of the Association, operating since 1923. The present one was the second ILA conference organized by Poland ; the first one was held in 1928 in Warsaw. This is the first time that the conference was hosted by a socialist country.

The 63rd ILA conference was organized under the auspices of the then President of the State Council Wojciech Jaruzelski. The Honorary Committee was presided by the First President of the Supreme Court Professor A. Łopatka, and the Organizing Committee—by Professor J. Makarczyk, President of the Polish ILA Branch. The honorary consultant of the conference was Professor M. Lachs, judge of the International Court of Justice.

The opening ceremony was held at the National Philharmonic Hall in Warsaw. The first speaker was the former ILA President who had been in charge of the Association's activities since the 62nd conference in Seoul in 1986. Next, President of the ILA Executive Board Professor C. J. Olmstead informed the audience about the appointment of Professor Jerzy Makarczyk to the office of President of the International Law Association for the next two years.

President of the State Council addressed the participants in the name of the Polish government. He stressed the importance of international law for friendly cooperation between nations, and the conference's role in the elaboration of new legal regulations in the sphere of international law.

A message from Pope John Paul II was read out, pointing to the relationship between the development of progressive international law on the one hand, and human dignity and observance of human rights on the other hand. In his letter to the participants, the UN Secretary General Javier Perez de Cuellar stressed the importance attached by his Organization to the Warsaw conference of ILA and to the Association's achievements.

Similar was the spirit of speeches delivered by President of the International Court of Justice Professor J. M. Ruda, and Professor S. Pawlak, member of the UN International Law Commission. The Chairman of the Honorary Committee A. Łopatka and the newly appointed ILA President J. Makarczyk stressed in their speeches the importance of unity of international law on the universal scale.

The proceedings were held in the Victoria Hotel in Warsaw in seventeen committees, and focused on the following subjects : legal aspects of long distance air pollution ; human rights ; cosmic law ; international commercial arbitration ; exclusive economic zone ; international recognition of adoption ; the new international economic order ; legal aspects of air traffic control ; medical and humanitarian law ; legal problems of extradition in relation to terrorism ; international penal law ; international foreign currency regulations ; legal status of refugees ; international recognition of foreign public law ; establishment of norms of international customary law ; the right to food ; immunity of State. Besides, three informal panel discussions took place which concerned the extra-territorial jurisdiction of states ; peaceful settling of disputes ; and international foreign currency regulations.

In their work, the problem committees based on reports prepared in advance. Discussions were followed by the formulation of resolutions which among others contain definite legal solutions in the form of proposals and even drafts of the respective international instruments. Thus the committee which dealt with medical and humanitarian law adopted a resolution containing five basic principles of protection of a human being in relation to the new possibilities of genetic engineering. According to that resolution, all research on human genetic material should be aimed at therapeutic advancement only and take place under supervision of competent agencies. Whatever the legal qualifications, the human embryo deserves to be recognized as a human being. It was also stated in this context that human genetic material cannot be an article of trade.

The committee which dealt with observance of human rights concentrated on the following issues : supervision of observance of human rights by intergovernmental organizations ; definition of the state of emergency ; coordination of the activities of extragovernmental organizations in disclosing infringements of human rights ; analysis of the state of emergency as a social phenomenon, irrespective of the possibly related infringements of human rights.

The committee for international foreign currency regulations deliberated on the question of international debts. According to its resolution, a State's inability to pay a foreign debt falls under the necessity clause. It has been stressed at the same time that both the practice of States and the general legal rules fail to provide a sufficiently clear definition of that clause and the consequences of its application. Adducing the proceedings of the UN International Law Commission, the resolution brings the fact to mind that illegality of a State's action is excluded if there are no other methods of protection of its basic interests in a situation of sudden and serious danger (Art. 33, section 1, of the draft convention on liability of States). In this context, the committee found the notion of basic interests, to designate the following issues : organization of internal and external order ; maintenance of services vital for the public weal ; environment protection.

In the committee's opinion, the state of emergency only results in a stay of the duty to pay debts until that state exists, and not in its cessation.

The committee which dealt with the problems of a new economic deal stressed the urgent need for a comprehensive regulation of the problem of indirect restrictions in international trade, particularly of the so-called unilateral self-limitations

of exports. Moreover, the committee's resolution stresses the need for inclusion into national economic legislations of the obligations resulting from GATT.

The committee for international recognition of a foreign public law states in its resolution that at the present stage of development of states, the recognition and application of that law should not be based on its external nature only.

The committee which dealt with the legal aspects of air traffic control submitted a proposal of elaboration of an international multilateral agreement to unify the relevant provisions. Such need results from divergence of many national legal regulations of this sphere.

The committee of cosmic law deliberated on the problem of demilitarization of the outer space and environment protection. In the first place, the destructive impact of the use of anti-satellitary weapons was stressed, and the need for bi- and multilateral agreements banning the testing of such weapons in space. Attention was at the same time drawn to the diversified interpretation of commonly used terms such as cosmic weapons or militarization of the outer space. Also postulated was the need for a catalogue of the most dangerous actions undertaken in space which are still subject to no explicit legal qualification.

The proceedings of the Warsaw conference (reports, resolutions, and discussion) will be published as a whole, as is customary after all ILA conferences.

The idea that the 63rd ILA conference should be organized in Warsaw aroused a great interest in the world. This was manifested, among other things, by the participation in it of many outstanding representatives of the doctrine and practice of international law. Over 600 lawyers from all continents took part in the conference ; they represented the main schools of the legal thought and practice. Among the guests, the President and judges of the International Tribunal of Justice should be mentioned as well as justices of the Supreme Courts and Ministers of Justice from some States (India, Pakistan), high-rank diplomats and functionaries of Ministries of Foreign Affairs.

The participants visited Warsaw, Cracow, Gdańsk, and a stud in Bogusławice. The conference ended with a formal reception given by Professor A. Łopatka, Chairman of the Honorary Committee of the conference, at the Palace of the Presidium of the Council of Ministers.

Ryszard Hara, Jerzy Kranz
Translated by Joanna Krahelska

LA CONFERENCE INTERNATIONALE AU SUJET DE LA REGULATION CONSTITUTIONNELLE DU SYSTEME DES SOURCES DU DROIT DANS LES PAYS OCCIDENTAUX

Les 3 et 4 novembre 1988, s'est tenue à Varsovie une conférence internationale organisée par la Section du Droit Constitutionnel de l'Institut de l'Etat et du Droit de l'Académie Polonaise des Sciences, sur le thème indiqué dans le titre de ce rapport. C'était l'étape suivante de la longue coopération des constitutionnalistes des Académies des Sciences des pays socialistes dans le cadre du programme « L'analyse critique des doctrines politico-juridiques et des institutions occidentales ».

