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TOWARDS MEMBERSHIP OF THE EUROPEAN UNION

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Originally, in early 1990, Poland hoped to avoid association status and to begin negotiations directly on full membership of the European Community. Following Spanish or Portugal pattern, such membership could provide for ten year long transitory period subdivided into three stages facilitating gradual assimilation with the Community's system and its institutional framework. Eventually Poland had, however, to acquiesce in much less ambitious solution. On 16 December 1991, the European Agreement** was signed establishing an association between the European Communities and their Member States of the one part and the Republic of Poland of the other part.[1] This treaty, as a whole went into force on 1 February 1994, whereas its provisions referring to trade and trade-related matters went into force on 1 March 1992 by the means of the Interim Agreement accepted by the EC Council on 25 February 1992. [2]

I. The Application

On 5 April, 1994, Poland acting on the ground of Article "0" of the Maastricht Treaty formally applied to the Presidency of the EU Council for membership of the Union.[3]

While applying for membership Poland did not want to push things too quickly or get into a race against the clock. Rather, by submitting its request for EU membership, it intended to show its willingness to open accession negotiations and to set a timetable: accession around year 2000 with five to ten years transitional period as

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** Further referred to as EA. The English text of the European Agreement has been published in ''Droit Polonais Contemporain/Polish Contemporary Law", issue 1 -4, 1993.

[1]Sec: *Official Journal of the European Communities*, L 348, Volume 36, 31 December, 1993; Council and Commission, 93/743/Euratom, ECSC, EC: Decision of the Council and the Commission of 13 December 1993 on the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part; Final Act; information regarding the date of entry into force of the Europe Agreement with Poland; also: *Dziennik Ustaw*, 1994, N° 11, Załącznik.

[2] Council Decision 92/228/EEC: O.J., N° L 114/1 (30.04.92) (text of the Interim Agreement, ibidem: L 114/2-11).

[3] Polish application was preceded by the Hungarian one of 31 March, 1994, see: *Demandes d'adhésion de la Hongrie et de la Pologne à l'Union* (1746e session du Conseil), 1994, 18/19 April 6292/94 (Presse 68-G), p.

was the case for Spain and Portugal when they joined the EC. Another objective of ''the well thought-out decision by the Polish government is to obtain — through accession — improvements in the provisions of Poland's European Agreement".[4]

The formal accession application was on 11 April, 1994 complemented by sixteen points ''Pro Memoria" submitted to the Presidency of the EU Council by Polish Prime Minister Waldemar Pawlak.[5] The document underlines that for Poland accession means consolidating the results of democratic and systematic transformations and accelerating her economic development.

''Pro Memoria" emphasises Poland's readiness to adopt, at a time and in a manner to be specified in the process of further negotiations, the EU's *acquis communautaire.* It also recognizes that Polish capability and willingness to implement the ''acquis" should remain the major condition for Poland's accession to the European Union. All remaining requirements, including adjustments timetable, the length of the transition period, and the pace of implementation of particular obligations should be decided in direct talks.

In point 8 the ''Pro Memoria" refers to the Government Programme of Adjusting the Polish Economy and Legal System to the Requirements of the European Agreement. It, inter alia, recalls that in the field of legal harmonization, procedures have already been introduced which provide for an obligatory assessment of draft laws from the point of view of their compatibility with the EU, before they are subjected to the actual legislative procedure.

Attention was also drawn to governmental White Paper on Poland's relations with the European Union which, among other, will recommend appropriate adjustments for each of the commodity, services, capital and labour markets.

As concerns inadequacies of the existing arrangements with the EU, the ''Pro Memoria" points-out that the European Agreement deals with the issue of mutual trade in agricultural products in a highly unsatisfactory manner. Successful completion of the GATT Uruguay Round indicates that implementation of its Final Act must inevitably lead to the annulment of, or at least, amendments to, some of the European Agreement provisions. It says that the present arrangements do not consider the structural adjustment. Thus — it is argued — efforts should be made now to define a path leading to the integration of agriculture of Poland and the European Union at a specific time in the future.

II. Legal setting

Polish application has been facilitated by pronouncements made by the Lisbon and Edinburgh European Council's meetings in 1992.[6] They were followed and fur-

[4] See: Ambassador J. Kulakowski's explanation to journalists in Brussels on the motivation and objectives of Poland's formal request for membership of the EU, *Together in Europe,* 1994, 15 April, Nº 47, p. 2.

[5] See also: ''Polish »Pro Memoria«", (in:) *Together in Europe*, 1994, 15 April, Nº 47, p. 3.

[6] See: *European Council in Lisbon* 26/27 June 1992 — Conclusions of the Presidency (SN 3321/1/92, Rev. 1, p. 6) where under the heading 2 item C — ''Enlargement" it was declared that: "As regards relations

ther developed in the Copenhagen Conclusions of the Presidency of 21 - 23 June, 1993 where the relationships established under the European Agreements were formally recognized as an association preliminary to membership.[7]

The Copenhagen Conclusions of the Presidency say:

''The Council of Europe today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession — the Council declared — will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required (...) . The *European Council* will continue to follow closely progress in each associated country towards fulfilling the conditions of accession to the Union and draw the appropriate conclusions".[8]

In legal terms the said above ''progress" may primarily be judged after fulfilment of the requirements set in EA and the follow-up settlements. Accordingly Article 6 of EA provides:

"2. The Association Council shall ... examine the application of the Agreement and of Poland's accomplishment in the process leading to market economy system (...)".

It should, however, be realized that no matter how disciplined observance of any arrangement limited in scope, like European Agreements or even much more comprehensive and complete one like the Treaty on the European Economic Area (EEA) would not, by itself, guarantee accession to the Union. The Community's view has always been that membership must be on the basis of acceptance of the whole *acquis communautaire*.[9] Yet, as the Community developed, its ''acquis" developed too and every new applicant country must therefore be prepared for acceptance of ever more demanding requirements resulting therefrom.[10]

Denmark, Great Britain and Ireland entered the European Community in 1973 after the Hague Summit had confirmed the acceptance by member states of the principle of the Community's own resources and after the Community had introduced the so-called European Political Cooperation schema based on the Davignon report

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with Central and Eastern Europe (...) cooperation will be focused systematically on assisting their efforts to prepare the accession to the Union which they seek". This concept was further developed by the Edinburgh Conclusions of the Presidency, see: Conclusion of the Presidency,: Edinburgh, 11-12 Dec., 1992, (Part D: External Relations, items 7 - 9), SN 456/92.

[7] As the established practice of the EC proves, three basic types of association relationships may be identified. These are:

a) association as a special form of development assistance,

b) association as a substitute for membership, and

c) association as a preliminary to membership.

See: P.J.G. Kapteyn and P. Verloren van Themaat, *Introduction to the Law of the European Communities. After the Coming into Force of the Single European Act*. pp. 829 - 845.

[8] See: *Council of Europe in Copenhagen*, 1993, 21 -22 June, Conclusions of the Presidency (Heading 7: Relations with the Countries of Central and Eastern Europe, sub-heading A, item (iii), pp. 12- 13), SN 180/93.

[9] This view was firmly confirmed by the Commission in its 1992 Report on *Europe and the Challenge of Enlargement* enclosed to the Conclusions of the Presidency, *European Council* in Lisbon 27/28 June 1992 (SN 3321/1/92, Rev. 1), see in particular: items 11 - 13, p. 3 of the Report.

[10] See: supra footnote i, item 9, p. 2.

of 1971. Then came a group of ''Southern" countries as Greece in 1981 followed by Spain and Portugal in 1986. Before the latter two entered the Community a far reaching changes to its decision making procedures and a host of new competences were introduced under the Single European Act aiming at completion of the single market by the end of 1992.[11]

Completion of accession negotiations with four EFTA States took place after the Maastricht Treaty on the European Union came into force.[12] This Treaty added more far-reaching changes to the Community's law-making capacity and sanctioned a considerable shift in policy-making from unanimity in the Council decision-making to majority voting. However, the most ambitious programme envisaged under the Treaty is the establishment of the economic and monetary union by 1999, albeit importance of the intergovernmental arrangements for Common Foreign and Security Policy (CFSP) should not be under-estimated, either.

For the existing Member States the crucial issue became how to bring about the enlargement of the Union while preserving and strengthening the advantages of the hitherto achieved level of integration. To reconcile these two objectives they, as with previous enlargements, have embarked on a process of strengthening the integration before they take any new members.

As the Commission emphasised: ''Enlargement must not be a dillution of the Community's achievements. On this point there should be absolute clarity, on the part of the member states and of the applicants".[13]

Acceding EFTA States — as David Spence rightly observes — ''had a head start in the enlargement process, since much of the important economic integration had been achieved in the complex negotiations leading to the creation of the European Economic Area. The Eftan countries can be integrated more easily into the Union — Spence continues — than the Central and Eastern Europeans, since much of the *acquis communautaire* was incorporated into national law by Sweden, Finland, Norway and Austria when the EE A came into force on 1st January 1994 [14]

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[11] The Single European Act (SEA) was signed on 17 February, 1986 by nine Member States and on 28 February, 1986 by Denmark (after the referendum), Greece and Ireland also after a referendum; see: *Bull. EC Supl.,* 1986, Nº 2. In the Final Act on the adoption of the SEA the Member States made various declarations, including a Declaration on Art. 8A EEC. This proclaims that the date of 1992 mentioned in that Article does not create an automatic legal effect. It is submitted, following de Ruyt: *L 'Acte Unique Européen* (Brussels, 1987) 159 and Toth (1986) 23 *CMLRev.* 803 *et seq.*, that this declaration would not prevent an action being brought for flagrant failure to achieve the objective of the establishment of the internal market by 1992. Even more so, the other declarations made at the time of the signature of the Single European Act can be at best regarded as mere statements of political intent. See: P.J.G. Kapteyn and P. Ver1oren van Themat, *Introduction to the Law of the European Communities After the Coming into Force of the Single European Act,* (Second Edition, Kluwer), p. 102 ff.

[12] Treaty on European Union (Europe Documents, Nº 759/60, 7 February, 1992; also: ''European Union Begins", *Together in Europe,* 1993, Nº 36, p. 1 and 6; A. Arnu11, ''Judging the New Europe", *European Law Review*, 1994, Nº 1, pp. 3 - 15.

[13] See: *Report*, supra footnote 9, p. 2, item 6.

[14] See: D. Spence, ''Towards Enlargement of the European Union", p. 7 (Author is Principal Administrator, The European Commission. This article enclosed to ''Presidency Conclusions — Brussels" 10 and 11 December, *1993* will be published, (in:) *Local Government Politics,* London, Longman, 1994).

Poland and other applicant Central European countries would have to evidence no mean consequence and determination to fulfil the like level of convergence before 1999.

Specific ''conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement [15] Thus the assumption of relevant rights and obligations by a new member may be subject to such technical adaptations, temporary derogations, and transitional arrangements as are agreed in accession negotiations.[16] As, however, the obligations presuppose a functioning of a competitive market economy and an adequate legal and administrative framework in the public and the private sector, the applicant country without these characteristics could not be effectively integrated. Therefore, the applicant country must not only be willing to accept the Community system but also be able to implement it. As the Commission put it: „Any applicant country without these characteristics could not be effectively integrated. In fact, membership would be more likely to harm than to benefit the economy of such country, and would disrupt the working of the Community".[17]

Thus, even if the Spanish and Portugal rather than the EFTA's Four ''pattern" would be more adequate for Central European applicants to be followed on their way towards full membership of the Union, their accession would require intense and comprehensive preceding adjustments. ''Working capacity" of the legal framework for association of these countries with the Union may substantially influence not only the prospects of adjustment process but also of membership itself.

III. The Scope of European Agreement

Technically speaking, the objective scope of EA comprises:
— political dialogue;
— free movement of goods;
— movement of workers;
— right of establishment;
— supply of services;
— current payments and movement of capital;
— competition and flanking economic problems;
— approximation of laws;
— economic cooperation and
— cultural cooperation.

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[15] Excerpt from Article "0" of the Treaty on European Union.

[16] See: ''The Challenge of Enlargement — Commission Opinion on Sweden's Application for Membership" (SEC (92) 1582 Final), *Bulletin of the European Communities Supplement,* 1992, Nº 5; compare with Commission opinions on application of Finland, SEC (91) 2048 *"Final, Bull. EC Suppl.,* 1992, Nº 6; (b) Norway, CO (93) 142 *Final, Bull. EC Suppl.,* 1993, Nº 2; (c) Austria — SEC (91) 1590 *Final, Bull. EC Suppl.,* 1992, Nº 4.

[17] See: *Report...,* supra footnote 9, p. 2, item 9 in finae.

However, only free movement of goods, rights and obligations of the Parties are defined in a precise manner. Europe Agreement provides for gradual establishment of a free trade area in a transitional period lasting a maximum of ten years, divided into two successive stages, each in principle lasting five years, in accordance with a detailed time-schedule for particular groups of products and under conditions provided for in the Agreement itself or Annexes enclosed thereto. In other areas operative provisions of EA are much less specific. At the same time practically no EA set of objective provisions preclude gradual extension thereto of relevant rules of the Union.

On the other hand, implied delays consequent upon optional departures from the established time-schedule or restraining effects that may result from application of admitted safeguard measures are counterbalanced by explicitly envisaged possibility of extension the original scope and acceleration of integration with the European Union. The latter category of provisions may be illustrated by Articles 14, or 61:2 of the European Agreement. The first of them says:

''Each party declares its readiness to reduce its customs duties in trade with the other party more rapidly than is provided for in Article 9 and 10 if its general economic situation and the situation of the economic sector concerned so permit".

In turn, Article 61:2 provides that:

''During the second stage (...) the Association Council shall examine ways of enabling Community rules on the movement of capital to be applied in full".

Considering that, as to the principle, EA does not foresee extension to Poland of the said freedom at all, the quoted article goes even further than the former one. Since convergence in the field of capital market may be achieved sooner and at a much lower cost than in other sectors, and in manufacturing and agriculture in particular, the above ''opening" may prove to be of great importance for acceleration of the whole adaptative process. It may become a powerful leverage for convergence of Polish economy with the one of the Union.

With regard to the right of establishment Article 44:5 empowers the Association Council to examine regularly the possibility of accelerating the granting of national treatment in the sectors referred to in Annexes XIIb, XIIc, and XIId to EA and by decision to amend respective Annexes appropriately.

Worth separate mentioning in this context is direct applicability of the Community rules and principles with regard to competition and related economic matters as provided under Articles 63:2 and 65 of Europe Agreement. Community's standards have also been granted to Polish companies with regard to procurement rules. Article 67:2 of Europe Agreement says:

„Polish companies (...) shall be granted access to contract award procedures in the Community procurement rules under a treatment no less favourable than that accorded to Community companies as of the entry into force of this Agreement".

Constructed in such a manner provisions of the European Agreement — although far from being comprehensive enough — may be characterized as flexibly task-

oriented, purposeful end-open regulatory set of instruments for gradual integration of the associated partner with the European Union.

However, in some areas, and with regard to agriculture and movement of workers, in particular, the European Agreement lacks sufficiently positive instruments for integration with the Union. As for agriculture, ''Community's standards" are referred directly only to cooperation in animal and plant health (Art. 77:1). Indirectly a possibility of assimilation those standards are implied under Article 20:6 which recognizes ''the need for an increased harmony between the agricultural policies of the Community and Poland". As far as Poland is concerned this can hardly be recognized as satisfactory enough. The main potential for progressive liberalization of trade in agricultural products between the Parties lies in Article 20:6 which refers to GATT standards as developed in ''multilateral trade negotiations". Autonomous standard of the European Agreement itself is rather restraintful. With regard to movement of workers, Community's standard is not envisaged at all, whereas autonomous standards of the Agreement are, as to the principle restriction-oriented and any possibility for liberalization is under Article 41 reserved either to discretionary action by individual States or to agreements between them. All the same, also in this domain the door has been slightly kept ajar. Thus, Article 42 provides that ''the Association Council shall examine further ways of improving the movement of workers (...)", and make recommendation to such end. Therefore, also in this domain, although to a lesser extent than in some other areas, a role of the Council may prove to be crucial providing its powers are used in an active and dynamic manner.

Among priorities for reform rules of the origin of goods should also be listed. Full and multilateral cumulation of origin operating throughout the EEA should, as soon as possible, be extended to Poland and other Visegrad countries who may wish so. This should be done for the sake of the increased and lasting flow of foreign direct investment (FDI) into those countries and accelerated convergence of their economies with the Union.

The existing rules, as envisaged under the European Agreement, in fact, discourage firms from placing their manufacturing facilities in any particular associated country if they had to supply from these facilities the whole region. This, in particular, is true where supplies originate in whole or in part in the territory bilaterally privileged in its relations with the territory of direct buyer (for further processing or other purposes) or a distributor, as well as with the territory of the final user, but not privileged in its relations with the latter one through the intermediary of the former. This would be the case in transactions bridging together at consecutive stages the territories of the Visegrad, EFTA and the European Union's countries, as well as the opposite way round. Therefore, the existing pattern of origin of goods is, in some way, not only counterproductive in terms of its impact on building conditions for the accession of Visegrad countries to the Union, but also contributes to gradual deterioration of competitive attractiveness of these countries as a place of investment location in favour of the EFTA countries. Maintaing the existing pattern of origins for

five more years may result in insurmountable prevalence of investment location in any EFTA country over their location in Poland or any other Visegrad country.

As Richard E. Baldwin rightly observes: ”Pan-European integration is proceeding, but with no coherent structure”. The bilateral ’’spokes”, as he calls European Agreements, are separately linking each of the Central and East European countries to the Western European ’’hub”. This — he continues — not only slows growth in the East but is also harmfull to the West by depriving it of worthwhile investment opportunities. At the same time thus structured relationships are frustrating the aspirations of Central and East Europeans. In a longer run this would create dangerous political problems for Western Europe and would mean missing important economic gains.[18]

Therefore, the Polish Government rightly in ’’Pro Memoria” observed that the European Agreement provides for further negotiations in many areas critical to mutual cooperation and the introduction of new provisions and the definition of their character and direction should be closely linked to Poland’s future membership. Thus, as the Polish Government concluded, membership negotiations would be a suitable form for establishing the conditions, pace and desirable shape of Poland 's integration with the EU.

IV. Which way to the Union’s membership

While preparing for accession negotiations we should be aware of the inventive multiplication of various secondary status proposals. It may be well illustrated with the European Parliament Report prepared by the German MP Klaus Hänsch.[19] Proposals presented in the Report include maintaining the EEA as an ante-chamber to the Union, with prospective member states able to move into the EEA having progressed through an association agreement. Thus David Spence believes that ’’the EEA may well prove a sensible option for those applicants where full acceptance of the Community rigours would be counter-productive — both for the Union and for the country concerned. Likewise — he continues — the European Agreements are already intended to be a stepping stone to full membership. They may prove an acceptable alternative to full membership in the medium term”. In principle one could agree with the above theory.

The membership of the EEA could really — at the first glance at least — seem the second best solution to full membership of the Union itself. At the same time, however, it is also the most demanding one. It was tailored to the needs of a group of rich and economically highly developed countries which for a number of reasons were not originally prepared to join political and security structures of the Community. On the economic side those countries need no adaptative transitory period or

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[18] See: R.E. Baldwin, *Towards an Integrated Europe*, London 1994 (Publ. Center for Economic Policy Research — CEPR, ISBN 1 89828 13 8).

[19] See: K. Hänsch, *Report of the Committee on Institutional Affairs on the Structure and Strategy for the European Union with Regard to its Enlargement and the Creation of a Europe wide Order,* (European Parliament Session Documents PE 152.242/Fin. 21 May, 1992).

assistance for accommodation with the Single Market. Their membership in the EEA was preceded by almost twenty year long period of the free-trade area-type relationship with the Community.[20] For all the above reasons the status of EEA-type membership seems neither particularly well suited to the needs of Poland and other Central European Countries nor ''digestable" for the Union itself.

On the other hand, an essence of most other yet pondered secondary-status schemes boil down to the postponement of full membership of the Union for indefinite period. In contrast with the above what is worth positive attention are structural elements contained in a proposal recently presented by earlier mentioned Richard Baldwin, the Co-Director of the Centre for Economic Policy Research International Trade Programme and Professor at the Graduate Institute of International Studies in Geneva. Baldwin proposes a European trading system of three concentric circles, where membership of each circle would evolve at a pace determined by development in each of the participating country.[21] The European Union would be the central circle with initially very limited membership.