Ont pris part à cette conférence des scientifiques de l'Insitut de l'Etat et du Droit de l'Académie des Sciences de l'U.R.S.S., de l'Institut de la Théorie de l'Etat et du Droit de l'Académie des Sciences de la R.D.A., de l'Académie des Sciences de

l'Etat et du Droit de la R.D.A., de l'Université de Gdańsk, de l'Université Marie Curie-Skłodowska de Lublin, de l'Université Silésienne de Katowice, de l'Université de Varsovie, de l'Institut de l'Etat et du Droit de l'Académie Polonaise des Sciences.

Les débats ont été inaugurés par le prof. J. Łętowski, directeur de l'Institut de l'Etat et du Droit de l'A.P.S., qui a souligné l'opportunité des recherches comparatives dans le domaine du droit constitutionnel. A l'époque de la recherche de nouvelles solutions constitutionnelles par les pays socialistes, la connaissance et une appréciation pénétrante des institutions du constitutionnalisme occidental peuvent jouer le rôle d'une précieuse inspiration.

Dans son discours inaugural, le prof. W. Sokolewicz de l'Institut de l'Etat et du Droit de l'A.P.S. a caractérisé les recherches communes sur le droit constitutionnel et l'idéologie des pays occidentaux comme un fond de toile des faits qui se produisent dans les pays socialistes. Il a souligné le caractère universel et le contexte historique particulier de l'étude des problèmes tels que la force obligatoire de la Constitution, l'inflation du droit, la nature du système — ouvert ou fermé — des sources du droit, la participation des organes législatifs et administratifs à la création du droit, le rôle normatif des tribunaux, l'internationalisation du droit interne comme résultat de l'intégration régionale et de la coopération internationale qui se développe.

Le premier jour, les débats ont porté sur des problèmes juridiques théoriques. Le prof. V. Tumanov de l'Institut de l'Etat et du Droit de l'A.S. de l'U.R.S.S. a pris le premier la parole. Il a déclaré que la Constitution doit servir de point de départ à une analyse du système des sources du droit. Il a mis en relief l'importance de la fonction juridique de la Constitution qui naguère était sous-estimée dans la doctrine socialiste au profit de la fonction idéologique. Il a qualifié la Constitution de critère d'appréciation de la norme juridique et s'est prononcé pour l'attribution aux dispositions constitutionnelles de la valeur des normes directement obligatoires.

Bien que les Constitutions des pays capitalistes n'énumèrent pas intégralement les sources du droit, on peut néanmoins y dégager les catégories d'actes juridiques correspondant à la structure et à la hiérarchie des organes de l'Etat. La règle est la primauté de la loi dans le système des sources du droit. A l'exception de la V^{e} République française, la régulation légale est la règle, et les organes exécutifs rendent des actes juridiques en vertu d'une délégation légale. La doctrine soviétique critique les nombreuses délégations légales dans les pays capitalistes, témoignage du rôle croissant du pouvoir exécutif aux dépens des Parlements. Ce phénomène n'est pas étranger aux pays socialistes. V. Tumanov a indiqué des anomalies dans le système des sources du droit : la jurisprudence des tribunaux constitutionnels dont la force légale est plus forte que celle de la loi et les actes émanant des structures préfédérales, dont le caractère diffère tant du droit interne que du droit international.

Au cours de la discussion sur le rapport, le prof. L. Garlicki de l'Université de Varsovie a soulevé le problème des critères selon lesquels les décisions judiciaires peuvent être considérées comme sources du droit. V. Tumanov distingue entre le système anglo-saxon, celui des précédents obligatoires, et le système continental où une pratique générale acquiert la valeur normative. En transportant ces considérations sur le terrain de la juridiction constitutionnelle, L. Garlicki a fait remarquer que la fonction propre aux tribunaux constitutionnels c'est l'interprétation de la Constitution tendant à statuer sur la conformité des autres actes avec celle-ci. De l'avis de V. Tumanov, cette interprétation est créatrice du droit. Quoique non

conforme à la séparation classique des pouvoirs, la fonction créatrice de la jurisprudence constitutionnelle est indispensable à l'époque de l'inflation du droit.

Le prof. V. Nersesjanc de l'Institut de l'Etat et du Droit de l'A.S. de l'U.R.S.S. a parlé de la constitution et des sources du droit dans l'histoire des doctrines juridiques. La genèse de la source est liée à l'histoire de la naissance de l'Etat bourgeois. La Constitution définit la structure du pouvoir, les compétences des organes de l'Etat — c'est ce que font les lois fondamentales jusqu'à nos jours. Le rapporteur considère comme erronée la doctrine de A. J. Wyszyński sur l'existence d'un droit socialiste spécifique. La spécificité du droit est fondée sur l'indication expresse du détenteur de fait du pouvoir politique, pendant que le droit en tant que tel reste la même chose dans chaque formation, à savoir le système normatif à caractère général et obligatoire. En réalité, le « droit socialiste » a parfois subi des déformations, en revêtant la forme des ordres des institutions politiques non dénuées d'arbitraire. En tant que partisan du positivisme juridique, V. Nersesjanc a déclaré que le droit est l'unique régulateur convenable de la vie sociale, en raison de l'élément d'égalité qu'il contient et de son caractère objectif, et a souligné la nécessité d'appliquer le principe de la primauté de la Constitution dans les domaines où les normes constitutionnelles entrent en concurrence avec des normes d'une autre nature.

Répondant à L. Garlicki, le rapporteur s'est déclaré pour l'appréciation formelle du caractère juste du droit en indiquant sa caractéristique immanente : le traitement de ses destinataires sur un pied d'égalité. Le dr J. Franke a soulevé le problème du caractère ouvert ou fermé du système des sources du droit. Le rapporteur a opté pour le système fermé, tout en reconnaissant que de nouvelles sources pouvaient apparaître à condition que leur origine soit située dans les organes constitutionnels du pouvoir. De son côté, le dr J. Mazur de l'Université de Varsovie a dénoncé l'avalanche d'actes juridiques rendus par les organes de l'administration, par suite de la croissance et de l'étroite spécialisation de celle-ci. L. Garlicki a souligné que l'évolution de la législation administrative devait être suivie par les mécanismes de contrôle, donc par les juridictions administrative et constitutionnelle. W. Sokolewicz a soulevé des questions théoriques : le caractère majoritaire formel de la volonté des organes représentatifs et les « irréguralités » de la position de la juridiction constitutionnelle à la lumière du principe de la séparation des pouvoirs ainsi que du principe de la supériorité des organes représentatifs.

Le rapport suivant, celui du prof. V. Cetvernin de l'Institut de l'Etat et du Droit de l'A.S. de l'U.R.S.S., était consacré au concept du droit naturel au regard de la théorie de la Constitution. Se référant à la jurisprudence du Tribunal Constitutionnel fédéral de la R.F.A., il a déclaré qu'à côté des sources du droit écrit, y sont en vigueur les normes découlant de l'ordre constitutionnel dans son ensemble, un recueil de principes et d'idéaux contenus implicitement dans la régulation et la pratique constitutionnelles inférés, par la voie d'interprétation, par le Tribunal Constitutionnel fédéral et par d'autres juridictions. Au lieu de cerner les actes juridiques de dispositions d'application détaillées qui perdent fréquemment de leur actualité, il a jugé qu'il était utile de laisser aux tribunaux la liberté d'interprétation des normes, ce qui leur permettrait de tenir compte des valeurs exprimées par le législateur ainsi que des conditions variables de l'application de ces normes dans la pratique.

L. Garlicki a déclaré pour sa part que les nombreuses clauses générales rencontrées dans les Constitutions permettent aux tribunaux constitutionnels de

rapporter les normes aux idéaux du droit naturel. V. Tumanov a mis en relief l'importance que le droit naturel présente pour l'interprétation des droits et libertés civiques. De son côté, V. Nersesjanc a attiré l'attention sur le danger d'affaiblissement de la force juridique de la Constitution dès qu'on reconnaît d'autres normes obligatoires supra juridiques.

Le rapport de Mme le dr M. Kruk-Jarosz de l'Institut de l'Etat et du Droit de l'A.P.S. était consacré au système des sources du droit de la Communauté Economique Européenne. L'auteur qualifie la Communauté comme institution supranationale, qui diffère des liens traditionnels entre Etats. Elle distingue les catégories suivantes de sources du droit de la C.E.E. : les traités internationaux créateurs de Communautés, ayant le caractère d'une Constitution spécifique de la C.E.E., le droit dérivé de la Communauté, c'est-à-dire les actes rendus par ses organes, le droit conventionnel et la jurisprudence de la Cour de Justice de la C.E.E., et aussi les « principes juridiques fondamentaux » déduits par la Cour du droit des gens et du droit interne des pays membres. Le droit européen est directement obligatoire dans les pays membres et sa force légale est supérieure à celle du droit interne, ce qui résulte de la renonciation par les pays membres à une partie de leur souveraineté au profit de la Communauté.

Le dr A. Dost de l'A.S. de l'Etat et du Droit de la R.D.A. a complété le rapport de Mme M. Kruk-Jarosz, en affirmant entre autres que la C.E.E. se trouve sur la voie de la création d'un état fédératif, et la première étape en sera l'abolition des frontières douanières. Il a fait remarquer qu'un très grand nombre d'actes juridiques de la Communauté sont liés au caractère technique des normes, principalement dans le domaine de la politique agricole commune. A. Dost a précisé que le droit de la Communauté a le caractère d'un conglomérat de normes de droit international et de normes spécifiques émanant des organes des Communautés où les décisions sont prises à la majorité des voix.

Le dr A. Szmyt de l'Université de Gdańsk a indiqué la tendance du droit des Communautés à devenir autonome. Mme le dr E. Gdulewicz de l'Université Marie Curie-Skłodowska de Lublin a fait remarquer, sur l'exemple de la V^{e} République française, que si la primauté, constitutionnellement accordée, du droit international sur le droit interne n'est pas rigoureusement respectée, la supériorité du droit européen, elle, est reconnue sans réserves par les tribunaux.

La seconde journée de la conférence était consacrée à l'analyse des systèmes des sources du droit dans quelques pays occidentaux. Mme E. Gdulewicz, en parlant du système juridique de la V^{e} République française, a indiqué le rôle de la jurisprudence du Conseil Constitutionnel pour l'élargissement de la notion matérielle de la Constitution. Le système français des sources du droit est ouvert, sa régulation constitutionnelle est imprécise et laisse une marge de liberté à la libre interprétation par la pratique et par les juridictions constitutionnelle et administrative. Dans l'ordre légal français, les matières'réglées par la loi sont définies par la Constitution. Alors que primitivement leur liste était restrictive, actuellement la doctrine, conformément à la jurisprudence du Conseil Constitutionnel, incline à donner un caractère de garantie et non de limitation à cette régulation. La Constitution donne au Premier ministre un pouvoir réglementaire qu'il exerce par la voie de décrets. La doctrine d'une première période de la V^{e} République accordait un pouvoir normatif illimité au gouvernement, mais la jurisprudence du Conseil Constitutionnel l'a rétréci, en enrichissant les sources des pouvoirs législatifs du Parlement.

Le rapport de Mme le dr B. Weiss de l'Institut de la Théorie de l'Etat et du Droit de l'A.S. de la R.D.A. était également consacré au droit de la V^{e} République

française, et notamment à l'influence du Conseil Constitutionnel sur la législation. Primitivement, cet organe était institué principalement pour délimiter l'objet respectif des normes administratives et celui de la législation. Depuis 1971, le Conseil s'est attribué la compétence de contrôle au fond de la constitutionnalité des lois. Invoquant le préambule de la Constitution, le Conseil a reconnu la valeur juridique des principes formulés de façon imprécise, en se garantissant ainsi une liberté considérable d'appréciation de la constitutionnalité des normes. La jurisprudence du Conseil est devenue une source autonome du droit, puisqu'il peut concrétiser « les principes fondamentaux reconnus dans les lois de la République ». Mme B. Weiss a critiqué la proposition du P.C.F. de liquider le Conseil Constitutionnel et de transmettre le contrôle de la constitutionnalité à une commission parlementaire spéciale.

Au cours de la discussion, L. Garlicki, en faisant un bilan du rôle du Conseil Constitutionnel, a souligné la tendance de sa jurisprudence « favorable au citoyen ». E. Gdulewicz a ajouté que, primitivement conçu comme un gardien du Parlement, le Conseil Constitutionnel est devenu depuis la réforme de 1974 un organe de protection des intérêts de la minorité parlementaire.

Le sujet suivant des débats était le constitutionnalisme américain. Le dr W. Zakrzewski de l'Université M. Curie-Skłodowska de Lublin a présenté quelques problèmes du système des sources du droit aux Etats-Unis. La source principale c'est la Constitution qui compte 200 ans, dont la longévité s'explique par son caractère juridique, par l'abondance de clauses générales et par le principe, adopté plus tard, du contrôle judiciaire de la constitutionnalité des lois permettant de façonner son contenu dans des conditions sociales variables. Au niveau fédéral, à côté de la Constitution, font partie des sources du droit : les précédents *{Common Law),* la législation du Congrès qui va s'élargissant et la législation déléguée de l'administration, les actes juridiques du Président ainsi que les traités et les accords administratifs internationaux, largement répandus, non prévus par la Constitution.