The so-called ''Organization for European Integration" (OEI) would be the next largest, comprising all the Union Member States plus the ''front runner" Central European Countries (CEC) that were not yet Union members. The OEI would provide an intermediate stage on the way to EU membership. According to Baldwin proposal, the OEI would resemble the present EEA, although without freedom of the movement of workers, and would be responsible for extending the Single Market to non-Union partners.

The outer circle — Baldwin proposes — would embed all existing European Agreements into the so-called Association of Association Agreements (AAA), which would create a European duty-free zone for industrial products. The AAA would bring all the Association Agreements under one umbrella and impose an additional requirements, and in particular MFN treatment guaranteeing that any liberalization by an AAA member must be extended on the same basis to all AAA members. This would eliminate the disadvantages of the "hub-and-spoke" bilateralism and facilitate collaboration towards gradual extension to the outer partners of all four freedoms on which the European Union is built.[22]Using Baldwin's proposal as a starting platform for further negotiations would make sense and could be fruitful.

The above underlines the importance of what was said both by the Polish Prime Minister in the discussed earlier ''Pro Memoria", and by Czech Premier Vaclav Klaus on 10 March during his talks with the President of the European Commission,

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[20] See: J. Norberg, ''Free Trade Agreements of the EFTA Countries with the EC - Experience and Problems", *Svensk Juristtidining,* 1988, Nº 77; J. Temp1e Long, ''Institutional Aspects of EC-EFTA Relationship", (in:) *Creating a European Economic Space Legal Aspects of EC-EFTA Relations* (Papers from Dublin Conference, October 1989).

[21] Compare the Author's views (in:) *Poland and the Emerging European Economic Space,* paper presented at the London School of Economics and Political Sciences Conference on Emerging European Economic Space, London, 1990, 29 November.

[22] See supra, footnote 18 compare with: ''Partnership for European Cooperation", (in:) *Together in Europe,* 1994, 1 April, Nº 46, pp. 1, 2 and 12).

Mr Jacques Delors, namelly that ''association arrangement is not sufficient and needs to be supplemented and further developed in order to prevent the appearance of a vacuum"[23] between the act of association and the actual accession. The phase leading from the entry of the association agreement into force, to accession needs to be ''permanently enriched" so that it progressively fills the gap between the two parties. For Mr Klaus the main focus was ''what to do to fill the gap". The answer to this question, I am afraid, cannot be simple.

We are aware that the time of our adjustment to the requirements of the European Union will be much longer in the economic area than in the political one. One may only agree with Edouard Balladur, the French Prime Minister, who stated in his first exposé at the National Assembly on 8 April, 1993 that the ''countries of Central and Eastern Europe that are applying for the Communities membership should at first be included in the political structures of the Communities before the reforms they have been introducing, some day let them join (the Communities) on the economic level". Helmut Kohl, the Federal Chancellor, in his speech given on 5 February, 1994 in Munich at the conference on the security policy, considered it very important as regards confidence and security constructing that ''the countries of the Central Europe striving at the European Union be urgently included in the common foreign and security policy" which would constitute supplementation to the ''Partnership for Peace".

The British-Italian proposal in this matter envisages consultations to be held and positions of the states associated with the European Union to be agreed on certain questions as well as their participation in common missions. However, it is hardly possible for the European Union to undertake such discussions on their partial membership of the European Union before 1996 i.e. before the conference is held to review the European agreements with the associated countries of Central Europe. Nevertheless, the countries concerned should submit their appropriate proposals, individual ly or together, to the EU as soon as possible.

I can hardly see any legal obstacles for Poland to be granted full membership to the Western European Union. After all, the Brussels Treaty on WEU provides for only one kind of membership — the ordinary one. Any other forms of''membership" like ''associated membership", or recently invented ''partnership association" have political decisions as their base. They were never ratified as a treaty itself. Consequently, they represent de facto revisions of the Brussels Treaty. Their ''binding force" is of a political nature and may be changed or waved under the same procedure for the needs of particular circumstances and individual cases e.g. for the needs of Poland's access to full or ordinary membership of the Western European Union.

As a matter of fact, that would correspond with the needs recognized in Mr Baladur's exposé mentioned above.

Granting Poland a full membership of the Western European Union could be seen as a legal means of indirect assimilation of that country to the political and

[23] See in: ''Czech Premier Minister Meets President Delors in Brusseles", *Together in Europe*, 1994, 15 March, N° 45, p. 2 (column on).

security mechanisms of the European Union without undermining the coherence of the Union's institutions as a whole and thus avoiding the undesirable ''Europe à la carte" approach.

Such a solution would, in its substance, be a reverse though legally much simpler and less expensive replica of the EEA formula. The EEA was invented to avoid ''Europe à la carte" effect, at the same time exonerating the EFTA countries from the political and military or security duties resulted from evolution of the economic community towards the European Union.

Hence, if the previous solution is regarded admissible, this one should hardly evoke any reservations either. The moreover that Poland aims at no everlasting exceptions from the Union's ''acquis" and its mechanisms in any area.

Not all applicants are as clear on this topic, as Poland is.

The Czech Prime Minister said, when questioned about the type of the European Union the Czech Republic would like to join, that he was definitively in favour of much more flexible Community with less strict institutions. From his responses it was clear that his choice would be a more towards free-trade area arrangements and a much looser institutional set up. "1 want to joint the Common Market" said the Czech Premier, in order that "we could have the same links with the Twelve that existed for example between Denmark and France twenty years ago."

Readers will recall that 20 years ago, Denmark was a new member of the EEC which, at the time, was a customs union only equipped with its innovative form of supra-national institutions. Poland has no interest in such journeys into the past. Our aim is to be an ordinary member of the Union as it is and would evolve further at the choice of its members. We wish to share all the rights and responsibilities, temporary exemptions being reserved in a transitional period for the adjustment purposes.

As concerns the expansion of the Union's powers vis a vis the national ones, we see the subsidiarity principle introduced and defined in Article 3b of the Maastricht Treaty and developed by the Community organs to be adequate response to the problem.[24]

At the same time Poland cannot be expected to acquiesce in a peripheral status of a more or less dependable nature. In view of Russia's intense endeavours at a strategic partnership in the NATO, along with and also superior to the ''Partnership for Peace", Poland cannot afford its staying beyond the western system of defence guarantees. Lack of those guarantee will connote placing Poland in the grey area of security the guarantors in that area would effectively be made up by the NATO and Russia acting jointly, i..e. within a peculiar condominium. Therefore there is no alternative for Poland's full membership of the Western European Union but that of the NATO.

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[24] See: *The Principle of Subsidiarity* (Communication of the Commission to the Council and the European Parliament), Brussels, 1992, 27 October; also *Commission Report* of 24 November, 1993 (COM (93) 545) and *Background Report — Adapting Community Legislation to Subsidiarity*, Commission of the European Communities, 1994, 25 January, (ISEC/B3/94).

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THE ''ADJUSTMENT" OF POLISH LAW TO THE LAW OF EUROPEAN COMMUNITY

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I. Introduction

1. The ''adjustment" of Polish law to the law of European Community is today among the most important tasks of Polish legislature. Efficient and proper performance of this task requires its setting both in the reality of Polish legal and economic system, and in the state and prospects of Poland's connections with the European Union. The perception of this ''adjustment" as a problem "in itself" may negatively affect the Polish legal system and competitiveness of Polish economy with respect to the economies of EU member states.

2. Poland has always had the legal system of a continental European state, that is a civil law system derived from the conception and technique of Roman law. Both the assumptions of the Polish legal system and the achievements of the Polish legal thought are fully comparable with the relevant assumptions and achievements found in EC member states. As regards the comparability of its legal system to Community law, Poland finds itself at a more convenient starting point than some of the states so far admitted to European Communities. This is related to two phenomena. First, the Polish legal tradition and doctrine is the resultant of several legal systems, including i.a. the Romanic and Germanic. Second, some of the Polish legal regulations of special importance for business relations, including in particular the law on commercial companies, have a lot in common with the legal system of Germany — the one that exerted the strongest impact on the development of Community law in the area of law of enterprises.

3. The ''adjustment" of Polish law to the law of European Union has to be considered and carried out in three different aspects: adoption of law adequate to Polish economic reform; Poland's fulfillment of its obligations resulting from the European Agreement on Association with European Communities and their member states; and creation of conditions for Poland's admission to European Union. The three

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aspects should be distinguished clearly but made complementary to one another as far as possible. Although the problem of the adjustment of Polish law to the law of the Community is formally closely related to Poland's relations with the European Union, yet of the above three aspects, the one of the greatest importance is no doubt the adoption of laws which would be adjusted to Polish economic reform. It involves a global approach to the problem on the grounds of a comprehensive reform of the Polish legal system. Such an approach, in turn, may prevent ventures which would be dangerous for the system's consistence, resolving themselves into a fragmentary transfer into Polish law of various partial legal regulations developed within Community law but still insufficiently founded on both basic regulations and the current state of economic relations.

4. The term ''adjustment" lacks a clearly defined meaning in the context of legislative ventures. In the European Agreement, provisions concerning this question have been included in a chapter entitled ''Approximation of Laws". The basic article of that chapter contains little to explain the very essence of such approximation. Besides, a reiterated statement that the problem resolves itself into approximation of Polish to Community law, such approximation is defined as an activity aimed at securing consistence of the law of Poland with that of the Community (Art. 68). The doctrine and practice of European Communities seem to agree that the term ''approximation of laws" (Angleichung der Rechtsvorschriften, le rapprochement des legislations) actually lacks its own normative contents and has to be related to a definite form of law-making which will determine its legislative contents. This situation could be found in the Treaty that established the European Economic Community (now the European Community) which, in its fundamental chapter concerning ''approximation of laws", provides for ''directive" as a possible form of such approximation (Art. 100 of the 1957 Treaty). The European Agreement does not contain any substantiation of this kind which means that the choice of a legal form of approximation of Polish to Community law has been left to the competent Polish authorities and can be made at their discretion. From Art. 68 of the Agreement it follows merely that the essence of ''approximation" consists in ''securing consistence" of Polish law with that of the Community. The state of such consistence may be expressed both in a transformation or incorporation of Community law into the Polish legal system, and in a specific shaping of that system so as to prevent cases of its inconsistency with Community law or to make it comparable with the legal systems of member states of the European Union.

II. ''Adjustment" in the aspect of law adequate to Polish economic reform

5. The systemic changes that occurred in recent years in Poland settled its position among the countries whose legal system of destination is to be fashioned after states with free market economy. Therefore, the very fact of the restructuring of the

Polish economic system makes it necessary for reformers of Polish law to use the legal solutions found in the West of Europe, the EU member states included. It is worth stressing in this context that even before Poland's association with the European Communities became a live issue, the institutions that watch over the directions of development of the Polish legal system — such as the Legislative Council attached to the Prime Minister and the Commission for Civil Law Reform attached to the Minister of Justice — had already borrowed in their work from the legislative achievements of Western Europe and the Community. In this aspect, a broadly conceived and not always intentional ''adjustment" of the Polish legal system to the systems of member states of European Communities as European free market states proceeded chiefly on the following three planes:

a) removal from the Polish legal system of institutions and notions glaringly inconsistent with the legal systems of member states of European Communities;

b) restoration in practice of upheld legal regulations from the period between the two World Wars;

c) introduction of new regulations as one of the major elements of the economic reform under way.

6. As regards the first of the above planes, what is of particular importance are the changes introduced into the Polish civil code of 1964 by the amendment of 28 July, 1990. Under this latter act, a specific type of legal persons — units of socialized economy — were removed from the Polish civil law, as were also a variety of legal solutions — relating particularly the obligations from contracts — specially designed for relations between such units of socialized economy. As a result of this operation, the Polish civil code became fully comparable with its counterparts in member states of European Communities: the main difference is that the Polish code does not contain legal regulations from the sphere of family and guardianship law.

7. What proved particularly rich and important was the second of the above-mentioned planes. Changes in the economy resulted in the restoration in practice of such legal regulations as provisions on commercial companies (partnership, private and public limited liability companies) of 27 June, 1934; the law on bills of exchange and promissory notes and the law on cheques of 28 April, 1936; or the bankruptcy law and the law on composition agreement proceedings of 24 October, 1934. In all these spheres of special importance for business relations, Poland has regulations which are fully comparable with or even — as in the case of the systems of the law on bills of exchange and on cheques — identical to the legal systems of continental member states of European Communities. In the law on commercial companies, after restoration of a limited partnership by the act of 31 August, 1991 and introduction, by the act of 23 December, 1988, of the possibility of forming single-member private limited liability companies (the relevant Directive of the EEC only passed on 21 December, 1989), certain changes have to be introduced in practically one case of public limited liability companies: in particular, such changes should adjust the Polish

law on associations of capital to numerous relevant directives of the EEC passed on the grounds of Art. 54 section 3 point ”g” of the 1957 Treaty. The changes to this effect are being prepared for some time now by a specially appointed group for reform of the law on commercial companies within the Commission for Civil Law Reform which bases on the Community regulations in its work. The Polish bankruptcy law and the law on composition agreement proceedings is consistent in its essence and basic solutions with the relevant regulations of EU member states. The fact considered, however, that most states with developed economies introduced a number of important changes in that law during the 1980s — with respect first of all to reparatory proceedings — the Polish regulations have to be modernized, the whole of the system left unchanged.

8. As an important element of the economic reform under way since 1989/1990, a whole package of statutes were promulgated from the sphere of the economic administrative law. Concerned here is mainly the customs law, the law on foreign exchange, and the tax law, as well as such borderline spheres fringing upon public and private law as the banking law and the law on monopoly control, and also the law on public securities trading. Also adjusted to the new economic principles have been such spheres as the law on technological inventions (Act of October 1992); besides, a new law on copyright was promulgated which also corresponds with those principles (Act of 4 February, 1994). In all those legislative ventures, a certain and sometimes even important role was played by the legal solutions found in Community law or in the legal systems of the separate member states of European Communities. In a decided majority of cases, though, such solutions were used not with the direct aim of adjusting Polish law to that of the Community but rather for the reason that a given solution proved necessary for the economic reform. Among the new regulations based on the changes in the Polish economic system, the following situations should also be distinguished.

a) Due to their direct relation to the current economic conditions, certain spheres of the law — as in particular the customs law, the law on foreign exchange, and the tax law — cannot possibly be adjusted with no relevance to the reality to any model solutions that are adequate for states with a developed free market economy. Therefore, according to the needs, such spheres inevitably contain and preserve solutions that depart from the standard solutions found in those countries. As a consequence, it is self-evident that introduction into the Polish legal system of Community solutions will only be possible in the course of Poland’s economic development that is to accompany the processes of the country’s association with European Communities.

b) In certain spheres, as in the banking law and the law on public securities trading, the crucial role is played by organization and the proper functioning of certain institutions, that is banks and the stock exchange in the discussed case. In such spheres, the possibility of introducing legal solutions which would be fully comparable with those found in Community law and the law of economically developed countries depends on the actual or potential conditions that can be created for the set-

ting of those very institutions. Therefore, whatever the degree of comparability of the Polish banking law or the law on public securities trading, the actual effectiveness of this adjustment is bound to depend on institutional solutions which are specially dependent on the current state of Polish economy.

c) Further, such spheres of law as the law on monopoly control or on fighting unfair competition offer broad possibilities of borrowing from foreign systems as their component solutions and mechanisms have a largely general value and only acquire definite contents in contact with the reality. On the one hand, Polish law can achieve (and has already achieved) a high degree of comparability with the Community law or the law of the separate member states of EU in those spheres. On the other hand, though, due to the Polish economic reality, the actual contents of monopoly practices and cases of unfair competition in the Polish conditions are bound to differ from those found in developed free market economies for a long time to come, the differences being sometimes quite considerable.

d) Finally, there are such spheres as patent law or the law on copyright which involve the right to intellectual property and, as shown by the most developed practice of concluding international agreements, clearly prove susceptible to unification. In such spheres, the direction of the general reform of Polish law practically agrees with what is being done in this area both in West-European countries and within the European Communities. This is particularly evidenced by the fact that provisions on computer programs contained in the Polish Act on copyright of 1994 have been directly transferred from EEC Directive of 1991 on legal protection of computer programs.

III. ''Adjustment" in the aspect of Poland's obligations resulting from the European Agreement on Association

9. The problem of the adjustment of Polish law to the law of the European Community is present in the European Agreement in the following three formulations:

a) as a separate problem discussed in a separate chapter on ''Approximation of Laws";

b) as an element of the contents of those provisions of the European Agreement which relate to the movement of workers, setting up of firms, supply of services (Part IV), as well as payments, capital, competition and other provisions relating to the economy (Part V);

c) as an element of cooperation discussed in provisions under the general title ''Economic Cooperation" (Part VII).

10. The chapter on approximation of laws consists of three articles, each performing a different function:

a) the first article provides the general legal grounds for approximation of Polish to Community law (Art. 68);

b) the second one specifies the spheres of law in which this approximation should take place first of all (Art. 69);

c) the third article declares the Community's intention to help Poland with the technicalities of the discussed approximation of laws (Art. 70).

11. The general legal grounds for approximation (adjustment) of Polish law to the law of European Community are composed of the following two elements: a definition of the mutually recognized importance of such approximation for Poland's relations with the Community, and a definition of the way in which Poland should proceed to adjust its domestic law to the law of the Community. Both of these elements require a closer analysis with the aim to find out whether, and to what extent, it follows from the European Agreement that Poland should adjust its entire legal system to Community law.

a) The first element has been formulated as follows: ''The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community". In this context, the verb "to recognize" usually expresses views of the parties entering an agreement, and not their undertaking of any definite obligations. It is found most often in preambles of agreements or other international contracts, and can also be used in outlined provisions that are to be filled with definite contents gradually. Therefore, no specific obligations of Poland as regards adjustment of Polish to Community law follow from the discussed fragment of Art. 68. Not imposing any definite obligations, the formulation is nevertheless of great importance in the context of Poland's application to be admitted to the European Union. Recognizing approximation of Polish law as the main preliminary condition of Poland's economic integration with the Community, the European Communities and their member states have undertaken at least a moral obligation actually to include Poland in the Community once the country can demonstrate ''proximity" of its legal system to the Community one. An opinion is justifiable that the discussed provision of Art. 68 is likely to matter more for Poland's endeavors to be admitted to EU than the formulation contained in the Preamble of the Agreement: ''Recognizing the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective".

b) The other distinguished element has found expression in the sentence: ''Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation". From this formulation it seems to follow that Poland does not undertake any obligations as to the result, that is does not undertake actually to adjust its law to the law of the Community but only to make adequate efforts to accomplish the state of consistence of the future Polish law with Community law. Therefore, Poland's obligation in this respect is that to act conscientiously.

12. The list, contained in Art. 69 of the Agreement, of the spheres of law in which approximation of Polish to Community law should take place particularly requires at least the following comment.

a) As follows clearly from the use of the phrase ''particularly", the discussed list is not limitative and can be interpreted mainly as a specification of the spheres of law that have to be approximated first.

b) Striking are the quite considerable differences between the Polish and English version of the article as far as some of the items it specifies are concerned. The Polish version mentions the following spheres: the customs law, company law, banking law, accounts of enterprises, taxation, intellectual property, protection of workers at workplace, financial services, principles of competition, protection of health and life of humans, animals and plants, consumer protection, indirect system of taxation, technical provisions and norms, transport, and the natural environment. The English version does not refer generally to the accounts of all enterprises or to taxation in general, the whole of the related problems — in accordance with the directions and degree of unification of the law in the EEC — being contained under the heading ''company accounts and taxes" and thus reduced to the accounts and taxation of companies only.

c) It would be interesting to know what determined the sequence of the items specified in the discussed article. The sequence seems accidental as there is nothing to explain it: neither the criteria of importance of the separate fields for the association processes, nor that of the degree of differences between Polish and Community law.

11. Analyzing the contents of Art. 70 of the Agreement, it has to be stressed that the Community's undertaking to render technical assistance to Poland in the work of approximating Polish law to that of the Community has not only a practical but also a legal meaning. Under the second sentence of Art. 68, Poland has undertaken to make all efforts to secure consistence of its future law with the law of the Community, and an insufficient assistance on part of the Community may significantly impair this obligation. This means that the EC can only blame Poland for insufficient performance of this obligation if, for its part, it does render technical assistance in approximation of Polish to Community law in such forms as e.g. the exchange of experts; provision of information; organization of seminars; training; and help in translating Community legislation (legal provisions) in individual branches of the law.