Le rapport du prof, agrégé R. Małajny de l'Université Silésienne de Katowice était consacré à l'objet de la loi dans la pratique constitutionnelle américaine. Malgré leur énumération dans la Constitution, les matières légales ont été élargies grâce à la conception — oeuvre de la jurisprudence de la Cour Suprême — des droits dérivés et des compétences immanentes du Congrès, grâce aussi aux lois rendues en vertu de traités. Etant donné l'aspect formel de la Constitution américaine, son inadaptation au fonctionnement de l'Etat contemporain et la nécessité de fonder sur la loi des actes de tous les organes de l'Etat, la Cour Suprême penche en faveur d'une vaste liberté à laisser au Congrès de choisir les moyens de réalisation de ses pouvoirs législatifs.

Au cours de la discussion, W. Sokolewicz a soulevé la question du rapport entre le *Common Law* et le droit écrit. W. Zakrzewski a indiqué la tendance qui apparaît depuis les années 70 au retour au droit judiciaire, découlant du mécontentement de l'activité régulatrice de l'Etat. Il a mis en relief le rôle croissant des tribunaux avec une baisse simultanée de l'importance des précédents. E. Gdulewicz a attiré l'attention sur la convergence des tendances dans le constitutionnalisme américain et français à l'élargissement de la régulation légale par la juridiction constitutionnelle.

Dans le rapport suivant, L. Garlicki a présenté le système des sources du droit en R.F.A. qui se caractérise par la coexistence des ordres légaux : fédéral et des *Länder.* Le rôle décisif est joué par l'interprétation de la Constitution et son application, notamment par le Tribunal Constitutionnel fédéral. A la tête de la hiérarchie

des sources figure la loi fondamentale dont toutes les dispositions, y compris de nombreuses clauses générales, ont une valeur normative. La doctrine de la séparation matérielle de la loi et du règlement perd actuellement de son importance en faveur de l'élargissement du domaine de la loi. Le règlement — acte normatif de l'exécutif — est rendu en vertu de la délégation légale, définissant son contenu, son but et ses limites.

A. Szmyt a complété ce rapport en faisant remarquer que, d'un côté, la loi est un acte juridique autonome, et que, de l'autre côté, le législateur est lié par l'obligation constitutionnelle à rendre des lois prévues par la loi fondamentale.

Le rapport de W. Sokolewicz clôturant la session, était consacré aux sources du droit en Suède. Ce sont en premier lieu trois lois fondamentales concernant : 1° la forme du gouvernement, 2° la liberté de la presse, et 3° la succession du trône ; lois qui se caractérisent par une procédure spéciale de révision : il faut deux résolutions identiques du Parlement, séparées par les élections parlementaires. La Constitution suédoise établit la présomption de compétence normative du gouvernement. En vertu d'une récente révision de la Constitution, qui a suivi la jurisprudence de la Cour Suprême, le contrôle *ex post* de la constitutionnalité du droit est exercé par les tribunaux de droit commun et les tribunaux administratifs. Les organes de l'administration et des collectivités locales rendent des arrêtés dans le cadre de la déconcentration des pouvoirs normatifs du gouvernement.

En faisant le point de débats, W. Sokolewicz a annoncé la continuation des recherches comparatives avec la participation de constitutionnalistes des Académies des Sciences des pays socialistes, et a informé du projet de publication d'un recueil d'études sur les sources du droit dans les pays occidentaux.

Ewa Popławska
Traduit par Maciej Szepietowski

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The LAW On Economie Activity* of DECEMBER 23, 1988

CHAPTER 1

General Provisions

Article 1

Undertaking and conducting economic activity is free and permitted for everyone under equal rights, notwithstanding the conditions defined by legal regulations (law).

Article 2

1. For the purposes of this Law economic activity is defined as manufacturing, building, trading and rendering services, for gain and on own account of the subject conducting such activity.
2. The subject conducting economic activity, hereinafter referred to as "economic subject" may be an individual, a corporate body as well as an entity not having corporate status, set up in keeping with legal regulations, if the object of its operation includes conducting economic activity.

Article 3

1. The economic subject is obliged to meet the legal terms of conducting economic activity concerning protection against hazard to human life and health as well as other conditions defined in building, sanitary, fire regulations and environmental protection.
2. The economic subject is obliged to ensure that work, operations or performance within the scope of economic activity are carried out by persons with proved appropriate qualifications if the duty of having such qualifications follows from the regulations of other legal acts.

Article 4

Within the scope of their economic activity economic subjects may perform operations and actions which are not forbidden by law.

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* The Law of December 23, 1988 has been amended in December 1989 ; the amendment will be discussed in one of the next issues of our *Review*.

Article 5

The economic subject may employ an unlimited number of employees without the intermediary of employment organs.

Article 6

1. Economic subjects are entitled, at their discretion, to associate themselves into organizations of economic subjects.

2. Association in organizations of economic subjects is regulated by laws.

Article 7

Economic subjects, irrespective of the type of ownership, are subject to the same rules of public legal obligations and have access to bank credits and supply of the means of production.

Article 8

Undertaking economic activity by natural persons an entities not having the legal person status requires, notwithstanding Articles 9—11, to be entered in the register of economic activity, hereinafter referred to as "register."

Article 9

1. Economic activity conducted by a natural person himself, within the scope defined in para. 2, the earnings from which constitute an additional source of income for that person (additional gainful side-occupation) does not require entry in the register.

2. Objects of economic activity mentioned in para. 1 can be :

1) manufacturing of goods of personal, household and farm use as well as folk and artistic handicrafts ;

2) repairs and maintenance of goods of personal, household and farm use as well as of apartments, and rendering other services with the use of own or entrusted materials and tools ;

3) trading operations consisting in selling unprocessed farm, garden, orchard and livestock products, including meat from onfarm slaughter, forest products fruits of the forest, homemade meals as well as goods defined in item 1.

Article 10

Entry in the register is not reguired for:

1) undertaking manufacturing activity in the agriculture in crop and livestock production, and fruit and vegetable growing ;

2) undertaking economic activity by corporate bodies ;

3) undertaking an economic activity which under this Law requires a licence.

Article 11

1. A licence is necessary for undertaking economic activity in :

1) extraction of minerals subject to the mining law as well as the exploration of deposits of these minerals ;

2) processing of, and trade in, precious metals and precious stones ;
3) manufacturing of, and trade in, explosives, arms and munitions ;
4) manufacturing of pharmaceuticals, barbiturates and psychotropic drugs, sanitary articles as well as toxic substances ;
5) manufacturing, rectification of dehydration of spirit as well as separation of spirit from another product, and the distillation of vodkas ;
6) manufacturing of tobacco products ;
7) sea and air transport and other airborne services ;
8) running of pharmacies ;
9) foreign trade in goods and services defined by way of an ordinance by the Minister of Foreign Economic Relations ;
10) trade in cultural objects produced before May 9, 1945 ;
11) services in : protection of persons and property, detectives' services and these pertaining to passport matters.

2. The Council of Ministers may exclude by way of an ordinance, certain kinds of economic activity defined in para. 1 from the requirement to obtain a licence.

Article 12

1. The head office of the economic subject and the site where the economic activity is conducted (plant) should be marked on the outside.

2. The marking mentioned in para. 1 should contain the name (logo) or the first name and surname of the economic subject as well as a brief implication of the type of economic activity conducted.

3. The economic subject engaged in manufacturing is obliged to label his products for sale, for :
1) name (logo) or the first name and surname of the producer and his address ;
2) name or symbol of the product, apart from any labelling required under separate regulations.

4. The provisions of para. 2 apply accordingly to stamps and prints (letter-heads) used while carrying out economic activity.

CHAPTER 2

Registering Procedure

Article 13

Notwithstanding further regulations of the Code of Administrative Procedure are applied in the registering procedure.

Article 14

1. The registering organ is the local organ of state administration of specific jurisdiction over the matters of registering economic activity of the basic level.

2. Supervision over the activity of local organs of state administration of specific competences in matters of registering economic activity is vested with the minister in charge of the administration.

Article 15

1. The registering organ enters economic activity in the register according to the application fild.

2. The registering organ *ex officio* furnishes the economic subject with a certificate of the entry in the register not later than within fourteen days from the date of filing the application, and submits a copy of the certificate to the relevant fiscal organ.

Article 16

1. The application mentioned in Article 15 para. 1 should contain :

1) designation of the economic subject and its head office (domicile) and, in the case of officers empowered to perform legal acts on behalf of the economic subject- also their first names and surnames ;

2) definition of the object of economic activity ;

3) designation of the place of engaging in economic activity ;

4) indication of the date of starting economic activity.

2. The register of economic activity is public.

Article 17

The registering organ issues a decision on refusing entry in the register if the application :

1) concerns economic activity to which the provisions of this Law do not apply ;

2) concerns economic activity which is subject to liceaning ;

3) concerns economic activity the undertaking of which is not subject to entry in the register;

4) contains formal errors which despite summons, have not been removed before indicated date ;

5) concerns economic activity covered by the exclusive rights of cooperatives of the disabled and the blind.

Article 18

The economic subject is obliged to notify within fourteen days the registering organ about changes in the factual and legal status concerning the economic subject and economic activity which have arisen after entry in the register, and covered by the data contained in the application. Provisions of Articles 13—17 apply accordingly to notification of changes.

Article 19

1. Entry in the register is subject to striking off in case of :

1) notification of the cessation of economic activity ;

2) valid ruling of the court prohibiting a natural person to carry out economic activity covered by the entry.

2. Entry in the register is subject to striking off also when the registering organ has made the entry in violation of the law ; in this case the provisions concerning resumption of administrative proceedings and stating invalidity of the decision apply where appropriate.

3. Deletion from the register takes place through administrative decisions within the period of time defined in the decision. In the case mentioned in para. 2, the period must be no less than three months.

CHAPTER 3

Licencing of Economic Activity

Article 20

1. The granting, refusal to grant, and withdrawal of, a licence depending on the object of economic activity to be licenced is vested with a supreme or central organ of state administration as appropriate hereinafter referred to as "licencing organ."

2. The granting, refusal to grant, and withdrawal of, a licence is done in the form of an administrative decision.

3. Provisions of Article 16 para. 1 apply accordingly to licence applications.

4. The licence includes the information covered by the application. The licencing organ can define in the licence the basic conditions for the performance of the economic activity.

5. The licencing organ may refuse to grant a licence or curtail the scope and object of economic activity requested in the licence application due to hazard to a vital interest of national economy, defence, or security of the state.

Article 21

1. The licence is granted for an unspecified period of time.

2. The licence may be granted for a specified period of time :

1) at the request of the licence applicant ;

2) in cases justified by safeguarding a vital interest of the national economy, defence, or security of the state.

Article 22

1. The licencing organ may withdraw a licence or curtail the scope or object of economic activity defined in the licence when the economic subject fails to meet the principal conditions set in the licence for the performance of economic activity.

2. The licence may also be withdrawn according to the rules set out in Article 19.5

Article 23

1. Anyone intending to take up economic activity in a field subject to licencing can apply for the issuance of a licence promise (pledge that a licence will be issued).

2. The promise is issued in the form of an administrative decision.

3. The promise defines its period of validity, which can be no shorter than 6 months.

4. Within the period of validity of the promise, the licence for the conduct of activities defined in the promise cannot be refused, unless there is a change in the actual or legal state of affairs stated in the promise application.

CHAPTER 4

Specific Provisions

Article 24

1. Economie activity for the purposes of this Law covers also the rendering of legal assistance (law counselling) to economic subjects within the scope of their economic activity, by partnerships or cooperatives of barrister-at-law or legal counsels.

2. Legal assistance (law counselling), as under para. 1, is meant in particular counselling, drawing up legal briefs, and representation by barrister or legal counsel in law cases.

Article 25

Income tax due from economic subjects cannot be set in an amount exceeding 50% of the proceeds obtained through the economic activity in the fiscal year.

Article 54

This Law takes effect as of January 1, 1989.

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The LAW
On Economic Activity with the Participation of Foreign Parties of DECEMBER 23, 1988*

Aiming at the creation or stable conditions for further development of mutually advantageous capital cooperation of Polish and foreign bodies and to guarantee the foreign bodies protection of their property, incomes and other rights, the following is proclaimed :

CHAPTER 1

General Provisions

Art. 1. 1. This law determines the conditions for the commencement of and the principles for the conduct of economic activity with the participation of foreign bodies in the territory of the Polish People's Republic.

2. For the purpose of this law economic activity is defined as production, construction, trade and services conducted for profit.

Art. 2. 1. The activity referred to in art. 1 may be conducted either in the form of a limited liability company or joint stock company, hereinafter referred to as "companies," established jointly by Polish bodies and foreign bodies or exclusively by foreign bodies. The contribution of foreign parties may not be smaller than 20 per cent of the registered capital.

2. The provisions of Polish law, in particular the Commercial Code shall apply to the companies unless the provisions of this law state otherwise.

Art 3. 1. The Polish bodies entitled to participate in companies shall be :

1) the Treasury and other legal persons established under the laws of the Polish People's Republic and having seats in Poland ;

2) natural persons domiciled in Poland.

2. Foreign bodies entitled to participate in companies shall be :

1) legal persons having their seat abroad ;

2) natural persons domiciled abroad ;

3) companies established by companies referred to in items 1 and 2 which have no legal personality.

Art 4. 1. The Foreign Investment Agency, further referred to as "the Agency" is established and shall act as an executive body of the President of the Agency. Organization and the procedure of operating shall be determined in its statute conferred by the Prime Minister.

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* The Law of December 23, 1988 has been amended in December 1989 ; this amendment will be discussed in one of the next issues of our Review.

2. The President of the Agency is a central administrative authority subject to the Prime Minister in foreign investment problems.

3. The President of the Agency shall be appointed and recalled by the Prime Minister at the request of the Minister of Foreign Economic Relations.