12. What should be discussed first of all among the relatively numerous references made in Parts IV and V of the Agreement to the task of securing consistence of Polish with Community law or concrete obligations to introduce changes in Polish legal regulations are the problems of setting up and functioning of enterprises, that is the sphere that can be called the law on enterprises or industrial law. The Polish legal system has many gaps as concerning this sphere. Its indirect regulation consists of a variety of provisions scattered among such normative acts as the Act of 23 December, 1988 on economic activity; upheld parts of the 1934 commercial code relating to commercial company and commercial register; or the Act of 14 June, 1991 on companies with a foreign capital share.

13. Under the European Agreement, Poland has undertaken so to shape its legal provisions relating to broadly conceived setting up of enterprises, their legal status included, as to:

a) secure to legal and natural persons who are members of the Community according to the criteria specified in Art. 48, with respect to the setting up of enterprises, a treatment which should not be inferior to that received by Polish legal or natural persons (Art. 44 section 1 (I));

b) secure, with respect to the activity of enterprises set up in Poland by legal and natural persons who are members of the Community, a treatment which should not be inferior to that received by Polish legal and natural persons (Art. 44 section 1 (II));

c) secure to legal persons who are members of the Community and have set up an enterprise in the territory of Poland, to branches and agencies established in Poland by such legal person, and also to natural persons who are members of the Community and pursue activity in Poland as self-employed (basing on independent work), the right to purchase, use, lease out, and sell real estate, and with respect to the natural resources, plough-land and forests — the right to lease, where these are directly necessary for such persons' pursuit of economic activity within the enterprise they have set up (Art. 44 section 7);

d) secure to all persons enjoying the right to set up an enterprise in the territory of Poland the right directly and indirectly to fill their key employment positions with subjects of EC member states, under the conditions specified in the Agreement (Art. 52).

14. Restructuring of the Polish legal system in accordance with the obligations that result from provisions relating to the setting up of enterprises is among the most urgent and at the same time the most difficult legislative ventures within the broadly conceived task of adjusting Polish law to that of the Community. Concerned here is not only application in Polish law of specific Community solutions but also development in Poland of industrial law (law on enterprises) which would meet the European standards valid since a long time in states with free market economy. Further, restoration in Polish law of industrial law (law on enterprises) requires also serious legislative interventions in the civil code, as well as solution of the problem of way and place of announcing the data on persons who run enterprises and on such enterprises. As quick as possible, additions should be made to the civil code: provisions dealing with the status of persons who pursue activity within an enterprise, as well as a regulation which would serve as the grounds for the entire system of registration and announcement of data, especially with respect to the legal effects of the fact of making or not making an entry or announcement of data contained in the register and the way in which such data can be used by third persons. The works on amending the civil code in this direction have so far failed to go beyond the preliminary stage; instead, a draft bill on the Economic Monitor has already been prepared which sho-

uld solve the problem of place and way of announcing data on the entrepreneur and his enterprise.

15. Adjusting provisions of the Agreement relating to the setting up and legal status of an enterprise, the fact was taken into account that the discussed sphere is particularly closely related to the economic reality; hence the considerable caution in formulating the way and pace of Poland's meeting its obligations resulting from Art. 44. This is expressed by the following adjustments.

a) Exclusion from provisions on the setting up and activity of enterprises of purchase and sale of natural resources, plough-land and forests.

b) Preparation of a schedule of implementation of provisions regulating the setting up of enterprises: in some areas, such implementation is to start with the entering into force of the Agreement, while in some other ones it is to follow either of two versions: not later than by the end of the first stage planned for completion of association, or not later than by the end of the transitory period preceding the moment of full association (Art. 44 section 1 (I) in relation to Appendices XIIa through XIId); included in the first of the above groups has been e.g. building, in the second one — e.g. mining, and in the third — e.g. financial services and purchases of state property in the course of privatization.

c) The principle of equal treatment of the activity of enterprises established in Poland by natural and legal persons from the Community is to become valid on the day of entering into force of the European Agreement; should, however, the valid legislation and provisions relating to certain spheres of economic activity in Poland fail to guarantee such treatment of legal and natural persons from the Community from that day on, Poland has undertaken to amend them so as to secure the due treatment of such persons not later than by the end of the first stage planned for completion of association (Art. 44 section 1 (II)); in connection with this obligation, it has to be decided as prompt as possible which legislative steps should be taken with respect to the act on companies with foreign capital share.

d) The granting to Poland of the right to introduce, during the first stage of association (branches of the economy specified in Appendices XIIa and XIIb) and during the transitory period (branches of the economy specified in Appendices XIIc and XIId), provisions quashing the regulations relating to the setting up of enterprises by legal and natural persons from the Community; this right, together with strictly specified conditions of introduction, period of validity and principles of application of such provisions, has been included in Art. 50.

e) The adoption of the principle that rights relating to real estates situated in Poland are to be granted on the day of entering into force of the Agreement only to legal persons who have set up an enterprise in Poland; in the case of branches and agencies established by legal persons from the Community, this grant is to take place by the end of the first stage of association, while self-employed natural persons from the Community are to be granted such rights by the end of the transitory period at the latest (Art. 44 section 7).

16. Of the other commitments of Poland which involve steps towards adjustment of Polish law to that of the Community and have been expressed in provisions of Parts IV or V of the Agreement, the following can be mentioned by way of example.

a) Poland's commitment gradually to adjust its legislation to the present legislation of the Community, during the transitory period, in the sphere of air and inland transport — administrative, technical and other relevant regulations included — towards liberalization and mutual access to the markets of parties to the Agreement, and towards facilitation of passenger and freight traffic (Art. 56 section 5).

b) As regards inclusion into Polish law of Community regulations relating to the flow of capital, it is provided that during the first stage of association, parties to the Agreement should take steps towards creation of conditions necessary for further gradual application of Community provisions in this sphere (Art. 61 section 1); moreover, during the second stage, the Association Council is to examine the ways of a full application of Community law on the flow of capital (Art. 62 section 2).

c) As regards consistence of Polish with Community law relating to competition, three types of procedure have first been specified that are considered inconsistent with a proper implementation of the Agreement provided they negatively affect Poland-Community trade (Art. 63 section 1); next, it has been stated that ''any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 of the Treaty estabilishing the European Economic Community" (Art. 63 section 2). It has to be stressed, though, that this principle does not operate automatically: required for its application is the Association Council's decision containing the necessary regulations, to be taken within three years of the day of entering into force of the Agreement.

d) Poland's commitment to introduce a regulation relating to tenders which would provide to legal persons with membership of the Community, by the end of the transitory period at the latest, access to tender procedures where they would receive a treatment at least equal to that guaranteed to Polish legal persons (Art. 67 section 2), and to grant such access to enterprises formed in Poland by such persons starting from the moment of entering into force of the Agreement (Art. 67 section 2).

17. A special position in the European Agreement is taken by provisions relating to the right to intellectual property. The obligations contained in them concern adjustment of Polish law to European standards with regard to international agreements: both those to which EC member states are parties and also other agreements applied by those states despite the fact that they are not parties to them. Therefore, the formal obligations of Poland in the sphere of intellectual property may appear to be further-reaching than those of some of the EC member states. Art. 66 of the Agreement obliges Poland:

a) Further to improve the protection of the right to intellectual, industrial, and commercial property so as to reach, by the end of year five from the day of entering into force of the Agreement, a standard of protection which would approximate the

one found in the Community, also in the sphere of comparable means of vindication of such rights.

b) To apply, within the same time-limit as above, to be admitted to the Munich Convention on granting European patents of 5 October 1973, and to accede to other multilateral conventions on the protection of the right to intellectual, industrial, and commercial property specified in Appendix XIII section 11. In the course of its recent reforms of the right to intellectual property, Poland has largely performed its obligations under the European Agreement. This was done on the grounds of such statutes as the Act on amending the act on inventiveness, and the Act on the Patent Office (30 October, 1992); the Act on patent agents (9 January, 1993); or the Act on protection of topography of integrated circuits (30 October, 1993). Besides, on 25 December, 1990 Poland joined the Patent Co-operation Treaty and became party to the Madrid Agreement on international registration of trademarks on 18 March, 1991 and to the Budapest Treaty on international recognition of deposits of microorganisms for patent proceedings on 22 September, 1993.

18. References to the problem of adjustment of Polish law to the law of the Community found in Part VI of the Agreement, ''Economic Cooperation", have been formulated as elements of individual provisions on cooperation as a rule; the formulation is general and involves no definite duties imposed on Poland. Thus for example:

a) In the sphere of banking, insurance and other financial services, cooperation is to aim, among other things, at the adoption of a common set of provisions and norms concerning i.a. accountancy as well as supervision and the regulating systems in banking, insurance, and finances; in this connection, it is planned to prepare dictionaries and translations of the legal provisions of Poland and the Community, and also to organize discussions and information meetings concerning the already valid legislation and provisions in preparation in Poland and the Community (Art. 83 sections 1 and 2), while

b) in the sphere of customs duties, cooperation aiming at approximation of the Polish customs system to the one of the Community is to include, among other things, the introduction of a uniform administrative document and mutual relations between the transit systems of Poland and the Community, as well as simplification of the procedure of customs inspection and of formalities involved in the flow of goods (Art. 91 sections 1 and 2).

IV. ''Adjustment" in terms of creation of conditions for Poland's admission to European Union

19. The following has always to be taken into account when deciding about legislative ventures towards adjustment of Polish law to the law of the Community and choosing definite legal forms to secure the former's consistence with the latter:

a) that the system of Community law is designed for EC member states and directly or indirectly created by those member states;

b) that it cannot be appraised or copied as a self-dependent normative value separated from its economic ''base";

c) that it is a natural element of a state's status as member of a larger international body — the European Union, and especially its part formerly known as the European Economic Community and now called the European Community.

20. All legislative ventures to secure consistence of Polish law with the law of the Community should take the fact into account that the basic and original competence of creating and deciding about the legal system is situated in the European Union at the level of each and every of its member states. This legal state can be summarized as follows:

a) the EU member states have resigned their law-making powers in such cases only which — as a result of adjustments making up the individual European Communities, including in particular the European Economic Community (today: the European Community) — have lost their former internal character, instead becoming matters of the Community exclusively;

b) at the same time, the law-making competencies granted to Communities in certain spheres bear the nature of so-called parallel competencies in that they are parallel to the competencies still preserved by member states;

c) therefore, the system of Community law is not based on a general competence of law-making: instead, it is a special system which is inseparably related to legal systems of individual member states preserving their original general competencies of law-making;

d) the matters that lost their original internal character, becoming matters of the Community only, pertain first and foremost to relations under administrative economic law; concerned here above all are the regulations that warrant the existence of common trade policy and determine a uniform customs area. It has to be stressed that with transition from common to internal market the range of such matters will grow ever larger;

e) in the sphere of private law, EU does not have exclusive law-making competencies, its parallel competencies concerning chiefly spheres such as the law on associations of capital, the law on intellectual property, the law on securities, banking or bankruptcy law.

21. A number of important statements follow from the origin, essence and aims of the law of EU member states, unified (by way of directives) and common (laid down in regulations), that is of the system of Community law itself. Such statements have to be taken into account when adjusting Polish law to that of the Community:

a) Community law does not resolve itself into separate normative acts to which individual segments of the Polish legal system should be referred and adjusted; the fact has to be borne in mind when adjusting Polish law to the law of the Community

that all such acts function within a bigger whole which is made up of appropriate pails of primary law (rules contained in the treaties that established European Communities, with subsequent changes), the remaining secondary law related to a given act (rules introduced by way of directives and regulations), and decisions of the European Communities Court of Justice based on all such rules.

b) Community law is inseparably related to definite economic reality; states agreed to have their legal systems supplemented with unified and common law for the sake of definite advantages that were to result from the creation and functioning of a common market. Therefore, when adjusting Polish law to the law of the Community, the principle should be observed that the necessary economic connections between Poland and the European Union to protect Poland's interests have to emerge in the first place, only accompanied or followed by appropriate adjustment processes.

c) Community law is a legal system created by a definite group of states and designed for application within that group; Poland has the status of a third party with respect to the sources of that law. Therefore, from its very nature, the system of Community law is a legal system alien to Poland. It has to be decided whether the provisions contained in the European Agreement and relating to the adjustment of Polish law to the law of the Community are specific enough to justify the assumption that, as a result of their implementation and of implementation of the whole of establishments of the Agreement, Poland will cease being a third party with respect to EU member states in definite spheres of regulation making up the Community law. There is a lot to indicate that this situation will only take place once Poland is admitted to European Union. For this reason, in the case of all adjustment processes taking place before that moment, a specific sequence has to be adopted which should be determined by the degree to which a given regulation is related to the common vs. internal market. The sequence should consist in adjustment taking place first in segments based on parallel law-making competencies of member states and European Communities; the legal solutions of purely ''Community" nature, that is those based on exclusive law-making competencies of individual Communities, would only be transferred to Polish in the final stage. This principle is no obstacle to using all types of Community regulations when reforming the Polish legal system towards its adjustment to the needs of the country's reformed economic system.

d) The transfer to Polish law of the legal solutions which make up Community law requires an appropriate substantiation of all those provisions of the European Agreement which provide for adjustment of Polish law to the legal system of European Community. In this case, substantiation would consist in establishing in the relations between Poland and European Communities together with their member states an economic reality corresponding with the reality inherent in the origin of uniform and common law. In practice, this means that in many situations, adjustment of Polish law to the law of the Community requires appropriate negotiations and adjustments within the Association Council formed under the Agreement. Such adjustments would aim at protecting the Polish economy against the consequences of irrelevant inclusion of Community law into the Polish legal system.

e) As has already been mentioned, Community law is a special law as compared to the legal systems of member states as general laws. This means that the uniform and common law of the member states constitutes but an appropriate supplement and enrichment of those states's domestic law, a development within that law of norms derived from international sources as compared to those of autonomous origin. From a reference of this characteristic of Community law to the problem of adjustment of Polish law to the EC legal system it follows that such adjustment cannot possibly take place without consideration to the specific nature of the Polish legal system, and that it aims not at replacing individual segments of Polish law with a foreign legal system but at an appropriate reform and supplementing of the Polish legal system.

22. All the above statements considered, however, the fact has to be borne in mind that applying for membership of the European Union, Poland must necessarily meet the expectations of the Union and its member states as far as the degree of consistence of its legal system with the law of the Community is concerned. The degree of this consistence is among the major criteria of appraisal of the newly-admitted members of the EU from the viewpoint of a given state's satisfaction of the conditions of its being granted the status of a member state. To avoid in the future all doubts as to the degree of adjustment of Polish law to the law of the Community, what has to be ascertained at a possibly earliest date, within all of the accessible forums — including in particular the Association Council and the Parliamentary Association Committee — are the minimum degrees of such consistence suggested by the authorities of the European Union with respect to both the whole of the Polish legal system and individual branches of law, those especially which pertain to relations embraced by the European Union.

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LE TRAITÉ EUROPÉEN ET LES ÉTAPES DU PROCESSUS DE RAPPROCHEMENT DU DROIT POLONAIS DU DROIT EUROPÉEN

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L'application du Traité d'association de la Pologne avec les Communautés Européennes (Traité de l'Europe, Traité Europeéen)* exigera de notre pays la mise en place de toutes les conditions requises à cet égard. Un rôle clé revient ici à l'adaptation de l'économie polonaise aux standards européens. Un des éléments essentiels de ce vaste processus constiste à rapprocher la législation présente et future de la Pologne du droit européen. Cette obligation découle directement des dispositions de l'art. 68 du Traité de l'Europe. Dans un sens plus large, il faut entendre par là l'adaptation de tout notre système juridique à celui des Communautés Européennes.

Les obligations de la Pologne en cette matière ont un caractère unilatéral. Toutes les mesures déjà prises en vue de l'application du Traité montrent que la Pologne les considère comme telles. Aussi n'attend-elle pas des Communautés Européennes une assistance spéciale à cet égard — excepté l'assistance technique et financière — ni n'estime-t-elle pas que les systèmes juridiques respectifs doivent se rencontrer "à mi-chemin".

Dès la signature du Traité (le 16 décembre 1991) et bien avant son entrée en vigueur (le 1er février 1994), la Pologne a commencé d'appliquer ses dispositions, en les considérant comme des directives d'action, convaincue — ajuste titre, comme on allait le constater — que la ratification du traité n'était qu'une question de temps, en dépit de diverses réserves formulées tant du côté plonais que communautaire. Grâce à cette attitude, les délais prévus par le Traité pour les travaux d'adaptation au sens large, notamment d'ordre organisationnel, ont été raccourcis dans la pratique.

Le rapprochement des dispositions juridiques polonaises du droit européen a toujours été considéré en Pologne comme un élément stratégique de notre adaptation aux solutions juridiques modernes, en vigueur dans le monde contemporain. Sous de nombreux aspects, le droit européen en est précurseur, sous d'autres — leur illustration exemplaire. Dans la pratique, l'adaptation du système juridique polonais aux

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standards européens signifie pour nous la possibilité de participer pleinement à la coopération économique et commerciale à l'échelle internationale, selon les règles les plus modernes, impliquant l'existence de nombreuses institutions juridiques nouvelles.

Le Traité d'association stipule que la Pologne prendra les meilleurs dispositions pour assurer la conformité de sa future législation à celle des Communautés. Les meilleures, comme le formule le Traité, mais non toutes, comme il est dit dans certains textes semblables. Une telle définition des mesures nécessaires garantit au législateur polonais la liberté d'action dans la détermination des priorités et de la cadence à laquelle le droit polonais se rapprochera du droit européen. Le devoir de prendre ''les meilleures" mesures a donc, pour nous, un caractère formel, plutôt organisationnel et disciplinaire pourrait-on dire, mais non restrictif quant aux moyens d'adaptation. L'organisation du processus d'adaptation est laissée à la libre décision de la partie polonaise. Il est vrai que l'art. 69 du Traité européen définit les domaines et questions que doit concerner le rapprochement des dispositions juridiques, mais cette énumération, précédée de l'expression "en particulier" n'est ni exhaustive, ni limitative, et il faut l'interpréter comme indicative de certaines priorités que les parties au Traité (la Pologne, les Communautés et les pays membres) ont reconnu d'un commun accord comme exemplaires. Si bon admet indiscutablement la thèse selon laquelle le rapprochement de la. législation actuelle et future de la Pologne du droit européen serait une condition préliminaire essentielle de l'intégration économique dans les Communautés (cf. l'art. 69 du Traité), et que cette intégration à son tour revêtira la forme de l'appartenance à l'Union, il est évident que l'adaptation du droit polonais doit avoir un caractère systématique, global et exhaustif, de façon que l'adhésion de la Pologne à l'Union ne pose pas trop de problèmes (bien plus graves que ceux qu'il nous est possible de prévoir et auxquels nous nous attendons). Les dispositions de l'art. 69 du Traité européen, qui énumère les domaines à adapter au droit européen, doivent être considérées comme une énumération exemplaire et une étape préliminaire à l'adaptation globale.

Les domaines du droit polonais actuel qui sont inadaptés au droit européen ont été définis dans le ''Livre Blanc — partie juridique", fruit d'une importante initiative de recherche scientifique. Dans cet ouvrage, les auteurs des 34 études approfondies, scientifiques de divers centres académiques de Pologne, se prononcent sur le caractère et la portée des modifications nécessaires à apporter dans divers domaines du droit, en procédant à une analyse appropriée de l'état du droit en Pologne et des règles européennes. Le Livre Blanc sera publié au début d'avril 1995, et servira de guide inestimable aux réformateurs de ces domaines du droit dont l'adaptation a été reconnue comme primordiale.

Dans les travaux d'adaptation, au premier rang se situent les domaines qui présentent une importance décisive pour notre économie. Il s'agit des normes qui régissent la situation juridique et le fonctionnement des agents économiques, ainsi que des régies des échanges commerciaux (également dans l'agriculture). Cette problématique complexe comprend aussi les règles générales du droit civil, relatives

à la conclusion et l'exécution des contrats, aux effets de leur inexécution, les règles du droit international privé concernant le choix de la loi applicable aux obligations conventionnelles, ainsi que les règles de la procédure civile et de l'arbitrage. Le processus d'adaptation englobera aussi certains aspects du droit du travail, concernant surtout la protection du travailleur sur le lieu de travail, ainsi que des assurances sociales, de la situation juridique du travaileur étranger, du droit de la protection de l'environnement et des normes relatives à la protection de la santé. Le texte du Traité n'énumère pas tous les domaines du droit à modifier et dès aujourd'hui, en abordant des questions complexes, nous les étudions attentivement, en cherchant à définir de façon détaillée les domaines du droit à adapter.