4. The scope of activities of the President of the Agency shall be :

1) drafting and implementing the policy of the state in capital cooperation with abroad ;

2) stimulating and organizing activities increasing the interest of the foreign bodies in undertaking economic activity in the Polish People's Republic in domains and in extent consistent with the interest of the national economy ;

3) supervision of compliance of the activities of bodies operating under this law with its provisions and the conditions determined in the permit of establishing a company ;

4) executing other duties as provided by this law.

5. The Foreign Investment Council shall act as an advisory body of the President of the Agency. The members of the Council shall be appointed and recalled by the Minister of Foreign Economic Relations at the request of the President of the Agency.

Art. 5. 1. The establishment of a company shall require a permit. Granting of a permit implies a consent for commencement of economic activity as defined in it.

2. A permit shall be granted if the economic activity shall ensure in particular :

1) introduction of modem technologies and managing methods into the national economy ;

2) provision of goods and services for export ;

3) improvement in the supply of modem and high quality products and services to the domestic market ;

4) protection of the natural environment.

3. A permit is also required for :

1) transfer of shares or stocks among partners ;

2) the access of a new partner to the company ;

3) amendment of the company's founding act regarding proportions of shares in company's initial capital, relative voting rights and the nature and value of partners' contributions ;

4) the change in the subject of the company's activity as specified in the permit.

4. A permit shall be granted by the President of the Agency upon application of the interested persons.

5. No separate foreign exchange permit is required for foreign exchange transactions indicated in par. 1 and 3.

Art. 6. 1. A permit shall not be granted if the conduct of economic activity would be aimless due to :

1) endengering the state's economic interests ;

2) the requirements of natural environment protection ;

3) the state's security and defence interests or the protection of state secrets.

2. The decision to deny a permit, referred to in par. 1, item 1 and 3 does not require reasoning of the underlying facts.

3. The interested persons have the right to appeal to the President of the Agency to re-examine the case within fourteen days from the date of the delivery of the decision denying the permit.

4. The decision to deny a permit may not be appealed to the Supreme Administrative Court.

Art. 7. Providing the conduct of economic activity specified in the permit by virtue of other regulations requires a license, the permit shall be granted after consultation with the apropriate licensing authority.

Art. 8. 1. The President of the Agency may grant the permit under the condition that the foreign body shall undertake economic activity jointly with a Polish body and that the partners' contributions to the registered capital of the company shall be determined by them in specific proportions.

2. In economically justified cases the President of the Agency may give consent to the collecting of the registered capital of a joint stock company through public subscription of shares, determining the proportions of shares to be held by Polish and foreign bodies. In such cases art. 5, par. 3, item 1 and 3 of this law shall not apply. Art. 10, par. 1, item 1 and art. 11, par. 1, item 1, apply respectively.

CHAPTER 2

Establishment of Companies

Art. 9. Persons establishing a company may arrange their mutual relations and internal relations of the company in compliance with their will in its founding act unless the provisions of the Commertial Code or this law state otherwise.

Art. 10. 1. An application for a permit should specify :

1) partners ;

2) subject and scope of the company's economic activity, including export and import activities ;

3) anticipated duration of company's activity ;

4) funds essential to start company's activity including the value of the registered capital ;

5) proportions in which each partner shall contribute to the company's registered capital and forms of contributions ;

6) the seat of the company and the future location of its plants.

2. The application referred to in par. 1 should enclose :

1) a draft of a campany's founding act as required by the Commercial Code ;

2) documentary evidence as to the legal status and financial condition of the future partners ;

3) a feasibility study of a proposed company.

3. The documents specified in par. 2 shall be submitted in Polish or in a foreign language together with a certified translation into Polish.

4. The decision granting a permit shall be made within two months from the date of filing the application.

Art. 11. 1. A permit shall specify :

1) partners, name and seat of a company, location of its plants as well as the subject and duration of company's activity ;

2) proportions and form of partner's contributions to the company's registered capital ;

3) other requirements that a company should fulfil during the conduct of its economic activity ;

4) the duration of the permit's validity.

2. In case of anticipated change of location of its plants, the company shall inform the President of the Agency of the proposed location. Lack of objection within one month is to be understood as a consent.

Art. 12. 1. The company shall be registered in court of register in accordance with regulations on the commertial register.

2. The application for registration should have the permit enclosed.

Art. 13. Within two weeks from the date of its registration the Board of the company is obliged to notify of this the President of the Agency delivering an extract of court's registration and a copy of a company's founding act.

Art. 14. The authority that granted the permit has the right to enter the seat of a company and its plants and to review its books and documentation to verify whether the activities of a company comply with the conditions of the permit.

Art. 15. If the company engages in activity incompatible with the conditions determined in the permit, the authority that granted the permit shall request this to be corrected within a specified period, otherwise it may restrict the scope or withdraw the permit.

Art. 16. 1. The contribution to a company's registered capital may be made both in cash and in kind.

2. The contribution of the foreign partners may be made :

1) in cash—in foreign currency or in zlotys obtained through a documented exchange of this foreign currency ;

2) in kind—either transferred from abroad or acquired for zlotys obtained through documented exchange or foreign currency.

3. The contribution of a foreign body domiciled or having its seat in one of the member countries of the Council for Mutual Economic Assistance may also be made in transferable roubles or in the national currency of one of these countries in accordance with agreements binding the Polish People's Republic in this respect.

4. The total value of the foreign bodies' contributions to the company's registered capital cannot be smaller than 25 million zlotys. This amount is adjusted accordingly to the changes in the rate of exchange of the zloty to the foreign currency in which the contribution is made.

5. The contributions of the Polish bodies can be made in cash in zlotys, in foreign currency or in kind. The rights to state-owned real property may be contributed to the company to the extent and in accordance with the principles determined in the regulations pertaining administration of state land.

6. The value and the nature of the contributions in kind should be determined in the company's founding act. The value of these contributions can be subject to Verification by independent experts at the request of the authority granting the permit. Should the verification prove that the market value of the contribution in kind is lower from that determined in the application, the cost of verification shall be borne by the contributor.

7. Documents certifying the contributions to company's registered capital can be delivered only to specific persons.

CHAPTER 3

The Company's Economy

Art 17. 1. For the purpose of determining profit, the operating costs of a company include depreciation of fixed assets, including those situated permanently

on leased land and non-material values in accordance to depreciation rates and the principles provided for state enterprises.

2. The depreciation allowances shall remain in the company.

3. The company's profit, after deducting the due corporate income tax shall form profit for distribution.

4. To cover balance losses 10% of the profit for distribution is transferred to a reserve fund. A company may cease to make such deductions if its reserve fund reaches in an accounting year 4% of the company's operating costs.

5. The profit is distributed to partners in proportions to their shares in the company's registered capital. Other agreement requires a consent of the President of the Agency.

Art. 18. 1. The Minister of Finance determines the general principles of keeping the company's accounts in compliance with the Commertial Code.

2. The annual balance sheet of a company shall be audited by the competent authority of the Minister of Finance or by other body of company's choice authorized by the Minister of Finance to audit the annual balance sheets of the companies, within three months of its filing. The cost of auditing shall be borne by the company.

3. The balance sheet is considered audited if within three months the authority indicated in par. *2* does not notify the company of its objections. After the objections shall be complied with, the balance sheet shall be considered auditied.

4. The auditied profit shown in the company's annual report forms the basis of determining that part of profit which the foreign partner may transfer abroad under the provisions of this law.

Art. 19. 1. A company shall resell 15 per cent of its foreign currency export proceeds to a Polish foreign exchange bank. This obligation does not apply to proceeds from the sale of means of production forming company's assets if they are replaced by new ones.

2. For the purpose of its activity a company may purchase, without a separate foreign exchange permit, goods and services abroad from the part of foreign currency proceeds remaining after the resale referred to in par. 1.

Art. 20. 1. A company may distribute profit in foreign currency from the surplus of export proceeds over import outlays without a separate foreign exchange permit.

2. A foreign partner has the right to transfer abroad the amount of profit referred to in par. 1 without a separate foreign exchange permit.

3. A Polish partner has the right to transfer the amount of profit referred to in par. 1 to his foreign currency account in a Polish foreign exchange bank.

4. In economically justified cases the Minister of Finance may give consent to a foreign partner to transfer abroad an amount of profit exceeding that determined in par. 1. Such a consent may constitute a part of a permit for the establishment of a company.

5. A foreign partner is, with the reservation of par. 6, free to use his zloty profit in the domestic trade turnover in the Polish People's Republic without a separate foreign exchange permit.

6. The purchase of real estate from the foreign partner's profit requires a separate foreign exchange permit.

Art. 21. 1. Partners have the right to use their part of profit to increase company's registered capital without a separate permit, providing this does not change the proportions of shares determined in the permit establishing a company.

2. After paying due taxes the foreign partner has a right to transfer abroad proceeds from the sale of his shares or stock and money due him in connection with the dissolution of a company without a separate foreign exchange permit.

3. In cases where the amounts referred to in par. 2 shall be received in zlotys, transfer abroad may be executed 10 years from the date of the registration of a company.

4. In specially justified cases the Minister of Finance may give consent to an earlier transfer of the amounts referred to in par. 3.

Art. 22. 1. The companies deposit their money in accounts with Polish foreign exchange banks they choose.

2. At the request of a company the banks referred to in par. 1 open and keep accounts in zlotys and in foreign currency and can grant credits to them.

3. A company may keep accounts in foreign banks after obtaining a foreign exchange permit.

4. A company may draw credits abroad without a separate foreign exchange permit.

5. Banks referred to in par. 1 may guarantee liabilities of a company in accordance of the applicable regulations.

6. The Minister of Finance on request of a foreign partner grants him a compensation payment guarantee to the amount of the value of the company's assets due him, in the event of a loss resulting from a decision of state authorities in respect of nationalization, expropriation or from other actions resulting in similar effects to that of nationalization or expropriation.

Art. 23. 1. A company may purchase goods and services for foreign currency in the domestic trade turnover from the licensed organizations.

2. Within the field of its economic activity a company may sell goods and services wholly or partially for foreign currency in the domestic trade turnover after obtaining a foreign exchange permit.

3. Companies may sell foreign currencies at the foreign exchange auctions conducted in accordance with separate regulations.

Art. 24. Materials and technical supply of companies .in the domestic market shall be conducted in accordance with the regulations and procedures determined for socialized economic entities.

Art. 25. Socialized enterprises may sell fixed assets to companies and establish in their name limited property rights on these assets.

Art. 26. 1. State land can be made available to the companies by way of :

— perpetual use agreements in accordance with the rules applicable to the administration of state land ;

— a lease.

2. Companies may acquire and lease land and other real property not owned by the state in accordance with the existing regulations.

CHAPTER 4

Taxes and Levies

Art. 27. 1. A company shall pay the following taxes : turnover tax, corporate income tax, agricultural tax, wage tax, real property tax and local taxes as well as stamp free and community or city levies and ejoys reliefs and exemptions in accordance with the principles applicable to non-socialized economic bodies with a status of a legal person, however :

1) the corporate income tax shall be 40 per cent of the taxable basis;

2) deducted from the taxable basis shall be :

a) investment outlays as defined in the decree of the Council of Ministers ;

b) donations for socially useful purposes, including social organizations and foundations with their seats in the Polish People's Republic;

3) the corporate income tax is decreased by 0.4 per cent for each 1 per cent of the share of export sales of goods and services in total economic turnover after deducting turnover tax, with the reservation that the final corporate income tax after applying this relief cannot be lower than 10 per cent of the taxable basis.

2. Donations referred to in par. 1, item 2 b may not exceed 10 per cent of income.

Art. 28. 1. A company shall be exempt from corporate income tax during the first three years from the date of commencing the economic activity which is determined as the date of the first invoice.

2. A company may be granted an additional corporate income tax exemption for a further period of up to three years if it engages in fields of activity determined by the Council of Ministers. The President of the Agency determines the additional exemption period in a permit.

Art. 29. The income of a foreign partner shall be subject to an income tax of 30 per cent, unless international agreements concluded by the Polish People's Republic provide otherwise. The tax shall be collected by the company acting as a taxpayer in accordance with separate provisions. Tax on income payed out in foreign currency shall be collected in zlotys from a documented exchange of such currency.

Art. 30. 1. Exempt from import duties and other levies similar in their effect shall be :

1) items forming partners' contribution in kind to a company's registered capital, such as machines, appliances and equipment as well as other means required for the conduct of economic activity determined in the permit ;

2) machines, appliances and equipment and other means required for the conduct of economic activity determined in the permit, purchased by the company or persons acting on its request within three years of its establishment.

2. Exempt from export duty shall be items falling to a foreign partner in case of a dissolution of a company.

3. A company is entitled to refund of import duty on export sales in accordance with the principles applicable to state owned enterprises.

CHAPTER 5

Employment

Art. 31. 1. Employment labour relations and conditions of work in the company, social problems, workers' social insurrance and trade unions' activity shall be governed by Polish law.

2. A company may employ foreign citizens or persons without a Polish domicile card with the consent of the local state administrative authority of the specific competence of the voivodship level.

3. The permission mentioned in par. 2 shall not be required for persons not employed by the company and acting in its plants on the assignment from the foreign partner with the consent of the company.

Art. 32. 1. The principles of remuneration of company's employees shall be determined either in its founding act or resolutions.

2. The remuneration of company's employees shall be determined and paid in zlotys with the reservation of par. 3.

3. Remuneration of employees classified as foreign persons under the Foreign Exchange Law may be partially paid in foreign currency from the foreign currency revenues of the company. This part of the pay may be transferred abroad upon the request of the employee without a separate foreign exchange permit.