Nous nous rendons compte que l'édification d'un système nouveau — ou une amélioration radicale du système actuel — doit se faire par étapes soigneusement planifiées. La phase qui a précédé l'élaboration des solutions formelles et systémiques, consistait à définir les normes du Traité européen dont l'application n'exige pas de mesures juridiques nouvelles, et celles qui réclament des travaux d'adaptation appropriés.

Il a fallu distinguer entre les mesures strictement juridiques et les mesures organisationnelles, qui sont aussi indispensables pour la réalisation des obligations découlant du Traité. Il s'agit de mieux organiser et en même temps d'informer les différents secteurs de l'administration publique sur les normes dont l'application entraîne des devoirs concrets, et aussi sur les formes admissibles et possibles de l'activité découlant directement du Traité. Cette question a fait l'objet de nombreuses discussions, où l'on cherchait à savoir quelle forme devaient revêtir les mesures à prendre et même s'il fallait les prendre. Faut-il chercher à élaborer une loi générale qui réglerait la mise en vigueur des normes en question, en modifiant de façon complexe nombre de lois particulières, ou bien adopter des lois particulières nouvelles, modifiant celles déjà existantes? Chacune de ces solutions présente des avantages et des inconvénients. Aucune n'est réalisable sans d'importants efforts organisationnels et législatifs. En attendant, nous nous contentons de propager l'information sur ces normes, entre autres par la publication d'un ''Commentaire du Traité européen". Ce n'est pas un document officiel, il ne contient aucune directive d'action, mais présente de nombreuses questions concernant la réalisation pratique du Traité, en tant que convention internationale particulièrement importante.

En premier lieu, les mesures d'adaptation devront concerner le droit douanier, la législation relative à la concurrence, la réglementation de la situation des entreprises, le droit des transports, les questions du transfert de capitaux et notamment du droit bancaire, les services financiers et le droit relatif aux crédits, les assurances économiques et les mesures tendant à prévenir le blanchissage des fonds.

Par ailleurs, les travaux d'adaptation les plus urgents devront porter aussi sur le droit concernant la protection de la propriété intellectuelle, en particulier du droit des brevets et du droit des marques de fabrique. Le droit d'auteur, qui fait partie du droit de la propriété intellectuelle au sens large, a déjà été réglé de telle façcon qu'il correspond pleinement aux standards en vigueur dans les pays de l'Union européenne

(Loi sur le droit d'auteur). Dans une première étape les travaux d'adaptation devront concerner également le droit des sociétés commerciales et le droit agraire. L'élaboration urgente des solutions globales concernant les questions relatives à la libre prestation de services est tout aussi indispensable.

A la deuxième étape les travaux d'adaptation porteront sur le droit concernant les investissements étrangers, en particulier la liberté de création des entreprises, la protection de la santé et de la vie des citoyens, y compris les prescriptions et les standards concernant les produits aliementaires; la protection de l'environnement, le droit fiscal et les collectivités locales. A cette étape également d'importants changements devront concerner des questions chosies du droit civil et du droit processuel, notamment les assurances économiques, la responsabilité de la qualité des produits, la protection du distributeur et la procédure d'arbitrage.

L'adaption de solutions complexes dans tous ces domaines devra contribuer à la cohérence du système juridique polonais par repport à celui des Communautés Européennes, et ipso facto, à l'exécution des dispositions du Traité européen. Par cela même la Pologne acquérira Γ aptitude à s'acquitter pleinement des obligations, qu'elle aura à remplir en taut que membre de l'Union de l'Europe.

Si nous adoptons des solutions complexes modifiant le système du droit polonais, au point qu'elles dépassent parfois les dispositions du Traité, c'est parce que nous l'envisageons comme une étape transitoire de notre acheminement vers l'Union de l'Europe. Cette conception est la conséquence directe de ce qu'on pourrait qualifier d'une interprétation ''évolutive et dynamique" du Traité d'association. On peut entendre cette dynamique, d'un côte, comme une amélioration constante du Traité au cours de sa mise en oeuvre (concertée évidemment entre les parties), adaptée aux conditions d'action changeantes. On peut aussi entendre cette dynamique et cette évolution plus largement, à savoir comme une nécessité d'intensification de l'application du Traité, mais envisagée dans le contexte de notre appartenance à l'Union. Cette seconde approche semble située dans une perspective plus lointaine.

La réalisation des solutions systémiques déjà entamées en Pologne est directement liée au programme et au calendrier d'actions résultant du Programme gouvernemental d'adaptation, adopté le 26 janvier 1993, soit un an avant l'entrée en vigueur du Traité européen. Dans le cadre de ce programme les différents ministères avaient présenté leurs projets d'adaptation pour les années 1993 et 1994. Ce programme comportait 130 actes juridiques de rang différent. Après deux années de sa réalisation, on voit nettement qu'il s'agit moins d'un programme d'adaptation que plutôt d'un plan de travail des administrations, découlant de l'application du Traité. Néanmoins, son adoption avait incontestablement pour effet de discipliner et de mettre de l'ordre dans l'activité législative des ministères.

L'adoption d'un programme adéquat de longue haleine est difficile en l'absence d'un calendrier européen des étapes d'adaptation, qui indiquerait les solutions détaillées, nécessaires à la réalisation intégrale du Traité. C'est une faiblesse du Traité. La composition d'un tel calendrier était postulée, au cours des négociations, non

seulement par la Pologne mais aussi par les autres pays membres du Groupe de Visehrad.

La détermination des étapes successives de la réalisation du Traité en matière d'adaptation du droit, lors même qu'elles ne seraient pas respectées jusqu'au bout et les délais prévus ne seraient pas observés, aurait une immense valeur mobilisant aussi bien les organes de l'Etat que l'opinion publique autour des tâches précises.

Un tel calendrier permettrait de transformer le Traité d'association en un Traité de préadhésion, ce qui ne porterait pas atteinte à sa structure formelle mais lui conférerait une nouvelle dimension.

Les mesures systémiques tendant à atteindre le degré nécessaire — et souhaitable — d'adaptation du droit polonais à celui de l'Union de l'Europe doivent être associées à des mesures mettant de l'ordre dans le système global du droit polonais. Quelles que soient les critiques formulées à l'égard de ce système, lui reprochant son incohérence, de nombreuses lacunes ou imperfections, il ne faut pas oublier qu'il constitue un ensemble d"éléments interdépendants l'un de l'autre, à la manière d'un système de vases communiquants, qu'il serait dangereux de détruire par des décisions hâtives et irréfléchies. Sa désintégration pourait mettre en danger la sécurité des rapports juridiques et contribuer à la déstabilisation du droit.

Dans le choix des mesures d'adaptation il faut impérativement tenir compte de la possibilité de leur exécution politique; il faut veiller aussi au juste choix des méthodes, afin de ne pas ajouter aux secousses économiques, que connaît notre pays dans la période de transformations politiques, des ébranlements à caractère juridique, inutiles et prévisibles. Le maintien de la continuité et de la cohérence de l'ordre juridique national, principe fondamental de la procédure d'adaptation, exige le respect des règles du choix des mesures proportionnelles au but envisagé. De là la nécessité d'une souple application des techniques d'adaptation à divers domaines du droit.

A vrai dire il est impossible de construire un modèle unique de procédure (de pratiquer une seule technique) dans le cadre de toute notre législation. Toutes les méthodes, depuis les règles unifiantes, en passant par les méthodes de rapprochement (dont il est question à l'art. 101 du Traité de Rome), jusqu'aux méthodes présupposant la coexistence des réglementations nationale et communautaire (ce qu'on observe dans le domaine du droit relatif à la compétitivité dans les pays de l'Union), les méthodes menant à la reconnaissance réciproque de l'équivalence des solutions nationales (p.ex. la reconnaissance des diplômes et certificats d'études), et aussi les méthodes d'adaptation aboutissant à l'harmonisation par l'introduction d'éléments nouveaux à l'accord existant, jusqu'à l'institution des règles communautaires comme alternatives des règles nationales (p.ex. pour les normes et les standards techniques) — toutes ces méthodes seront donc appliquées parallèlement et leur choix dépendra du domaine concret du droit et de la période d'adaptation.

Ce choix dépendra aussi indubitablement de l'orientation générale des transformations économiques et politiques en Europe. La recherche de ''l'unité dans la diversité" sera favorisée par le choix des méthodes de coordination promouvant des solu-

tions communes complémentaires ou alternatives des lois nationales. Par ailleurs, la reconnaissance réciproque de décisions, diplômes, certifats d'études, etc., peut s'avérer une bonne méthode de réalisation d'une Europe fondée sur le modèle fédératif — au cas où une telle vision de l'Europe future l'emporterait, nous serions tenus de conformer les dispositions juridiques polonaises au droit européen.

Les mesures systémiques et le choix des méthodes d'harmonisation déterminées, constituent le premier, et peut-être le plus important domaine d'adaptation du droit polonais au droit européen. Pour des raisons évidentes nos efforts en ce sens doivent être espacés dans le temps.

Indépendamment des mesures visant l'adaptation complexe du droit polonais au droit européen, des initiatives ont été prises (et sont en cours de réalisation) pour prévenir dès à présent les situations, où des regies contraires au droit européen ''pénétreraient" dans le droit polonais. Ces initiatives ont un caractère en quelque sorte préventif et ont été réglées par la résolution du Conseil des Ministères du 29 mars 1994, adoptée spécialement à cet effet. Ce texte confie au Délégué du Gouvernement pour l'Intégration Européenne et l'Aide Etrangère la mission de donner avis final sur la conformité des actes juridiques projetés par les différents ministres et le Conseil des Ministres avec le droit de l'Union de l'Europe. Cet avis est un élément important de la justification de chaque projet, it est précédé d'un avis dit préliminaire, formulé par les ministères responsables des projets déterminés. L'avis préliminaire doit préciser dans quelle mesure les règles envisagées ne sont pas conformes au droit européen, les raisons pour lesquelles ont été adoptées les solutions différentes des mesures européennes et les délais dans lesquels seront apportées des modifications conformes au droit européen. Les avis préliminaires relèvent de la compétence des unités chargées des questions relatives à l'intégration européenne, qui doivent être créées dans tous les ministères.

Le Délégué du Gouvernement est obligé d'émettre l'avis final. Aucun projet de règlement ou de loi ne peut être délibéré au Conseil des Ministres, si ses motifs ne contiennent pas l'avis final, qui a, pour le gouvernement, une valeur avant tout informative et auxiliaire. La décision définitive du gouvernement sur l'adoption ou le rejet d'un acte juridique ne doit donc pas nécessairement correspondre à cet avis. Cela affaiblit en quelque sens son rôle, mais, d'un autre côté, il est difficile d'imaginer que le Conseil des Ministres soit absolument lié par cet avis et agisse selon les suggestions du Délégué du Gouvernement.

Jusqu'à présent, le Délégué du Gouvernement a émis son avis sur plus de 250 projets d'actes juridiques de rang différent, dont environ 80 projets de lois. Cela témoigne de l'importance du problème mais en même temps permet d'imaginer la multitude de toutes sortes de difficultés (d'organisation, d'effectifs et financières) que rencontre le Délégué dans sa tâche quotidienne.

L'avis final du Délégué comporte trois parties. La première concerne toujours le droit européen et définit largement dans quelle mesure le projet concerné remplit ou ne remplit pas les normes du droit européen. C'est toujours une partie très développée,

qui se réfère à des règles communautaires concrètes. Elle décrit aussi les modifications à apporter pour que le projet soit conforme au droit européen.

La deuxième partie concerne la réalisation du Traité européen et précise dans quelle mesure l'acte projeté est, respectivement, conforme et contraire aux dispositions du Traité. Alors qu'il est possible que le Conseil des Ministres accepte un projet qui ne soit pas intégralement conforme au droit européen, en revanche, il est absolument impossible que le gouvernement adopte une règle contraire au Traité. Celui-ci, en effet, fait naître des obligations déterminées de droit international dont l'exécution ne saurait être sujette à discussion. En cas d'une contradiction des règles projetées avec le Traité européen, elles ne peuvent plus faire l'objet de la procédure législative, ce que l'avis final doit constater expressément.

La troisième partie concerne les conditions économiques de la mise en oeuvre des règles envisagées et les frais éventuels que le budget de l'Etat devrait supporter par suite de l'adoption de l'acte juridique concerné.

La procédure d'avis, et, en un certain sens, de contrôle de l'activité législative des différents ministères sous l'angle de sa conformité au droit et au Traité européens, ne concerne que les règles proposées par le gouvernement ou les ministres. Pendant de longs mois, les commissions parlementaires — législative et pour le Traité européen — ont débattu de la mise en place d'un mode d'examen semblable pour tous les projets d'actes juridiques soumis à la Diète par des agents autres que le gouvernement (députés, Sénat, Président de la République). Les propositions d'institution d'une procédure appropriée dans le règlement de la Diète ont déjà été élaborées par les commissions susmentionnées et atendent les décisions de la Diète. Ceci exige toutefois une préparation adéquate des services juridiques de la Diète, du Sénat et du Bureau (Chancellerie) du Président de la République aux tâches nouvelles (européennes).

L'organisation des travaux d'adaptation du droit polonais au droit européen, le déroulement de ces processus et le choix des méthodes et techniques déterminées dépendront autant des domaines concrets du droit que des circonstances accompagnant ce processus. Aussi, dès aujourd'hui faut-il admettre qu'ils devront être révisés à l'avenir. Il semble évident que ce processus doit être poursuivi avec souplesse et adapté aux objectifs partiels que les parties en présence se proposeront d'atteindre aux étapes successives. Un calendrier précis des travaux d'adaptation favoriserait considérablement une telle approche des tâches à accomplir. Le choix des voies et méthodes utiles en la matière dépendra dans une forte mesure de la manière dont la Pologne aura interprété le Traité européen et sa qualité de membre de l'Union. Il ne serait sans doute pas opportun de diviser ce processus en deux phases: celle de la réalisation proprement dite du Traité européen, où l'adaptation du droit polonais aux standards européens serait ponctuelle et parallèle au maintien durable des solutions nationales spécifiques, et une seconde — celle de l'adaptation complexe du droit polonais au droit européen. Si l'on considère le Traité européen comme un traité de préadhésion, il faudrait dès à présent passer à la seconde phase et prendre des mesu-

res d'unification complexe, notamment dans les domaines où elles sont poursuivies, et le seront dans un avenir prévisible, par les Etats membres de l'Union européenne.

Le Traité européen, en laissant à la Pologne le choix des méthodes d'adaptation, suscite aussi de nombreuses interrogations. Certaines d'entre elles présentent une importance capitale pour la réalisation pratique des processus d'adaptation. Le texte du Traité ne contient aucune directive quant à la profondeur des changements à opérer dans les différentes disciplines juridiques. Cette profondeur, il ne faut pas évidemment l'entendre à la lettre. Il s'agit, d'un côté, d'aboutir à un état comparable aux standards européens, tout en évitant de détruire le système du droit polonais et de rejeter, inutilement, les solutions nationales valables. D'un autre côté il s'agit aussi — et c'est là une indication politique plutôt que juridique — de ne pas jouer au-delà des besoins réels, un rôle de pionnier. Le Traité européen ne définit pas non plus la notion du minimum de concertation, par laquelle il faut entendre un tel degré d'adaptation du droit dans son ensemble, de ses différents domaines et des actes juridiques particuliers, au-dessous duquel il ne saurait être question de la mise en harmonie nécessaire du droit polonais et du droit européen. Il serait évidemment difficile de s'attendre à ce que cette notion soit explicitée dans le texte du Traité européen, même dans son sens général. Le critère du ''minimum de concertation" aura donc un caractère appréciatif.

Ces appréciations seronf formulées au Conseil et au Comité d'Association, ainsi qu'au Sous-Comité pour la mise en harmonie du droit. Les débats de ce Sous-Comité à la fin de septembre 1994 et en février 1995 ont confirmé la haute appréciation par les Communautés des efforts polonais en matière d'adaptation du droit, y compris des travaux organisationnels liés à ce processus. Une appréciation positive ont mérité les règles de notre droit concernant la concurrence déloyale, le droit d'auteur, le droit des brevets, le droit des transports et le droit des sociétés commerciales. Ces règles sont pleinement conformes aux dispositions du Traité européen et correspondent à celles du droit européen.

La Pologne se rend compte qu'elle n'en est qu'à ses débuts sur la longue voie d'adaptation. Nous savons que ce processus durera de longues années. Nous savons aussi que nous cherchons à rejoindre l'Union qui ne cesse de se développer — sur le plan juridique également. Pour cette raison précisément, les efforts d'adaptation actuellement déployés par la Pologne ne peuvent se borner à imiter ce qui existe, mais ils doivent aussi prendre en considération ce qui arrivera au sein de l'Union de l'Europe à l'avenir. Les processus d'adaptation entamés en Pologne sont notre affaire à nous, et c'est à nous qu'incombe la tâche de les mener à bonne fin. L'aide de l'Union en cette matière ne peut dépasser un cadre raisonnable. Ce sont là des processus fort complexes et difficiles, mais irréversibles.

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LA RÉGLEMENTATION JURIDIQUE DES SOCIÉTÉS COMMERCIALES EN POLOGNE

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I. Remarques générales

Le droit des sociétés commerciales en Pologne est toujours régi par le Code de Commerce de 1934 (désigné dans le texte qui suit par le sigle CC).

Imité du droit allemand et fondé sur le système subjectif (c'est-à-dire ayant pour objet les rapports juridiques d'une catégorie donnée de sujets: commerçants et commerçants enregistrés), le CC de 1934 reste toujours un acte juridique relativement moderne, déterminant l'organisation et les principes d'activité des sociétés commerciales.

A la lumière de l'art. 5, § 1 du CC, toute société commerciale, même une société anonyme ne dirigeant pas une entreprise (qui ne doit pas nécessairement être constituée en vue d'un but économique), est toujours commerçant enregistré, ce qui veut dire qu'elle est tenue de se faire immatriculer au registre du commerce et de révéler un certain nombre d'informations concernant ses statuts, qu'elle est sousmise à la juridiction du tribunal d'enregistrement, qu'elle a droit à la protection de dénomination (raison) sociale, qu'elle peut donner procuration, etc.

Aux termes de l'art. 5, § 2 du CC sont sociétés commerciales les sociétés en nom collectif, les sociétés en commandite, les sociétés à responsabilité limitée et les sociétés par actions (anonymes). Les deux premières sont des sociétés de personnes, tandis que la société par actions est par excellence une société de capitaux. La société à responsabilité limitée, bien qu'elle soit indubitablement une société de capitaux, comporte d'importants éléments personnels.

Les sociétés à responsabilité limitée et les sociétés par actions peuvent également revêtir la forme de société unipersonnelle. Dans le cas d'une société par actions, l'associé unique peut être soit le Trésor, soit la commune (ou union de communes), en tant qu'unité administrative d'autogestion locale.

Le contrat de société en commandite ou de société à responsabilité limitée et les statuts d'une société par actions peuvent ''façonner" le type fondamental de chacune

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de ces formes de la société commerciale, en lui conférant davantage le caractère d'une société de personnes ou de capitaux. Ainsi, dans une société par commandite, peut être commandité (celui qui répond indéfiniment des dettes sociales) une société à responsabilité limitée ou une société anonyme. Dans le cas d'une société à responsabilité limitée ou d'une société anonyme, le contrat (les statuts) peut définir les rapports des associés avec la société strictement en fonction du capital (les obligations des associés se bornent en principe aux apports en numéraire ou autres), prévoir la participation personnelle des associés à la gestion de la société ou un apport de travail à l'entreprise qu'elle dirige, définir leurs obligations supplémentaires en matière de coopération avec la société, etc. Cela concerne notamment la société à responsabilité limitée, qui peut être organisée — en fonction des modalités adoptées de réalisation du but économique commun et de la volonté des associés — soit selon le modèle de la société anonyme, avec une limitation sensible des droits des sociétaires relatifs à l'administration de l'entreprise dirigée par la société, soit comme une société en nom collectif. Dans ce dernier cas, les associés, en règle générale, sont employés dans la société et la gèrent eux-mêmes. Cependant, si l'on confère à la société à responsabilité limitée le caractère d'une société de capitaux, le contrat de société (de même que les statuts de la société anonyme) définit généralement les rapports à l'intérieur de la société de telle façon que, pratiquement, les différents associés sont écartés de la gestion, voire privés de la faculté de contrôle individuel de ses activités (art. 206, § 3 du CC). En raison de cette souplesse de la forme juridique qu'elle peut revêtir, la société à responsabilité limitée jouit d'une très grande popularité. Selon les données de l'Office Général des Statistiques, au 30 juin 1994 étaient enregistrées en Pologne (système REGON) environ 90.000 sociétés commerciales, dont plus de 85.000 sociétés à responsabilité limitée et environ 3.500 sociétés anonymes. L'on sait cependant que les données de l'Office Général des Statistiques n'englobent pas toutes les sociétés commerciales existant en Pologne, par exemple les sociétés déjà fondées mais en attente d'immatriculation ou celles qui n'ont pas encore entrepris d'activité économique.