4. The remuneration of employees, classified as foreign persons under the Foreign Exchange Law shall be subject to 30 per cent tax in the currency in which the payment shall be effected, unless international agreements binding the Polish People's Republic provide otherwise. The tax shall be collected by the company upon the payment in accordance with the procedures determined in separate provisions. Tax on remuneration paid in foreign currency shall be collected in Polish zlotys after a documented exchange of such currency.

5. The remuneration of the Polish employees of the company shall be subject to tax applicable to employees of non-socialized enterprises.

CHAPTER 6

Transfer of Rights Resulting from Participation in a Company and the Dissolution of a Company

Art. 33. If the sale of shares or stocks is to be made by way of execution, a company may within two months from the date of receiving notice of an order of sale, name a person who will purchase the shares or stocks at a price to be set by a court on request of the company and after consultation with experts.

2. If a request for a price determination shall not be filed during the period specified in par. 1 or a person indicated by the company fails to pay the price within a month of the date of the notification of the company of the price determination or of the consent for the replacement of a partner, whichever expires later, the shares or stocks shall be sold in accordance with the rules of judical execution with the reservation of art. 5, par. 3, item 2.

Art. 34. In case of a dissolution of a company, the Polish partners enjoy the right of preemption of property and rights forming the assets of the company unless its founding document provides otherwise.

Art. 35. In case a dissolution of a company shall be notified during the corporate income tax exemption period or within three years after it expires, as stated in art. 28, par. 1 and 2, the company shall be obliged to pay the tax for the period of exemption. In such a case the tax liability arises upon the notification of the dissolution of the company.

CHAPTER 7

Special, Temporary and Final Provisions

Art. 36. Unless this law states otherwise, the regulations pertaining to socialized economic bodies shall not apply to the companies.

Art. 37. 1. Companies may associate in the Foreign Investors' Chamber of Industry and Commerce and other Polish economic chambers.

2. The Polish-Polonian Chamber of Industry and Commerce established under the Law of July 6, 1982 on the Principles of Conducting an Economic Activity in Small Industry by Foreign Corporate Bodies and Natural Persons in the Territory of the Polish People's Republic (Dziennik Ustaw of 1985 No. 13, item 58), hereby becomes the Foreign Investors' Chamber of Industry and Commerce hereinafter referred to as "the Chamber." The former foreign members of the Polish-Polonian Chamber of Industry and Commerce may within three months of the date of coming this law into effect, confirm their membership in the Chamber.

3. The President of the Agency shall supervise the Chamber and approve its statute. The President of the Agency may refuse to approve the statute should its provisions infringe the law.

4. The tasks of the Chamber include in particular :

1) representing the economic interests of its members and undertaking measures for the protection of these interests ;

2) assisting its members in solving economic, organizational and legal problems of commencing and conducting their economic activity.

5. The specific tasks of the Chamber and the principles of its activities, authorities, procedures for its establishment, scope of its activity and the rules of financing shall be determined in its statute.

6. The Chamber has legal personality.

7. Should an authority of the Chamber substantially infringe upon the law or the provisions of its statute, the authority supervising the Chamber's activity may set apropriate date in which these violations can be amended or may request a change in the composition of the Chamber's authority within a specified period. In case such a period should expire ineffectively, the supervising authority may suspend that authority and establish an appropriate temporary authority which shall act until a new authority shall be created in accordance with the procedures determined in the statute.

Art. 38. 1. This law does not apply to international enterprises, with the reservation of the provisions of par. 2—4 of this article unless an international agreement provides otherwise.

2. If an international agreement provides that international enterprise or its branch with its seat in the territory of the Polish People's Republic has legal personality, this enterprise or its branch should be registered in the commercial register.

3. The registration in the commercial register shall be effected upon application of the appropriate authority of the international enterprise or its branch. The registration shall be made on the basis of a certified copy of the Polish text or a certified translation into Polish of the agreement establishing the international enterprise or its branch. The agreement should have enclosed a list of full names of managing directors and the plenipotentiaries of such an enterprise or its branch.

4. The regulations governing the commercial register on the limited liability companies shall be applied respectively to the registration of the international enterprises or their branches and in accordance with the provisions of the international agreement.

Art. 39. 1. The foreign bodies conducting economic activity under the law referred to in art. 37, par. 2, may upon a permit, contribute their enterprise or its part as well as property, rights and money from this activity to companies established under this law.

2. The permit referred to in par. 1 may be granted providing the foreign body

has completed in the contributed enterprise or its part investments in convertible currency of at least 50.000 US dollars.

3. The application for a permit should specify the methods by which the creditors of the foreign body will be satisfied in respect of the liabilities arising in connection with the operation of its enterprise. The granting of a permit may be conditioned by the establishment of a proper security for the creditors' claims.

Art. 40. 1. Limited liability companies and joint stock companies established pursuant to the law referred to in art. 37, par. 2 may obtain a permit to reorganize themselves into companies established pursuant to this law.

2. The permit may be granted after fulfilling the requirement of art. 39, par. 2.

Art. 41. After obtaining a permit, foreign bodies may purchase shares or stocks in existing companies established under Polish law which are not companies with foreign capital participation, providing that as an effect of this the registered capital of these companies shall be increased. The provisions of this law shall apply to these companies after the registration of the company's capital increase.

Art. 42. 1. The permits referred to in art. 39, par. 1, art. 40, par. 1 and art. 41 shall be granted by the President of the Agency.

2. The provisions of art. 6 and art. 10 shall be applied respectively to the application of granting a permit.

3. Should the location and subject of economic activity be the same as in the existing permit, permits referred to in art. 39, par. 1 and in art. 40, par. 1, shall be granted after the applicant fulfils the conditions of art. 39, par. 2 and submits the draft of the founding act of the company in accordance with the provisions of this law.

Art. 43. The provisions of art. 28, par. 1 shall not apply to the companies established pursuant to the provisions of art. 39, 40 and 41.

Art. 44. 1. Companies with foreign capital participation established under the Law of April 23, 1985 on Companies with Foreign Capital Cooperation (Dziennik Ustaw No. 17, item 88 and of 1987 No. 33, item 181), operating at the time this law comes into force, shall become companies subject to the provisions of this law.

The President of the Agency shall adapt the permits already granted to the requirements of this law within three months after the law comes into force.

Art 45. The President of the Agency shall be an authority of appeal in respect to the decisions of the regional state administrative authorities of the specific competence of the voivodship level and made in accordance with the law mentioned in art. 37, par. 2.

Art. 53. The Law of April 23, 1986 on Companies with the Foreign Capital Participation (Dziennik Ustaw No. 17, item 88 and of 1987 No. 33, item 181) is hereby null and void.

Art. 54. This Law takes effect as of January 1, 1989.

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