Dans la réalité polonaise les sociétés commerciales deviennent peu à peu la forme juridique dominante de gestion des grandes et moyennes entreprises de fabrication, commerciales ou de prestation de services. Ce processus s'accélère avec la transformation des entreprises d'Etat en sociétés avec participation du Trésor, la fondation de sociétés dites de travailleurs, lesquelles reprennent à bail ou sous forme de leasing les moyens de production des anciennes entreprises d'Etat, et aussi avec la création des sociétés à responsabilité limitée ou anonymes avec participation du capital étranger. D'importants établissements artisanaux également sont assez fréquemment transformés en sociétés à responsabilité limitée, souvent unipersonnelles.

II. Les institutions communes aux sociétés commerciales

1. *Le contrat de société (acte de fondation)*

Le contrat de société est une institution fondamentale du droit des sociétés, et non seulement des sociétés commerciales. Cependant, à côté du contrat, un acte de volonté d'une seule personne peut aussi servir de fondement à la constitution d'une société à responsabilité limitée ou anonyme. De là l'opinion toujours plus répandue dans la littérature juridique, polonaise également, que la société, en particulier la société de capitaux, n'est pas tant un rapport juridique contractuel que, plutôt, une structure durable de droit privé, une institution particulière de cette branche du droit (bien que le droit des sociétés commerciales comprenne non seulement des normes du droit privé mais aussi du droit administratif et pénal). La société à responsabilité limitée et la société anonyme acquièrent la personnalité morale dès leur immatriculation au registre du commerce. Cette inscription a un caractère constructif. La société en nom collectif et la société en commandite sont des personnes morales ''imparfaites", car elles peuvent acquérir en leur propre nom des droits et contracter des obligations, agir ou être citées en justice (art. 81 et 144 du CC).

Le contrat de société en nom collectif doit être passé par écrit (art. 77 du CC). Celui de fondation de sociétés en commandite, à responsabilité limitée ou anonyme doit être passé sous forme d'acte notarié — v. les art. 145, 162 § 1 et 308 du CC.

En droit des sociétés est en vigueur le principe du *numerus clausus* des formes de sociétés. Seule donc peut être légalement constituée une société expressément prévue par les dispositions juridiques.

Le contrat de société — ou acte de fondation — doit indiquer avant tout le but de la société (dans le cas des sociétés en nom collectif et à responsabilité limitée ce but doit être nécessairement économique, tandis que dans celui de la société anonyme ce peut être n'importe quel but légal), son champ d'activité — appelé ''objet de l'entreprise" (en dépit des dispositions du CC, il s'agit seulement du champ d'activité défini et délimité par les associés), la désignation des associés, la raison sociale et le siège de la société.

Le contrat devrait définir aussi les apports des associés à la société, et dans le cas des sociétés de capitaux — les actions ou les parts sociales attribuées aux associés contre leurs apports.

2. *Les apports et les parts sociales*

Les apports des accociés doivent avoir toujours une valeur économique déterminée. Il s'agit généralement des droits partimoniaux, comme la propriété, les droits sur les biens immatériels, les créances, etc. Mais ce peut être aussi une valeur qui ne soit pas un droit patrimonial, par exemple le savoir-faire technique ou commercial, etc. Dans le cas de la société en nom collectif ou en commandite les apports peuvent aussi prendre la forme des services ou plus exactement des créances en prestation de services déterminés, assurés par l'associé.

On distingue généralement deux formes d'apports: en propriété et en jouissance. Les apports se divisent en apports en numéraire (pièces et billets polonais) ou en nature. Ces derniers peuvent consister en droit de propriété (ou d'usage) d'un bien matériel ou en un autre droit patrimonial, par exemple sous forme de créances.

En contrepartie de leurs apports les associés reçoivent des parts: ils ''prennent possession" des parts sociales dans une société à responsabilité, et des actions dans une société anonyme (actionnaires). Les parts sociales dans les sociétés de personnes (en nom collectif ou en commandite) ont un caractère tout à fait différent que les parts ou actions dans les sociétés de capitaux. Ces dernières peuvent être librement cédées ou mises en gage, à moins que le contrat ou les statuts (société anonyme) ne prévoient des restrictions à cet égard.

Par la notion de ''part" on entend avant tout l'ensemble des attributions de l'associé, qui déterminent ses droits et compétences au sein de la société. Elle recouvre aussi les obligations légales pesant sur l'associé.

3. *Le registre du commerce*

L'organisation du registre du commerce, les conditions de fond (juridico-matérielles) relatives à l'immatriculation, ainsi que les règles de procédure formelle sont définies par les art. 13 - 25 du CC, les dispositions spéciales de ce Code concernant les différentes sociétés commerciales et celles du décret du ministre de la Justice du 1er juillet 1934 concernant le registre du commerce. Les registres sont tenus par les sections appropriées des tribunaux économiques, lesquelles constituent des unités d'organisation des tribunaux locaux dans les villes ou siègent les organes départementaux (de voïvodie) du pouvoir et de l'administration de l'Etat.

Le registre du commerce se compose de trois parties (A, B, C), et pour chacune d'elles est tenu un livre distinct. Dans la partie A sont inscrites les sociétés en nom collectif et les sociétés en commandite, dans la partie B — les sociétés à responsabilité limitée et les sociétés anonymes. Dans la partie C on immatriculait primitivement les sociétés de capitaux étrangères, autorisées à exercer leur activité en Pologne, et actuellement elle est réservée aux entreprises internationales constituées en vertu de dispositions spéciales.

Chaque société commerciale est immatriculée au registre sous un numéro consécutif dans la partie concernée. D'autre part on tient pour chaque société un dossier contenant les pièces de justification de l'immatriculation, la correspondance judiciaire, etc.

Le registre du commerce et les pièces annexées sont publiés (art. 13, § 2 du CC). Les données à inscrire doivent être déclarées dans les deux semaines à compter du moment où est apparu le fait soumis à être inscrit (art. 17, § 1 du CC). Le registre et les pièces peuvent être consultés par tout individu sous la surveillance d'un huissier. La personne intéressée peut en demander des copies et des extraits authentiques.

Les tiers ne peuvent se prévaloir de l'ignorance des données enregistrées, à moins qu'ils ne prouvent qu'ils ne pouvaient les connaître (art. 23, § 1 du CC). Lorsque

ces tiers agissent de bonne foi, la société commerciale ne peut leur opposer le grief que les données inscrites conformément à sa déclaration ne sont pas vraies. Elle ne peut le faire lors même que ces données auraient été en contradiction avec la déclaration ou inscrites sans déclaration, si elle avait négligé d'agir en rectification ou en radiation de l'inscription erronnée (art. 24 du CC).

4. *Le nom social*

La dénomination sociale (pour la société en nom collectif et société en commendite — la raison sociale) c'est la dénomination sous laquelle le commerçant (société commerciale) dirige son entreprise. Le commerçant peut agir et être cité en justice sous son nom social — art. 26 du CC.

Le nom social remplit une fonction d'identification et de publicité. Il présente parfois une valeur patrimoniale considérable. La dénomination sociale ne peut toutefois être cédée que conjointement avec l'entreprise (art. 34 du CC).

Aux termes de l'art. 35, § 1 du CC, toute nouvelle raison ou dénomination sociale doit se distinguer suffisamment des autres raisons ou dénominations sociales dans la même localité, immatriculées ou déclarées au registre du commerce. Les dispositions de la loi sur la lutte contre la concurrence déloyale qui vont plus loin à cet égard, demeurent en vigueur (art. 35, § 1 du CC).

La pratique économique a établi les principes suivants du droit de la dénomination ou raison sociale:

1) le principe de véracité — la dénomination ou raison sociale doit être conforme à l'état de fait et l'état de droit, elle ne peut donc induire les tiers en erreur sur un quelconque élément essentiel de la société (par exemple sur son entreprise, dont son genre ou l'objet d'activité, etc.);

2) le principe d'unicité — la société commerciale peut utiliser une seule dénomination ou raison sociale; pour une succursale, le nom peut être suivi d'un complément indiquant les liens avec la maison mère;

3) le principe de continuité — la dénomination ou raison sociale peut être reprise dans des criconstances déterminées (art. 32, § 1 et 33, § 1 du CC);

4) le principe de publicité — le nom social doit être accessible à toute personne intéressée, aussi faut-il le déclarer au registre du commerce et porter à la connaissance du public, entre autres en l'affichant au siège de la société, en l'indiquant dans le cachet de la société, etc.;

5) le principe d'exclusivité — v. plus haut.

De la dénomination ou raison sociale, telle que la définissent les articles 26 - 38 du CC, il faut distinguer les différentes dénominations et désignations d'agents économiques (et d'autres personnes), qui ne sont pas sociétés commerciales. Ces dénominations et désignations ne bénéficient pas de la protection dont jouit le nom social en vertu de dispositions du CC.

5. *La ''prokura"*

La réglementation generale du mandat en droit civil (dans le Code civil) s'avère en règle générale insuffisante pour les besoins des transactions commerciales, puisque, assez fréquemment, des doutes peuvent surgir sur l'étendue de la procuration ou sur sa validité au moment de la transaction. De là la nécessité d'une procuration dont l'étendue serait définie par la loi. C'est le cas de la ''prokura" prévue par le CC (art. 60 - 65), qui autorise à accomplir tous les actes judiciaires et extrajudiciaires liés à la direction d'une quelconque entreprise lucrative. Sa limitation est inopposable aux tiers. Aux termes de l'art. 61, § 2 du CC, une procuration expresse supplémentaire est requise seulement pour céder l'entreprise, la donner à bail ou instituer sur elle le droit d'usufruit, ainsi que pour vendre ou grever un immeuble.

La ''prokura" peut être donnée à une ou plusieurs personnes, séparément ou conjointement et peut être révoquée à tout moment. Le décès du commerçant ou la perte de la capacité d'exercice n'entraînent pas l'extinction de cette ''prokura". En revanche, elle s'éteint dès la publication de la faillite du commerçant. L'institution et l'extinction de la ''prokura" doivent être déclarées au registre du commerce.

Dans une société en nom collectif, l'institution de la ''prokura" exige le consentement de tous les associés habilités à diriger les affaires de la société (art. 95 du CC). Dans une société en commandite le droit de donner procuration appartient aux commandités, selon les règles analogues à celles de la société anonyme. Dans une société à responsabilité limitée, il faut le consentement de tous les membres du conseil d'administration. Dans les cas évoqués ci-dessus le droit de révoquer la procuration appartient à chacun des associés mentionnés et à chacun des membres du conseil d'administration (SARL). Dans une société anonyme, c'est le conseil d'administration qui donne et révoque la procuration.

En tenant compte des dispositions des articles 95- 109 du Code civil sur la représentation, il y a lieu de reconnaître que la ''prokura" commerciale donne le plus de droits au fondé de pouvoirs, dont les compétences dépassent l'étandue de la procuration générale. Le fondé de pouvoirs est également autorisé à donner procuration en vertu des dispositions du Code civil, mais il ne peut constituer d'autres fondés de pouvoirs (art. 63 du CC).

III. Les différents types de sociétés commerciales

7. *La société en nom collectif*

L'on sait que la forme actuelle de la société en nom collectif remonte au Moyen Age, où elle constituait une forme de gestion du ménage. On la rencontre déjà au XIIIe siècle en Italie (societas fratrum). En France elle est réglée par dispositions légales d'abord sous le nom de société générale (en 1673) et prend sa dénomination actuelle dans le Code de Commerce de 1807. En Allemagne, elle est réglée en 1861, sous le nom de Offene Gesellschaft.

Aux termes de l'art. 75, § 1 du CC, est société en nom collectif la société qui dirige au nom collectif une entreprise lucrative importante, sans être une autre société commerciale. Elle possède les caractéristiques essentielles d'une société civile. Mais il s'agit exclusivement des sociétés (présentant les traits caractéristiques d'une société civile) qui: 1° dirigent une entreprise "de grandes dimensions", et 2° dirigent cette entreprise "au nom collectif". La société en nom collectif diffère de la société civile surtout par le fait qu'elle peut participer aux échanges en son propre nom, comme si elle était une personne morale, car aux termes de l'art. 81 du CC elle ''peut acquérir des droits et contracter des obligations, agir et être citée en justice". Aussi l'appelle-t-on parfois ''personne morale imparfaite".

Tous les associés d'une société en nom collectif sont gérants et représentants légaux. La limitation de ce droit n'est pas opposable aux tiers. Une restriction contractuelle ou résultant d'une décision des associés ne produit d'effet qu'à l'intérieur de la société, elle n'a pas d'impact sur la validité d'un contrat passé par la société avec un tiers.

Les décisions qui exigent une résolution des associés sont prises à l'unanimité (art. 96 du CC). Les décisions dépassant l'administration ordinaire exigent le consentement de tous les associés, y compris ceux qui sont exclus de la gestion de la société (art. 97 du CC).

Chaque associé a droit à une part égale dans les bénéfices et contribue solidairement aux pertes, quels que soient le genre et le montant de son apport (art. 105, § 1 du CC). L'associé qui n'a apporté que son travail, ne contribue pas, en cas de doutes, aux pertes. Aux termes du contrat l'on peut exempter aussi d'autres associés de la contribution aux pertes.

A l'égard des créanciers, chaque associé d'une société en nom collectif répond indéfiniment, solidairement avec les autres associés et la société (art. 85 du CC).

Le patrimoine commun des associés d'une société en nom collectif constitue une communauté conjointe. Les parts des différents associés ne peuvent pas être cédées, ni fixées en pour cent ou fractions (v. cependant l'art. 120 du CC). Ces parts ont un caractère tout à fait différent de celui des parts des associés d'une société à responsabilité limitée (v. ci-après, point 5). Pour cette raison, la composition personnelle d'une société en nom collectif est en principe stable, et son changement nécessite en règle générale une modification du contrat de société (pour les dérogations à ce principe v. les art. 114-115, 118, § 2 et 119 du CC).

2. La société en commandite.

La société en commandite — qui a poui trait caractéristique fondamental que l'un des participants d'une entreprise commerciale (commendator) réalise seulement un apport de fonds, tandis que l'autre (tractator) gère les affaires de la société et répond de ses obligations — est née au Moyen Age comme une variété de la société en nom collectif. Elle s'est répandue notamment dans les pays du bassin méditerranéen (Italie, France), où l'on observait à l'époque un développement vigoureux du corn-

merce maritime, ensuite terrestre, et aussi de toutes sortes d'opérations financières et monétaires.

La réglementation de la société en commandite par les articles 143 - 157 du CC reproduit assez fidèlement les dispositions du Code de Commerce allemand de 1897. Dans une société en commandite nous avons obligatoirement deux sortes d'associés: au moins un commanditaire qui n'est tenu des obligations de la société qu'à concurrence du montant de la commandite déclarée, et au moins un commandité, tenu intégralement des obligations de la société, mais ayant en règle générale le droit exclusif de gérer la société et de la représenter.

La société en commandite diffère de la société tacite (qui pour la plupart des cas n'est pas une société commerciale) avant tout par ce que: 1° le commanditaire, à la différence de l'associé tacite, n'apporte généralement pas de capitaux réels mais une garantie, c'est-à-dire qu'il garantit à concurrence d'une somme déterminée (commandite) le réglement des engagements de la société, ce qui permet en règle générale de contracter des crédits ou des emprunts auprès des tiers; 2° le commanditaire dont le nom est toujours rendu public (art. 146 du CC) jouit des droits déterminés (art. 154 - 155 du CC). Le contrat de société peut en outre prévoir tant le droit que l'obligation du commanditaire de gérer les affaires de la société. On peut évidemment convenir que le comanditaire sera tenu de faire un apport de numéraire ou en nature d'une valeur déterminée, en lui attribuant la position de quasi-propriétaire de la société. Le commandité devient alors directeur exécutif, chargé d'affaires courantes (mais non stratégiques) de la société, de son administration, etc. Dans ce cas, la responsabilité illimitée du commandité des obligations de la société n'a guère d'importance, car le patrimoine du commandité n'est point comparable avec le chiffre d'affaires d'une société en commandite constituée selon le mode ''capitaliste". Il devient à vrai dire un agent salarié de la société.

Il peut y avoir des sociétés en commandite — et elles sont assez fréquentes dans la pratique — où le commandité est une société à responsabilité limitée ou une société anonyme. Dans ce cas le commandité, théoriquement répondant indéfiniment des engagements de la société, verra sa responsabilité limitée à la valeur du patrimoine réel de la société à responsabilité limitée ou anonyme.

Il convient de signaler à ce propos la technique, utilisée par le CC (art. 144), de ''renvoi" à ses dispositions sur la société en nom collectif. Cette même manière de régler certaines questions, on la retrouve aussi à l'art. 497, concernant la transformation de la société à responsabilité limitée en société anonyme.

Il importe de souligner que la société en commandite, absente pendant près de 28 ans du droit polonais, a été restituée par la loi du 31 août 1991 (Journal des Lois n° 94, texte 418) à partir du 4 novembre 1991. Rappelons que l'art. VI, al. 1 de la loi de 1964, introduisant le Code civil, avait maintenu en vigueur seulement les dispositions du Code de commerce concernant les sociétés en nom collectif, à responsabilité limitée et par actions. Il semble que la société en commandite avait mérité disgrâce aux yeux du législateur socialiste à cause de son caractère excessivement capitaliste. Pour la même raison sans doute on avait liquidé la société tacite.

3. La société à responsabilité limitée

C'est la forme de la société commerciale historiquement la plus jeune. Elle est née à la fin du XIX siècle (1892), en Allemagne, comme un sous-type simplifié (déformalisé) de la société par actions, d'application facile et peu coûteuse. La société à responsabilité limitée, formellement une société de capitaux, est souvent considérée comme une forme mixte (intermédiaire), à mi-chemin entre les sociétés de personnes et la société anonyme, qui est par excellence une société de capitaux. De plus, étant donné la grande souplesse des dispositions régissant son organisation et son fonctionnement, elle se laisse facilement ''façonner", par contrat d'associés, soit comme une société de capitaux pure et simple, soit comme une société de personnes (ou presque). Il est évident que le contrat des associés ne peut priver la société à responsabilité limitée de la personnalité morale qu'elle acquiert dès son immatriculation au registre du commerce; il existe donc des limites infranchissables qui ne permettent pas de la transformer en une société de personnes pure et simple.

La procédure de constitution d'une société à responsabilité limitée comprend plusieurs étapes. La première c'est la signature de l'acte notarié concernant la conclusion du contrat de société. C'est le moment de la fondation de la société à responsabilité limitée. L'élection du conseil d'administration, l'apport des capittaux et la demande d'immatriculation constituent les étapes suivantes. L'acte final c'est l'immatriculation au registre du commerce en vertu de la décision du tribunal d'enregistrement. Dès ce moment, prend naissance la société à responsabilité limitée comme personne morale.

En dépit des doutes parfois fomulés, la société à responsabilité limitée existe légalement depuis sa fondation (la conclusion du contrat de société) en tant que société à responsabilité limitée en formation (Vorgesellschaft). Les personnes qui, pendant cette période, ont agi au nom de la société, sont tenues personnellement et solidairement des actes accomplis.

La majorité des dispositions du CC sur la société à responsabilité limitée sont absolument obligatoires (ius cogens). Ces dispositions exigent la forme notariée pour le contrat de société, la modification de ce contrat, la déclaration d'un nouvel associé sur son adhésion à la société (art. 256 du CC) ainsi que pour la résolution des associés sur la dissolution de la société. Le minimum du capital social est actuellement fixé à 40 millions de zlotys, et celui d'une part à 500 mille zlotys. Les résolutions sont adoptées à l'assemblée des associés. Elles peuvent être prises sans tenir une assemblée, si tous les associés consentent par écrit à la décision à prendre ou au vote par correspondance.

Le montant du capital social indiqué dans le contrat de société auquel correspond, à l'actif, la valeur globale des apports, est indiqué au jour de la conclusion du contrat de société.

Le capital social est divisé en parts égales ou inégales. Le contrat de société indique si l'associé peut avoir une part ou plus. S'il peut en avoir plusieurs, toutes les parts doivent être égales (d'un montant égal) et indivisibles.

Le capital social c'est la somme des valeurs des parts de tous les associés. Il définit indirectement — comme dénominateur de la fraction dont le numérateur indique la valeur des parts de l'associé — l'étendue des pouvoirs des différents associés. Pour cette raison, le montant du capital social, adopté dans le contrat de société, présente une importance non seulement pour fixer la valeur primitive, au moment de la constitution de la société, des biens de la société (notamment quand il y a des apports en numéraire), mais aussi pour définir (compte tenu du nombre des parts et de leur montant) l'étendue des droits appartenant aux associés. Il s'agit aussi bien de droits aux bénéfices que, avant tout, de l'étendue des ''pouvoirs", c'est-à-dire de la possibilité d'exercer une influence sur les décisions prises sous forme de résolutions par l'assemblée des associés.

Dans une société à responsabilité limitée enregistrée, les droits de parts sociales, ayant le caractère majeur de créance, ressemblent aussi, dans une forte mesure, aux droits de propriété. Ils n'ont pas, à dire vrai, le caractère juridique d'une copropriété en parts fractionnaires, mais y ressemblent sensiblement. Cependant, comme les droits de parts naissent par suite de la conclusion du contrat de société et concernent directement cette société, ils portent aussi les traits propres aux droits d'obligation. Il en est du reste pareillement avec les droits "de propriété" des actionnaires dans une société anonyme, autrement dit avec les actions. La différence consiste avant tout en ce que ces droits "de propriété" dans une société anonyme — les actions — sont incorporés aux titres portant le même nom d'actions, tandis que les droits de parts dans une société à responsabilité limitée existent indépendamment de tout document, par exemple des certificats de part, qui ne font que confirmer les parts, si bien que pour la transmission d'une part on n'a pas besoin de document, ni même qu'il ait existé auparavant ou qu'il faille en rédiger un après la cession de parts.

Dans la pratique, le montant et le nombre des parts jouent pour la définition des droits de l'associé, soit du nombre de voix à l'assemblée des associés, compte tenu aussi bien du *quorum* requis pour l'adoption des résolutions valables que de la majorité exigée pour cette adoption. Ces facteurs ont aussi leur importance pour la définition du taux de participation aux bénéfices. Les règles suivantes sont à suivre en cette matière:

1) Les associés ont droit au bénéfice net résultant du bilan annuel, si le contrat de société ne soustrait pas les bénéfices nets au partage.

2) Le contrat peut prévoir que la société ne pourra disposer des bénéfices qu'en vertu d'une résolution des associés. Dans ce cas, les associés peuvent fixer, pour le partage des bénéfices, des critères autres que le montant et le nombre de parts et le réaliser, par exemple, en fonction de la valeur globale du capital engagé par l'associé, c'est-à-dire de sa part dans le capital social augmenté du montant du prêt qu'il a accordé à la société ou du crédit obtenu à des conditions avantageuses, ou encore en fonction de sa contribution personnelle à la réalisation des bénéfices par la société, etc.

3) A moins de stipulation contraire du contrat de société, les bénéfices revenant aux associés sont partagés proportionnellement à leurs parts (art. 191 du CC).

Le CC ne contient pas de définition légale de la société à responsabilité limitée. On peut toutefois la définir comme une société commerciale à structure corporative, jouissant de la personnalité morale, disposant d'un capital social divisé en parts et tenue des obligations exclusivement sur ses biens. Elle peut être constituée uniquement dans un but économique (art. 158, al. 1 du CC).

Aux termes de l'art. 159, § 3 du CC, les associés ne sont pas tenus personnellement des obligations de la société. Une question à part reste celle de la responsabilité réparatrice ou de la responsabilité spéciale, encourue en vertu de l'art. 290 du CC ou bien, par exemple, par suite de la garantie donnée, de la constitution de gage ou d'hypothèque, etc. La responsabilité naît alors en relation avec des circonstances exceptionnelles (art. 290 du CC) ou avec les actes juridiques d'un ou de plusieurs associés, entièrement distincts du contrat de société ou de la déclaration contenue dans l'acte de fondation d'une société unipersonnelle à responsabilité limitée.

Il convient toutefois de remarquer que récemment, la loi du 6 mars 1993 changeant certaines lois concernant les règles fiscales et d'autres lois (Journal des Lois — J. des L. — n° 28, texte 127) a modifié l'art. 47 de la loi du 19 décembre 1980 sur les obligations fiscales (J. des L. n° 27, texte 111 avec amendements ultérieurs) et actuellement les associés d'une société à responsabilité limitée sont tenus sur tous leurs biens des obligations fiscales de la société, proportionnellement à leur droit au partage des bénéfices. Cette disposition est universellement critiquée et il semble qu'elle a un caractère temporaire.

Par principe donc, les associés ne sont tenus, a aucun titre, des obligations de la société (art. 176 et 192 du CC, prévoyant dans certaines situations la responsabilité des associés, ne concerne pas les obligations de la société et l'art. 290 a un caractère de pénalité). Comme il en résulte, n'est pas juste l'opinion, assez fréquemment énoncée, selon laquelle les associés répondent à concurrence du montant de leurs parts ou du montant (valeur) de leurs apports (la valeur des apports d'un associé peut parfois dépasser sensiblement celle des parts dont il a pris possession). Certainement, dans la pratique il peut arriver que l'associé subisse la perte des valeurs ou objets apportés à la société, par exemple en cas de faillite, lorsque les biens de la société ne suffisent pas pour satisfaire à toutes ses obligations. Dans ce cas en effet il ne restera plus rien à partager entre les associés et ceux-ci ne recouvreront pas la valeur de leurs apports. Cela ne signifie aucunement que les associés soient tenus des obligations de la société. Ils peuvent sauver la société (v. p.ex. l'art. 264, § 2 et l'art. 278, § 2 du CC), lui accorder des prêts pour satisfaire ses créanciers, et ensuite, lorsque'elle aura déployé une nouvelle activité, effective et lucrative, récupérer les moyens financiers qu'ils avaient prêtés à la société et conserver intacte la valeur de leurs apports en numéraire et en nature (faits au moment de sa constitution). Mais là nous avons affaire à un problème de gestion et non à celui de la responsabilité des associés des engagements de la société.

La valeur des parts que les associés reçoivent en contrepartie de leurs apports de capitaux (en numéraire et en nature) figure au passif du bilan de la société; il ne

s'agit donc pas de sommes ''données" à la société. Ce sont des sommes à mettre dans les comptes et à récupérer par les associés en cas de dissolution de la société en situation normale. Pour cette raison, l'art. 253 du CC prévoit l'obligation pour le conseil d'administration de convoquer l'assemblée des associés, si le bilan dressé par le conseil d'administration fait apparaître des pertes excédant le capital de réserve et la moitié du capital social. C'est précisément en raison du danger réel de perte, pour les associés, de la valeur de leurs apports, qu'il faut convoquer l'assemblée générale extraordinaire des associés pour qu'ils prennent la décision concernant l'existence de la société à l'avenir.

En matière de la constitution d'une société à responsabilité limitée sont en vigueur les restrictions légales suivantes:

1) L'art. 158, al. 3 du CC, qui exclut la possibilité de fondation d'une société unipersonnelle à responsabilité limitée par une société unipersonnelle à responsabilité limitée.

2) Les art. 57 - 87^7 de la loi du 31 janvier 1989 sur le Droit bancaire (J. des L. n° 4, texte 21 avec amendements ultérieurs), qui excluent la possibilité d'ouvrir une banque sous forme de la société à responsabilité limitée.

3) L'art. 11 de la loi du 28 juillet 1990 sur les activités d'assurance (J. des L. n° 59, texte 344), qui autorise à exercer ces activités seulement les sociétés par actions et les sociétés d'assurances mutuelles).

4) L'art. 54 et suivants de la loi du 22 mars 1991 sur le Droit relatif au commerce de titres et les fonds fiduciaires (J. des L. n° 35, texte 155 avec amendements ultérieurs), qui prévoit que la société par actions est la seule forme admissible pour la bourse de valeurs mobilières.

5) L'art. 90 de la loi mentionnée sous 4), qui indique la société par actions comme la forme exclusive de constitution des fonds fiduciaires.

6) L'art. 3, al. 1 de la loi du 30 avril 1993 concernant les fonds nationaux d'investissement et leur privatisation (J. des L. n° 44, texte 202), qui prévoit que lesdits fonds sont créés par le Trésor sous forme de sociétés par actions; il en résulte que la forme de société à responsabilité limitée est exclue.

4. La société par actions

La société par actions (anonyme) doit son existence à la pratique économique. Ses origines sont à chercher dans les différentes formes juridiques de sociétés de capitaux du bas Moyen Age. C'est sous cette forme que fonctionnaient, au XVII^{e} siècle les grandes compagnies commerciales, fondées pour coloniser des pays d'outremer, notamment l'Amérique et l'Inde. Les plus anciennes d'entre elles — la Compagnie anglaise des Indes orientales, fondée en 1600, et la Compagnie hollandaise des Indes orientales créée en 1602 — avaient aussi un caractère de droit public. C'étaient de grandes corporations jouissant de la personnalité morale, dotées de droits souverains et dont la fondation exigeait une concession de la part du pouvoir d'Etat.

Au XVIII[e] siècle, ces sociétés portent leur intérêt à l'activité purement économique — au commerce maritime, à l'activité bancaire et d'assurances. La forme de la société par actions se développe rapidement, notamment en France. On voit apparaître des actions au porteur qui permettent d'effectuer des transactions rapides et informelles avec les droits de propriété sur ces sociétés.

La première moitié du XIX[e] siècle, c'est la période du système des concessions, où la fondation d'une société par actions exige l'autorisation des pouvoirs publics. La seconde moitié de ce siècle, c'est l'époque du libéralisme économique et le début d'un système normatif de fondation des sociétés par actions.

Les règles relatives à la société par actions sont définies par les articles 307 - 490 du CC, et les art. 491 - 497 concernent la transformation de la société par actions en société à responsabilité limitée, et inversement. On voit que le CC consacre à cette forme de société relativement le plus de dispositions. Cela résulte des méthodes assez compliquées de constitution de cette société et d'une réglementation détaillée des questions qui dans les autres formes de société sont laissées à la libre entente des associés.

Dans le Code de commerce de 1934 la Pologne a adopté un système normativo-concessif de fondation des sociétés par actions. En dépit du fait que la création de ces sociétés obéit, en principe, à un système normatif, la fondation d'une banque ou d'une société d'assurances exige la concession du ministre compétent, qui approuve aussi les statuts et leurs modifications (Art. 310 du CC).

Les sociétés par actions peuvent être fondées à toutes fins admises par la loi, donc non seulement à des fins économiques. En règle générale, elles sont fondées pour l'exploitation des grandes entreprises industrielles ou commerciales, des banques et des sociétés d'assurance. Elles permettent d'accumuler d'importants capitaux d'actionnaires anonymes (d'où la dénomination française: société anonyme), sous forme d'actions à valeur relativement peu élevée.

Le capital social dont le minimum s'élève actuellement à un milliard de zlotys (art. 311, § 1 du CC) est divisé en actions, nominatives ou au porteur. On peut émettre des actions privilégiées, qui doivent être strictement définies par les statuts. Notamment, les avantages particuliers peuvent concerner le droit de vote (jusqu'à 5 voix par actions), les dividendes (art. 359 du CC), l'attribution prioritaire d'actions nouvellement émises, le partage des biens en cas de liquidation de la société, etc.

La société par actions prend naissance à l'issue des déclarations concordantes de volonté d'au moins trois fondateurs de la société, sous forme d'acte notarié. Il faut que ces déclarations concernent: 1) la fondation de la société, ?.) les statuts, 3) la quantité et le genre d'actions dont prennent possession les différents actionnaires,
4) le prix d'action à l'émission, 5) le taux d'émission, 6) les délais de versement du prix d'actions. Le dossier concerné devrait aussi renfermer l'information sur l'élection du premier conseil d'administration et du conseil de surveillance (obligatoire).

La société par actions peut aussi être fondée par une seule personne (art. 308 du CC). Le rôle du fondateur unique peut être rempli par le Trésor, la commune ou l'union de communes.

Le mode de creation d'une société anonyme indiqué ci-dessus est qualifié de constitution conjointe ou simultanée et ressemble beaucoup à la fondation d'une société à responsabilité limitée (art. 313-315 du CC).

Un autre mode de création d'une société par actions est la fondation dite successive, c'est-à-dire par souscription publique, réglée de façon détaillée par les articles 316 - 328 du CC. Dans ce second cas, les règles obligatoires sont les suivantes:

1. Les statuts de la société doivent être préalablement publiés (art. 316).
2. Avant la publication d'appels à la souscription, les fondateurs doivent déposer auprès d'un tribunal une caution représentant un vingtième du capital social (art. 317).
3. Dans la publication d'avis de souscription il faut indiquer les données définies à l'art. 318, § 1, 1° - 9° du CC. L'avis doit citer les décisions concernant les apports de numéraire, de biens et de droits patrimoniaux acquis avant l'enregistrement de la société, ainsi que les autres données indiquées à l'art. 318, § 2, 1°- 3° du CC.
4. Les souscriptions d'actions se font conformément à l'art. 319 du CC. Les déclarations de souscription et les versements peuvent être reçus seulement par la Banque Nationale de Pologne, les autres banques d'Etat et les banques autorisées à cet effet par le ministre des Finances. Le délai de souscription ne peut excéder 3 mois à compter du jour d'ouverture de la souscription.
5. En cas de non-versement d'une fraction périodique de la somme souscrite, exigible avant l'enregistrement de la société, les fondateurs peuvent considérer la souscription comme éteinte par suite de l'expiration du délai. Les versements effectués ne sont pas remboursés et reviennent à la société, tandis que les actions concernées peuvent être reprises par d'autres souscripteurs (art. 320 du CC).
6. Les fondateurs attribuent les actions aux souscripteurs dans les deux semaines après la clôture de la souscription, si toutes les actions sont souscrites et dûment payées (si cette condition n'est pas remplie, la société n'est pas constituée).
7. La première assemblée générale des actionnaires est convoquée, par un avis unique, dans les deux mois qui suivent la clôture de la souscription. Deux semaines avant la date de l'assemblée, les actionnaires peuvent consulter le rapport des fondateurs et les avis des commissaires aux comptes (art. 324).
8. L'asemblée précitée constate la prise en possession de toutes les actions et le paiement des sommes dues; elle élit les premiers conseils d'administration et de surveillance (art. 327).
9. Le conseil d'administration communique au tribunal d'enregistrement la constitution de la société par actions en vue de son immatriculation au registre du commerce (art. 329).
10. A dater de son immatriculation au registre du commerce la société acquiert la personnalité morale.

L'associé qui fait des apports de numéraire ne peut verser, avant l'enregistrement de la société, qu'un quart de la valeur de ses actions (à moins que les statuts n'en décident autrement). Celui qui réalise des apports en nature doit le faire intégralement.

Une nouvelle émission d'actions peut être effectuée seulement après le versement intégral du capital social initial (art. 432, § 2).

Le conseil d'administration est élu par l'assemblée générale au scrutin secret. Les statuts peuvent prévoir un autre mode de désignation du conseil d'administration ou de ses membres.

Le premier conseil d'administration peut être élu pour deux ans au maximum, et les membres des conseils d'administration suivants — pour trois ans au maximum.

Le conseil de surveillance, composé d'au moins cinq membres, est désigné par l'assemblée générale, sauf stipulation contraire des statuts. Les membres du premier conseil de surveillance peuvent être nommés pour un an au maximum, ceux des conseils suivants — pour trois ans.

Pour des causes graves, le conseil de surveillance peut suspendre tous ou quelques-uns de membres du conseil d'administration. Elle peut aussi déléguer ses membres à l'exercice temporaire des fonctions des membres du conseil d'administration (art. 383).

Les articles 463 - 460 du CC définissent les règles et la procédure relatives à la fusion des sociétés par actions. Les articles 491 -497 règlent la procédure de transformation d'une société par actions en société à responsabilité limitée et inversement.

IV. Les dispositions introduisant le Code de Commerce et le décret sur le registre

Les dispositions du règlement du Président de la République du 27 juin 1939 introduisant le Code de Commerce ont aujourd'hui une signification plutôt historique. Le règlement comporte les 10 chapitres suivants:

Chap. I^{er} — Dispositions générales, qui contiennent la clause dérogatoire générale et qui abrogent le Code de Commerce de 1933 et les dispositions des règlements du Président de la République concernant les sociétés par actions et les sociétés à responsabilité limitée.

Chap. II - IV. — Dispositions spéciales destinées aux territoires où avaient été en vigueur: le Code de Commerce français (chap. II), le vol. XI, Ilème partie du Recueil russe de lois (chap. III), le Code de commerce français et le vol. XI, 2^{e} partie du Recueil russe des lois (chap. IV), le Code de Commerce autrichien (chap. V), le Code de Commerce allemand (chap. VI).

Chap. VII. — Dispositions transitoires, réglant notamment certaines questions concernant les sociétés par actions et les sociétés à responsabilité limitée, fondées avant l'entrée en vigueur du Code de Commerce.

Chap. VIII. — Dispositions temporaires concernant principalement le registre du commerce et établissant la surveillance des chambres d'industrie et de commerce sur la régularité des immatriculations au registre du commerce.

Chap. IX. — Modifiant les dispositions sur les droits de timbre.

Chap. X. — Confiant au ministre de l'Industrie et du Commerce, ainsi qu'au ministre de la de la Justice l'application des dispositions introduisant le Code de Commerce et précisant son entrée en vigueur au 1er juillet 1934.

Le décret sur le registre du commerce rendu le 1er juillet 1934 par le ministre de la Justice, de concert avec le ministre de l'Industrie et du Commerce, comprend 7 chapitres et contient les modèles de fichier d'enregistrement des parties A, B et C du registre. Les dispositions de son chapitre II, réglant la procédure relative à l'enregistrement, sont particulièrement importantes.

V. Les sociétés à participation du capital étranger

La Loi du 14 juin 1991 sur les Sociétés à participation étrangère (J. des L. n° 60, texte 253 avec amendements ultérieurs) se borne à définir les conditions d'admission des agents économiques étrangers à la participation aux revenus provenant de la gestion d'entreprises sur le territoire de la Pologne — v. art. 1er de la Loi.

Pour gérer des entreprises en Pologne les étrangers peuvent fonder uniquement des sociétés à responsabilité limitée ou sociétés par actions. La société en nom col lectif ou en commandite n'est donc pas admissible.

La loi susmentionnée établit le devoir d'obtenir, dans certaines situations et dans certains domaines d'activité, l'autorisation (art. 4) et règle autrement que le Code de Commerce certaines questions particulières, concernant les apports (art. 10 et 11) et les causes de dissolution de la société (art. 19, al. 3).

Lorsque les apports étrangers dépassent l'équivalent de 2 millions d'ECU et la société exerce son activité dans les régions menacées d'un chômage élevé, utilise de nouvelles technologies ou encore au moins 20 p.cent de ses ventes proviennent des exportations de marchandises et de services, une telle société peut être exemptée de l'impôt sur le revenu (art. 23).

Les associés étrangers ont le droit de transférer les revenus de leur société à l'étranger, sans avoir à obtenir une autorisation de transfert de devises (art. 25 et 26). Le transfert à l'étranger des rémunérations des employés de la société est réglé par l'art. 28.

La loi précitée a abrogé la loi du 23 décembre 1988 sur l'activité économique à participation des agents économiques étrangers (J. des L. n° 41, texte 325 avec amendements ultérieurs). Signalons que l'art, 51 de la loi du 23 décembre 1988 sur l'activité économique (J. des L. n° 41, texte 324 avec amendements ultérieurs) a maintenu en vigueur les dispositions antérieures concernant les représentations des personnes morales ou physiques étrangères, rendues en vertu de la loi du 18 juillet 1974 sur l'exercice du commerce et de certains autres genres d'activité par les unités de l'économie non socialisée (texte unique J. des L. 1983, n° 3, texte 11 avec amendements ultérieurs).

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PROMOTION ET RÉGLEMENTATION DE LA CRÉATION DES POSSIBILITÉS D'EMPLOI EN POLOGNE*

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1. A l'époque du socialisme réel, c'est le principe du plein emploi qui était en vigueur: il fallait assurer l'emploi à toutes les personnes qui le désiraient et qui étaient capables de travailler. Par malheur, ce plein emploi n'était pas toujours rationnel; ses avantages économiques, ainsi que le contenement et le profit des salariés, étaient souvent douteux. En réalité, il y avait un suremploi qui prenait la forme d'un chômage dissimulé. Selon de différentes évaluations, on estime que dans les années 80 ce type de chômage concernait de 20 à 25% des employés.

Dans la premèire moite de 1989, les transformations politiques et sociales fondamentales mettant fin au régime socialiste avaient boulversé l'ancien ordre sur le marché du travail. Le phénomène du chômage s'était manifesté et avait vite pris une ampleur importante.

Ce phénomène allait croissant surtout durant les deux premières années de la réforme économique. Le taux de chômage montait de 0,3% (55,8 mille personnes) en janvier 1990 à 3,1% (568 mille) vers la moitié de la même année et jusqu'à 6,1% (1.126,1 mille) de la population active à la fin de 1990. Dans le courant de 1991, le nombre de chômeurs a presque doublé, en atteignant 11,4% (2.155,6 mille) en fin de décembre.

En 1992, l'accroissement du chômage était trois fois moindre qu'au cours des deux années précédentes. Au 31 décembre de cette année-là, le taux de chômage s'élevait à 13,9% (2.509,3 mille) de la population active. Cette tendance s'est poursuivie en 1993 où, en juin, le chômage a atteint 14,8% (2.701,8 mille) et 15,7% de la population active (2.889,6 mille) en fin de décembre.

Il y avait trois causes principales qui déterminaient cette situation sur le marché du travail en Pologne: un récession économique, une rationalisation de l'emploi et les processus structurels. Le rôle qu'a joué chacune d'entre elles dans la généralisation du chômage variait selon les phases de la transformation de la réalité polonaise, Un saut-record du chômage, enregistré dans la première phase de cette transformation,

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était lié surtout à une récession économique générale. Déjà dans le premier trimestre de 1990, il y avait une grande chute de productivité: de plus de 25% par rapport au premier trimestre de 1989. Une inadaptation de la production aux besoins actuels, les technologies dépassées et le manque d'éléments concurrentiels par rapport aux produits étrangers ont été mis en évidence. Cette récession résultait aussi de la perte du marché traditionnel de l'industrie polonaise, à savoir celui de l'ancienne URSS.

Une autre source du chômage, qui jouait un rôle important dans la première période de transformation, c'était la réduction de l'emploi non-effectif. Cependant, cette réduction rencontrait de grands obstacles. Certaines entreprises d'Etat, ne prenant pas au sérieux la transformation engagée et se faisant guider par des raisons sociales, ne saisissaient pas l'opportunité créée par la réforme pour licencier les effectifs superflus. La meilleure preuve en est que la chute de la production était plus importante que la baisse de l'emploi. Il en découle que la situation sur le marché du travail aurait été beaucoup plus grave, si l'on avait réduit les effectifs superflus d'une façon plus conséquente.

Par contre, dans cette période initiale le chômage n'était que très secondairement lié à la restructuration de l'économie nationale. Cette relation ne commence qu'à avoir de l'i importance à l'heure actuelle, où la restructuration contribue à la croissance du chômage.

Les relations entre les ''effets" respectifs des causes évoquées ci-dessus dans l'ensemble du chômage variaient et elles changent toujours. Actuellement, il n'en compte que deux: le processus de restructuration de l'économie nationale et la rationalisation de l'emploi. Il est difficile d'apprécier laquelle des deux l'emporte sur l'autre. Dans un proche avenir, les processus de restructuration vont jouer sans doute un rôle primordial; en cette occurence, on peut s'attendre au chômage technologique. Toutefois, il faut remarquer que l'emploi excessif dans le secteur public se maintient toujours à un niveau relativement élevé. On estime que les entreprises de ce secteur ''cachent" encore 1.500 mille chômeurs au moins. L'élimination de ce chômage dissimulé peut durer jusqu'à l'an 2000.

2. En Pologne, le poids du chômage tel quel et les risques sociaux inhérents sont renforcés par une grande différenciation de ces phénomènes. Ils touchent davantage certains groupes sociaux et certaines régions du pays que d'autres. Cette remarque concerne avant tout les jeunes gens dont le pourcentage dans la population des chômeurs est assez élevé. Selon les données de la fin de 1992, 35% des chômeurs étaient des gens de moins de 24 ans. Le taux de chômage parmi les jeunes entre 18 et 24 ans représantait à l'éoque presque 28%, soit le double du taux de chômage général. Cette situation continuait aussi en 1993. En septembre, l'indice de chômage pour cette tranche d'âge par rapport au nombre général de chômeurs n'a crû que de 0,3% et à la même proportion (0,3%) à la fin de l'année.

Une autre catégorie de la population particulièrement touchée par le chômage ce sont les femmes, qui représentent, presque depuis le début de la transformation, la majorité des chômeurs. Malheureusement, la participation des femmes dans le nom-

bre général de chômeurs continue à grandir. En fin de 1990, elle représentait 50,9%, en décembre 1991 — 52% et en fin de 1992 — 53,4%. En 1993, cet indice se maintenait au même niveau, légèrement supérieur à 53%.

Cette image sombre de la situation des femmes est d'autant plus dramatique qu'elles sont visiblement majoritaires parmi les chômeurs de longue durée, c-à-d. de plus de 12 mois. Dans cette catégorie des chômeurs, la part des femmes s'élève à plus de 58%. Ajoutons aussi que les femmes sont plus souvent privées du droit à l'allocation de chômage (34,2%) que les hommes (27,6%).

Les handicapés constituent un autre groupe à risque élevé de rester sans emploi. Nous ne disposons pas de statistiques qui définissent le taux de chômage parmi les hadicapés aptes à travailler, mais les chiffres qui illustrent la part des handicapés dans le nombre général de chômeurs en disent long. Cette part est considérable et elle va croissant; en fin de décembre 1991, les handicapés constituaient 1% des chômeurs, en fin de 1992 — 1,3% et à la fin de 1993 — 1,5% du total des chômeurs.

La complexité du chômage en Pologne se traduit aussi dans la différenciation territoriale de ce phénomène. Le taux moyen de chômage dans le pays étant inférieur à 16%, il y a des voïvodies où il est doublé. Sur 49 voïvodies, on en trouve 13 où le taux de chômage dépasse 20% et seulement 4 où il est inférieur à 10%.

Cette différenciation ne rend pas exactement compte de l'importance du problème. Les voïvodies ne constituent pas des marchés de travail intégraux. Dans plusieurs d'entre elles le taux de chômage diffère sensiblement d'un endroit à l'autre. Il y a des communes et des villes où le nombre de chômeurs est proche du nombre de travailleurs. Et ce ne sont pas seulement les différences économiques (présence de l'industrie, du secteur tertiaire) qui en sont la cause. La raison principale c'est la pénurie de logements, qui entrave la mobilité de la main d'oeuvre et qui rend impossible les changements d'emplois dans un délai raisonnable.

Un autre trait caractéristique du chômage en Pologne, qui influe sur les menaces qui en résultent, c'est la grande dimension du chômage à moyen terme — de 6 à 12 mois — et du chômage prolongé, qui dépasse 12 mois et qui doit être considéré comme la forme la plus choquante et la plus pathologique de chômage. On sait qu'il est extrêmement frustrant et qu'il entraîne souvent chez l'individu une perte de capacité à travailler. Ses conséquences économiques et sociales sont donc très graves. Selon les données pour la fin de 1993, le pourcentage des chômeurs à moyen terme était de 22,9%, et à long terme — 44,8%.

Le chômage de longue durée comporte encore un élément qui fait grandir son impact social. A savoir, les dispositions en vigueur stipulent que les personnes qui restent sans emploi pendant une période dépassant douze mois perdent le droit à l'allocation de chômage. Les exceptions à cette règle sont très rares. Ces chômeurs, si les moyens de survie leur font défaut, peuvent solliciter des prestations d'assistance sociale. Mais l'obtention de ces prestations est incertaine, leur montant est inférieur à celui de l'allocation de chômage et la procédure formelle est humiliante pour les prestataires.

Pour en terminer avec la caractéristique du chômage en Pologne, il faudrait ajouter encore quelques mots sur sa répartition sectorielle dans l'économie nationale. Il s'agit des secteurs d'activité dans lesquels les chômeurs travaillaient juste avant de perdre leur emploi. L'industrie est la première à générer le chômage: en premier lieu viennent de grandes entreprises industrielles représentant les branches traditionnelles en déclin, qui exigent une restructuration ou une liquidation. En fin de 1993, les personnes licenciées par les entreprises industrielles représentaient 30,9% de la population globale de chômeurs. Vient ensuite le commerce où 16,8% des chômeurs actuels ont perdu l'emploi. Le bâtiment et la construction occupe la troisième position dans ces statistiques avec 12,2% de la participation dans le volume global du chômage.

Bien que la présentation de cette structure du chômage par secteurs d'activité du dernier emploi soit très sommaire, elle fait tout de même ressortir un trait atypique de ce phénomène en Pologne. Une partie importante de chômeurs n'a aucune chance de trouver un emploi qui réponde à leur formation professionnelle. Ceci concerne avant tout ceux qui travaillaient dans les branches industrielles en voie de disparition. En confrontant cette constatation avec la faiblesse générale du système de formation pour les chômeurs en Pologne, qui n'est pas suffisamment développé et ne permet pas aux chômeurs une reconversion professionnelle rapide en fonction des besoins courants du marché du travail, on touche à l'aspect fondamental de la problématique du chômage structurel dans notre pays.

3-4. Les auteurs de la réforme économique réalisée depuis le début de 1990 supposaient l'apparition du chômage, mais ils avaient sous-estimé l'étendue de ce phénomène et formulaient des prognostics assez optimistes. Selon la première loi relative au chômage (la loi sur l'emploi du 29 Décembre 1989. J. des L. N^{o} 75, texte 446) tout chômeur avait droit à l'allocation de chômage, indépendamment de la durée de son emploi précédent. De plus, ce droit n'était pas limité dans le temps. La loi ne se prononçait d'une façon relativement exhaustive que sur les moyens de lutte contre la perte de l'emploi et sur les facilités offertes aux chômeurs pour trouver un nouvel emploi.

Un tel libéralisme du droit à l'allocation de chômage était l'une des causes d'une véritable explosion du chômage déjà dans la première phase de la réforme. On estime que dans la première moitié de 1990, de nombreux chômeurs qui touchaient leur allocation de chômage, n'étaient pas du tout intéressés à trouver un emploi quelconque. Cette erreur évidente du législateur, ainsi que d'autres défauts de la loi du 29 décembre 1989 étaient à l'origine du vote d'une autre loi, à savoir celle du 16 octobre 1991 sur l'emploi et sur le chômage (J. des L. N^{o} 106, texte 457). Cette nouvelle loi, fait dépendre le droit à l'allocation de chômage de la durée minimale de 180 jours d'emploi du chômeur durant les 12 mois précédant son inscription et elle limite à 12 mois la période au cours de laquelle l'allocation est versée. Néanmoins, ce qui est plus intéressant pour nous ici, la loi prévoit un évantail plus large de moyens

stimulant les chômeurs à obtenir un emploi. Ce système comprend les options suivantes:

1) permettre aux chômeurs de suivre les cours de formations en vue d'apprentissage d'un savoir-faire nouveau ou d'une reconversion professionnelle,

2) organiser les travaux d'intervention et les travaux publics pour les chômeurs,

3) accorder des crédits aux entreprises qui créent des emplois nouveaux pour les chômeurs,

4) accorder des prêts aux chômeurs qui veulent créer leur propre entreprise.

Les composants particuliers de ce système sont financés, intégralement ou dans une majeure partie, du Fonds du Travail dont les moyens proviennent des cotisations d'employeurs et des subventions d'Etat. Le système de formation professionnelle destiné aux chômeurs est gratuit aussi pour les chômeurs qui n'ont pas droit à l'allocation de chômage. Ceux qui remplissent les conditions requises touchent une allocation de formation pendant la période d'apprentissage; celle-ci est supérieure à l'allocation de chômage ordinaire. Il faut encore ajouter que la formation professionnelle est accessible aussi aux salariés qui sont en période de préavis donné par l'employeur.

L'emploi réalisé dans le cadre des travaux d'intervention, des travaux publics ou aux ''postes de travail supplémentaires" ne signifie pas, bien sûr, que l'on cesse d'être chômeur; il ne fait qu'interrompre la période d'inactivité de la personne privée de travail. Cependant, cet emploi, mis à part les travaux publics, peut se transformer en un emploi stable. La loi prévoit même des solutions financières avantageuses permettant à l'employeur de transformer un emploi intérimaire en un emploi permanent.

Il faut souligner que les moyens de mobilité professionnelle évoqués ci-dessus ne sont opérationnels que lorsqu'on ne peut pas assurer au chômeur un ''travail convenable". Il est à remarquer que ces moyens sont liés au droit à l'allocation de chômage. Lorsque le chômeur refuse sans motif apparent de suivre une formation ou d'accepter un emploi substitutif, il perd le droit à l'allocation de chômage.

L'efficacité de ces outils est assez limitée. La mauvaise situation économique générale, notamment l'insuffisance des moyens financiers, en est la raison principale. A cela s'ajoutent d'autres barrières: juridiques, organisationnelles, ainsi que psychologiques. Le lien mental avec la formation acquise est une cause importante de l'impopularité de diverses formes de formation. Par exemple, en 1993, les agences d'emploi ont recommandé à 72,7 mille personnes des stages de formation, soit en vue d'apprentissage d'un nouveau savoir-faire, soit en vue d'une reconversion professionnelle. En fin de décembre, il n'y avait que 11 mille personnes qui participaient à ces formes de formation. Au 31 décembre 1993,48,3 mille chômeurs travaillaient dans le cadre des travaux d'intervention et 23,6 mille dans celui des travaux publics (rappelons ici que le nombre général de chômeurs en décembre 1993 était de 2.889.601 personnes).

Les moyens de promotion de l'emploi des handicapés rélèvent d'un régime à part, en vertu de la loi sur l'emploi et la réadaptation professionnelle des personnes

handicapées du 9 mai 1991 (J. des L. № 46, texte 21). Elle met un accent particulier sur la réadaptation professionnelle qui, outre la formation professionnelle proprement dite, en tenant également compte de l'aptitude générale au travail de la personne concernée, ainsi que de ses capacités d'acquérir une autonomie physique et psychique. Le Fonds National pour la Réadaptation des Personnes Handicapées soutient les actions engagées en vue d'une réadaptation ainsi conçue.

Une autre solution qui mérite d'être soulignée dans ce contexte c'est l'obligation imposée aux entreprises, dont les effectifs dépassent 50 personnes, d'employer 6% des handicapés. L'employeur peut ne pas respecter cette obligation, mais dans ce cas il doit payer une cotisation mensuelle d'un montant fixé par la loi, au profit du Fonds National pour la Réadaptation des Personnes Handicapées.

Depuis la mise en oeuvre de la réforme économique en 1990 jusqu'à 1993, on n'a pas créé en Pologne de programme national global, qui ait pour objectif primordial de lutter contre le chômage et qui soit orienté sur la création de nouvelles possibilités d'emploi. Plusieurs éléments ont contribué à cet état des choses et nous en avons indiqué quelques-uns: les prognostics erronnés quant à l'échelle du chômage et de ses effets sociaux, quant à la durée et l'étendue de la crise économique.

Si le gouvernement a entrepris quelques efforts en ce sens, ils consistaient généralement à conseiller aux autorités locales d'élaborer des programmes régionaux de la lutte contre le chômage, qui devaient faire partie des programmes régionaux de restructuration économique. Néanmoins, les autorités à l'échelle des voïvodies avaient toute la libéré de décider si, où, quand et dans quelle mesure elles allaient mettre de telles initiatives en oeuvre. A présent, nous ne disposons d'aucune information sur les résultats de ces démarches, ce qui peut justifier la constatation que ces résultats font défaut.

En 1993 seulement, le Ministère du Travail et de la Politique Sociale a élaboré un programme global de la lutte contre le chômage. Ce programme, ayant un caractère directif, fait partie des principes de la politique sociale et économique du gouvernement à réaliser en 1994. Comme le Ministre du Travail et de la Politique Sociale de la coalition gouvernementale actuelle a déclaré qu'il réaliserait le programme de son prédécesseur, il faut croire que ce document n'a pas perdu d'actualité.

Il précise quatre objectifs principaux auxquels doivent être assujettis toutes les démarches:

— créer des emplois,
— rendre le marché du travail plus dynamique,
— rendre le système de la protection sociale plus performant,
— intégrer les activités de tous les sujets présents sur le marché du travail.

L'accent principal dans le programme visant la création des possibilités d'emploi est mis sur la stimulation d'une reprise économique à travers, entre autres, l'accroissement des investissements, des exportations et la diminution des coûts de revient. Cette reprise suppose quelques instruments économiques qui la favorisent: les allègements fiscaux liés à cette partie du bénéfice qui est réinvestie, le taux d'intérêts préférentiel des crédits destinés aux investissements, la promotion des expor-

tâtions (par les allégements fiscaux entre autres) et l'appui donné par l'Etat aux PME/PMI.

On accorde aussi une attention particulière au développement du bâtiment d'habitation. La réalisation du programme gouvernemental dans ce domaine assurera l'emploi à des centaines de milliers de chômeurs et stimulera aussi un accroissement de l'emploi dans une partie importante de l'industrie et dans le secteur tertiaire. Le développement du bâtiment doit favoriser aussi une plus grande mobilité de la main d'oeuvre.

Le marché du travail doit être dynamisé par une extension et une meilleure exploitation des outils de promotion que prévoit la loi sur l'emploi et le chômage. Il s'agit des services d'orientation professionnelle, des stages de formation qui améliorent les aptitudes professionnelles déjà acquises et celles qui favorisent une reconversion des travailleurs, c-à-d. de cet ensemble d'instruments qui sert à rendre plus compatible la structure du chômage et les emplois disponibles. Il s'agit aussi des différentes formes de l'emploi substitutif des chômeurs, qui leur permettent de soutenir une activité professionnelle, c-à-d. des travaux publics, des travaux d'intervention et des nouveaux postes de travail destinés surtout aux personnes privées d'emploi depuis longtemps. Cette partie du programme prévoit aussi une extension des fonctions des offices de l'emploi, dont l'activité, jusqu'ici, se limite presque au paiement de l'allocation de chômage.

Nous devons souligner que le programme gouvernemental comporte aussi des actions détaillées, adressées aux groupes sociaux particuliers, qui sont plus menacés par le chômage et ses effets que d'autres. Ces programmes concernent les jeunes chômeurs et les diplômés, les chômeurs qui restent longtemps sans emploi, les handicapés, les femmes au chômage, les personnes licenciées dans le cadre des licenciements collectifs liés à la restructuration sectorielle et les chômeurs dans les régions au taux de chômage élevé.

Les auteurs du programme partent du principe que l'efficacité de la lutte contre le chômage exige une action intégrale à tous les niveaux et qu'une coopération entre tous les acteurs présents sur le marché du travail: organes et institutions d'Etat, syndicats, agents et organisations économiques, est indispensable.

En même temps que le programme gouvernemental, un programme d'auteur de la lutte contre le chômage a été élaboré par le professeur M. Kabaj. Ce programme a été très apprécié par l'Institut du Travail et des Affaires Sociales, qui est une unité de recherche agréée auprès du gouvernement. Il a obtenu une recommendation de nombreux membres du Conseil chargé de la politique sociale, organe consultatif du Président de la République de Pologne.

Ce programme est aussi intégral. Il présente en même temps une approche micro- et macroéconomique du problème du chômage, en le considérant sur le plan social et économique. Cependant, les solutions proposées ne présentent pas d'alternatives à part entière par rapport au programme gouvernemental. Les deux programmes convergent sur plusieurs points. La différence essentielle consiste dans l'approche du phénomène de l'inflation. Le programme gouvernemental fait

étroitement lier la lutte contre le chômage à la lutte contre l'inflation. D'où l'évaluation de tous les outils à travers leur impact possible sur l'inflation. Le programme d'auteur, au contraire, paraît faire subordonner la problématique de l'inflation à la réduction du chômage, considéré comme un fléau bien plus grave au sens économique et social.

Bien que le programme du professeur Kabaj n'ait pas de force obligatoire, il peut exercer quand même une influence sur la réalisation du programme gouvernemental.

La présentation des programmes pour la création des possibilités d'emplois ne peut négliger ni les initiatives, ni les actions entreprises par divers organismes extra-gouvernementaux. Ce sont, peut-on dire, des mini-programmes qui se limitent à une seule ou à plusieurs activités ponctuelles. A titre d'exemple je ne cite ci-après que quelques-uns des projets dans ce domaine:

1) Banque d'initiatives Socio-Economiques (Bank Inicjatyw Społeczno-Ekonomicznych). Son devoir statutaire est de porter l'assistance aux initiatives économiques qui visent la création de nouveaux emplois. Cette Banque accorde des crédits preferentiels surtout à de petites entreprises dans les régions particulièrement menacées par le chômage.

2) Fondation pour les Initatives Socio-Economiques (Fundacja Inicjatyw Społeczno-Ekonomicznych) ayant ses filiales dans plusieurs voïevodies. Son objet social est de mobiliser économiquement les collectivités locales et d'organiser les stages de formation professionnelle.

3) Fondation Economique du syndicat ''Solidarité" (Fundacja Gospodarcza ''Solidarności"). Son objectif est d'aider les chômeurs, membres du syndicat ''Solidarność" à entreprendre une activité économique indépendante. Elle le réalise en organisant des cycles de formation pour les futurs chefs des PME/PMI et en accordant des crédits aux conditions avantageuses. Elle organise aussi des stages de formation qui permettent aux participants de perfectionner leur savoir-faire professionnel ou de se reconvertir.

On réalise aussi des programmes spéciaux en vue de favoriser la création de nouveaux emplois avec le concours des organisations et institutions internationales. Le programme ''PHARE" n'en est qu'un exemple. Son objectif est de stimuler le développement du secteur des petites entreprises. Un autre exemple, c'est le programme de la création de petites entreprises par les personnes ou chômage, financé avec le crédit de la Banque mondiale. On peut citer encore le programme britannique ''KNOW-HOW", qui soutient les activités des bureaux d'emploi.

Nous ne pouvons pas évaluer l'importance de ces différents types de mini-programmes en tenant compte uniquement du nombre d'emplois créés, qui reste proba blement. très faible. Mais leur importance c'est aussi le fait d'introduire de nouvelles solutions, inconnues jusqu'ici en Pologne et mieux adaptées à la réalité économique du marché du travail en mutation.

5. En Pologne, on n'a pas recouru, jusqu'à présent, à la réduction du temps de travail pour atténuer les effets du chômage élevé. Depuis plusieurs années, la norme

de 42 heures de travail par semaine et de 8 heures par jour est en vigueur. De surcroît, elle est souvent dépassée, notamment dans de petites entreprises privées. Il en découle que la durée du travail présente une réserve importante, qui peut être utilisée pour diminuer les effets du chômage. Le programme gouvernemental de la lutte contre le chômage en tient compte.

6. Depuis la mise en oeuvre de la réforme économique, on pratiquait largement un autre moyen de lutte contre le chômage: la retraite anticipée. Dans un premier temps, on permettait de bénéficier de cette forme de retraite aux salariés des entreprises d'Etat en liquidation. Les salariés pouvaient en profiter indépendemment de leur âge. Leur ancienneté seule était prise en considération: elle ne pouvait pas être inférieure à 40 (hommes) ou à 35 (femmes) ans. Peu de temps après, en vertu des dispositions en vigueur (Arrêté du Ministre du Travail et de la Politique Sociale du 26 janvier 1990), cette solution a été élargie sur tous les salariés licenciés pour motifs économiques. Ceci veut dire qu'elle concerne maintenant non seulement les licenciés des entreprises d'Etat en liquidation. Evidemment, le salarié licencié pour motifs économiques doit avoir l'ancienété évoquée ci-dessus.

Pour mieux illustrer cette solution, il faut dire que selon le régime général des retraites en vigueur en Pologne, le salarié acqiert le droit à la retraite à l'âge de 60 (femmes) et de 65 (hommes) ans et après avoir travaillé pendant 20 (femmes) et 25 (hommes) ans.

On estime qu'avant la fin de 1992, plus de 400 mille salariés ont profité de leur droit à la retraite anticipée, en libérant ainsi une part importante du marché du travail. En 1993, ce processus a sensiblement perdu d'intensité; avant la fin de cette année-là, on n'a accordé qu'environ 73 mille retraites.

Bien que le problème de la retraite anticipée, à cause des difficultés économiques, suscite de nombreuses controverses, cette solution persiste et le programme gouvernemental l'énumère parmi les outils disponibles qui doivent contribuer à la réduction du chômage. De plus, on propose d'introduire, pour atténuer les effets négatifs du chômage dans des régions menacées d'un chômage structurel particulièrement élevé, une allocation de pré-retraite pour les chômeurs; elle serait accordé selon un régime moins rigoureux que la retraite anticipée.

7-9. Les modalités contractuelles ayant pour but la création de nouveaux emplois et qui auraient une caractéristique spécifique sont encore absentes du système juridique polonais. En l'occurrence, nous ne pratiquons pas de contrats qui favoriseraient la formation dans l'entreprise, au début d'un emploi permanent en qualité de travailleur.

Le système d'apprentissage dans l'entreprise, destiné aux adolescents et prévu dans le code du travail, n'est pas générateur d'emplois directs, même si l'on conclue avec l'adolescent un contrat de travail en vue de la formation professionnelle, qui lui accorde le statut de travailleur. Un emploi ''normal" ne commence qu'après la période d'apprentissage et seulement dans le cas où l'adolescent reste dans l'entreprise.

La relation entre l'apprentissage et l'emploi qui peut en résulter dépend du genre de contrat d'apprentissage, conclu pour une durée déterminée ou pour une durée indéterminée. C'est l'employeur qui choisit le genre du contrat à signer, en fonction de ses propres besoins dans le domaine des effectifs. Conformément aux dispositions du code du travail de 1974 et du réglement d'application (arrêté du Conseil des Ministres du 12X1 1989: J. des L. de 1989, №56, texte 332), le contrat d'apprentissage à durée déterminée ne peut être conclu que dans le cas où le nombre des apprentis dépasse les besoins de l'employeur.

Bien qu'il n'y ait pas de disposition explicite dans ce domaine, on considère que l'employeur est tenu, la période de formation venue à son échéance, de continuer à employer l'apprenti qu'il formait en vertu d'un contrat de travail en vue de la formation professionnelle, conclu à durée indéterminée. S'il refuse de satisfaire à cette obligation, laquelle constitue un élément essentiel du contrat d'apprentissage à durée indéterminée, l'adolescent peut intenter une action en justice. Par contre, le contrat de travail en vue de la formation professionnelle conclu pour une durée déterminée ne fait naître aucune obligation du côté de l'employeur quant à sa relation juridique avec l'apprenti apres l'expiration de ce contrat.

On retrouve certains traits de ces modalités contractuelles dans le contrat d'emprunt aux termes duquel les offices d'emploi locaux peuvent accorder des prêts financiers aux entreprises qui s'obligent à créer de nouveaux emplois, destinés aux chômeurs. Ces prêts sont financés du Fonds du Travail et ils étaient déjà mentionnés dans le passage consacré aux moyens de lutte contre le chômage, prévus par la loi sur l'emploi et sur le chômage du 16 octobre 1991. Ils sont accordés aux conditions préférentielles et leur montant atteint vingt salaires moyens, ce qui correspond au coût ordinaire de l'organisation d'un poste de travail.

Bien que la loi sur l'emploi et le chômage n'utilise que le terme de *contrat d'emprunt,* il présente, à la fois, le caractère d'un contrat stipulant la création d'un (des) emploi(s) et d'un contrat d'embauche. L'employeur s'oblige à employer un chômeur au poste ainsi créé pendant, au minimum, vingt-quatre mois.

L'efficacité de ce moyen de lutte contre le chômage est très restreinte: en 1992, on n'a créé dans tout le pays que 1.700 emplois nouveaux, basés sur ce type de contrats. En 1993, ce nombre a doublé (3.430), mais cela ne modifie pas notre avis exprimé plus haut. La raison principale de cet état des choses c'est que les fonds alloués à cette activité restent très modestes. En 1992, on n'a destiné que 4,7% des moyens disponibles du Fonds du Travail à toutes les formes d'activisation des chômeurs; tout le reste a été absorbé par les allocations de chômage. En 1993, cette partie du Fonds du Travail a atteint, il est vrai, 10% mais elle représentait toujours une somme insignifiante.

Une construction juridique similaire est instituée par la loi précitée du 9 mai 1991 sur l'emploi et sur la réadaptation professionnelle des personnes handicapées. L'employeur qui organise de nouveaux emplois pour les chômeurs handicapés pendant, au minimum, une période de trois ans, peut bénéficier du remboursement des frais supportés pour la création de ces emplois, jusqu'à l'équivalent de trente salaires

moyens mensuels pour chaque nouveau poste. En cette occurence, il est remboursé par le Fonds National pour la Réadaptation des Personnes Handicapées. Outre cela, l'employeur peut bénéficier du remboursement des frais salariaux liés à l'emploi des handicapés, enregistrés chômeurs par les offices d'emploi. Cette récompense ne comprend que les salaires moyens payés pendant la période de dix-huit mois et les charges sociales associées.

Les effets pratiques de cette solution sont meilleurs que ceux de la solution prévue par la loi sur l'emploi et le chômage. Pourtant, au niveau national, ils restent toujours modestes: en 1993 on a créé ainsi 23.148 nouveaux emplois.

10. Les normes générales qui accorderaient des avantages et/ou facilités particulières en raison de la création de nouveaux emplois ou de la participation au programme favorisant l'emploi des chômeurs, font défaut dans le droit polonais. Certa ins droits avantageux sont liés soit à des initiatives définies, soit réservés aux entreprises agissant au profit des groupes sociaux particuliers, soit encore aux actions réalisées dans des régions au taux de chômage élevé. Ces avantages prennent le plus souvent la forme d'une réduction des impôts sur le revenu et sur les sociétés, mais leur importance réelle est assez restreinte parce que l'état des finances publiques ne permet pas une politique fiscale libérale.

Voici quelques exemples de ce type de droits. L'un d'entre eux c'est l'allègement de l'impôt sur le revenu, accordé à la personne physique qui assure la formation complète d'un apprenti. Le montant de l'allègement, qui varie en fonction de la duré de la formation, constitue l'équivalent de six ou neuf rémunérations minimales admises à l'échelle nationale pour la préparation professionnelle d'un apprenti. Il est majoré de 20% lorsqu'il s'agit d'un nombre plus important d'apprentis. Il est remajoré de 20% suivants, si l'activité économique est menée dans de petites localités au nombre d'habitants inférieur à 5.000 ou dans les régions reconnues menacées d'un chômage structurel élevé.

Chaque employeur menant ses activités dans une région reconnue menacée du chômage structurel élevé a le droit de déduire de son assiette imposable 50% des dépenses pour les investissements, au cas où ces investissements feraient accroître ses effectifs au cours de l'exercice d'un coefficient défini par les réglements (de 20% à 8% par rapport à l'emploi initial).

La mise en place d'une activité économique dans les régions à taux de chômage élevé constitue une opportunité pour les sociétés à capital étranger qui peuvent obtenir une exonération complète d'impôt sur les sociétés . Néanmoins, elles doivent remplir encore deux conditions: 1) l'apport du capital étranger doit dépasser 2 millions d'ECUS, 2) elles sont obligées soit d'introduire de nouvelles technologies, soit d'exporter au moins 20% du volume total de leurs ventes.

Divers avantages sont également accordés aux entreprises qui emploient les personnes handicapés. Outre les bénéfices dont il a déjà été question, elles ont droit à l'allègement du régime de l'impôt sur les sociétés ou sur le revenu, dont l'importance varie en fonction du nombre des handicapés par rapport aux autres travailleurs. Si

leur nombre dépasse 50% des effectifs, l'entreprise ne paie pas d'impôt sur les sociétés/revenu. En plus, la rémunération des personnes handicapées n'est pas soumise à l'impôt spécial sur l'augmentation exagérée des salaires, qui a été introduit en tant qu'outil antiinflationniste. Le troisième droit de cette catégorie, c'est la réduction des cotisations d'assurance. Dans le cas des handicapés qui sont des invalides du I^{er} ou du II^{e} groupe d'invalidité, les cotisations sont abaissées de moitié par rapport aux charges normales.

Les unités économiques occupant 20 travailleurs au moins, lesquelles, compte tenu d'un nombre élevé d'handicapés employés (40 pour-cent au minimum) et d'autres conditions prévues par la loi, sont reconnues entreprises dites *de travail protégé,* bénéficient des avantages encore plus importants. A titre d'exemple, nous pouvons préciser qu'elles ont l'obligation de ne payer que 5% de la cotisation d'assurance ordinaire pour chaque handicapé employé. Elles ont également de plus grandes facilités pour accéder aux lignes de crédits bancaires, car le Fonds National pour la Réadaptation des Personnes Handicapées peut leur financer jusqu'à 50% de la valeur totale des intérêts.

11. En Pologne, la problématique juridique du chômage et de toutes les formes d'activité en vue de la création des possibilités d'emploi est régie par les normes légales, c-à-d. dans le droit qui est statué par l'Etat. Les conventions collectives de travail n'y jouent aucun rôle. A présent, on ne conclut plus de conventions collectives de travail. Le système du droit conventionnel qui, du point de vue formel, reste toujours en vigueur, est né dans la période du socialisme réel et il n'est pas compatible avec la réalité d'aujourd'hui. Le projet du nouveau droit conventionnel, qui remplacera le régime ancien, est déjà prêt et nous attendons son adoption par le Parlement.

12. L'impossibilité de conclure les conventions collectives de travail fait sensiblement rétrécir l'espace d'action potentiel des partenaires sociaux en vue de l'élargissement du marché du travail. Malheureusement, ceux-ci ne manifestent pas d'activité suffisante dans les domaines où ils pourraient agir déjà de manière efficace, surtout dans celui de la formation professionnelle. Cette remarque concerne en particulier les employeurs et ses syndicats. Il paraît que ces derniers ne sont pas encore assez mûrs pour se rendre compte qu'ils doivent participer plus activement à l'organisation de différentes formes de formation professionnelle des travailleurs. Et cela non seulement pour des raisons purement sociales, mais aussi dans l'intérêt économique de leurs entreprises. Néanmoins, il est vrai aussi que la solution de ce problème rencontre également des obstacles liés au financement: les entrepreneurs qui mettraient volontiers en place ces activités de formation n'ont pas souvent de moyens matériels suffisants.

Les syndicats de travailleurs se montrent un peu plus engagés dans l'organisation des activités de formation et d'autres initiatives qui facilitent l'emploi des chômeurs. Le syndicat ''Solidarité", par exemple, développe un système d'actions diverses, vi-

sant des groupes précis de chômeurs. Les effets de ces activités à l'échelle nationale restent pourtant très faibles.

13. Nous pouvons affirmer que c'est l'essor des petites entreprises pivées qui contribue d'une manière essentielle à freiner la croissance du chômage. Sans la prolifération des petites entreprises, créatrices de nouveaux emplois, le nombre de chômeurs aurait sans doute été beaucoup plus considérable.

Les chiffres en disent long sur la dynamique du développement de ce secteur. S'il est vrai que les données disponibles comprennent également des entreprises moyennes, il faut souligner que leur participation à ce développement est minime (de l'ordre de quelques pour cents). On estime que les effectifs des 90% des entreprises privées ne dépassent pas 10 personnes. Ce sont souvent les entreprises familliales qui, au fur et à mesure de leur développement, commencent à embaucher les tiers.

A la fin de 1990, il y avait déjà 1.135.000 entreprises privées et en fin de décembre 1992 elles étaient au nombre de 1.630.000. Au 30 juin 1993, il y avait 1.689.063 agents économiques. A présent, leur nombre dépasse toujours le seuil de 1.600.000. On estime que tout le secteur privé, dominé par de petites entreprises, emploie presque la moitié des salariés.

Les formes par lesquelles on soutient le développement de ce secteur sont très diverses. Comme nous l'avons déjà remarqué, telle est la mission de certains organismes extragouvernementaux, supportés souvent par les moyens financiers d'origine étrangère. Parmi les formes qui sont prévues par la loi, il faut mentionner les crédits préférentiels, accordés aux chômeurs qui veulent créer leurs propres entreprises. Ils reçoivent des prêts du Fonds du Travail, conformément à la loi sur l'emploi et le chômage. Ces prêts sont accordés pour la période de quatre ans à un taux d'intérêts préférentiel et leur montant atteint vingt salaires moyens pour un nouveau poste de travail. La somme empruntée peut être annulée jusqu'à 50% de sa valeur, sous réserve que l'intéressé maintient son activité économique pendant deux ans.

Une possibilité analogue est prévue aussi par la loi sur l'emploi et la réadaptation professionnelle des personnes handicapées. L'intéressé qui veut entreprendre sa propre activité économique peut bénéficier d'un prêt financier représentant l'équivalent de vingt-cinq salaires mensuels. Le taux d'intérêts et la période de remboursement sont définis dans le contrat. Le montant de ce prêt, tout comme dans le cas précédant, peut être annulé jusqu'à 50%, sous condition que le bénéficiaire mène son activité pendant deux ans.

Dans ce contexte, il faut également prendre en considération les prêts accordés dans le cadre de l'assistance sociale, conformément à la loi sur l'assistance sociale du 29 novembre 1990 (J. des L. 1990, N° 84, texte 87). Cette loi stipule que les communes peuvent accorder l'aide financière aux individus ou aux familles pour les encourager à devenir économiquement indépendants. Cette aide consiste dans l'octroi d'un prêt financier pour l'achat des machines et des outils indispensables pour l'organisation de sa propre entreprise, lequel peut être intégralement annulé.

Contrairement aux apparences que créent le nombre impressionant de petites entreprises, les prestations sous forme de prêts, accordés des fonds spéciaux ci-dessus mentionnés, ainsi que les crédits bancaires et d'autres moyens disponibles dans le cadre de différents programmes, ne contribuent que d'une façon très réduite à la création de nouveaux emplois par le biais de la création de petites entreprises. En 1993, par exemple, le Fonds du Travail a accordé 8.300 prêts financiers et le Fonds National pour la Réadaptation Professionnelle des Personnes Handicapées 2.024 aux chômeurs qui voulaient entreprendre leur propre activité économique. En ce qui concerne les causes possibles de cette situation, il faut remarquer que le Fonds du Travail a mis à la disposition des chômeurs des moyens très modestes, et dans le cas des handicapés, qu'il leur est très difficile d'organiser leur propre société. L'évaluation actuelle du secteur de petites entreprises en Pologne ne peut nullement ignorer ses origines. La chute de l'ancien régime a donné une impulsion suffisante pour que des centaines de milliers de personnes se mettent à mener des activités économiques pour leur compte personnel; elles s'appuyaient sur leurs propres invention, savoir-faire, enthousiasme et ressources économiques.

14. La période récente démontre l'accroissement de la participation du capital étranger dans la création de nouveaux emplois. Ce capital est présent sous forme d'entreprises du type joint-ventures (agents polonais associés aux agents étrangers) ou de sociétés étrangères. Dans la première phase de la réforme, l'arrivée de ce capital était très lente, car la Pologne comptait parmi les pays à risque élevé. Au fur et à mesure de la stabilisation, tant politique qu'économique, les entrepreneurs étrangers montrent de plus en plus de confiance à l'égard de notre pays. Les chiffres sont très éloquents à cet égard: en fin de 1991 il y avait 4.796 sociétés; en 1992, il y en avait déjà 10. 131 et en fin de 1993, elles étaient au nombre de 15.053. Pour la plupart des cas il s'agit des entreprises moyennes dont les effectifs atteignent de 100 à 500 salariés, qui assurent des postes de travail à une partie importante de la population active en Pologne.

15. Les entreprises à participation unique du capital étranger, comme celles où ce capital représentait au moins 20%, ont obtenu des conditions fiscales très préférentielles quant à l'impôt sur les sociétés. Les entreprises de ce type, créées depuis 1989 jusqu'à la moitié de 1991, étaient de plein droit exonérées de cet impôt pour trois ans (la loi du 23 décembre 1988, J. des L. N^{o} 41, texte 325). Elles pouvaient bénéficier d'une prorogation de cet avantage pour trois années suivantes, sous réserve de mener leurs activités dans les domaines reconnus prioritaires par le gouvernement.

La nouvelle loi sur les sociétés à capital étranger (la loi du 14 juin 1994, J. des L. N^{o} 60, texte 253) a fait réduire ces privilèges. L'exonération en question n'est plus automatique, elle peut être accordée par l'organe compétent, qui vérifie si l'entreprise remplit les conditions prévues par la loi. La condition la plus importante, c'est le

montant de l'apport du capital étranger, qui doit être supérieur à deux millions d'ECUS.

Par contre, ni la loi actuelle, ni la loi précédente ne privilégiait ces entreprises dans le domaine du droit du travail et de la sécurité sociale. Les rapports de travail dans ces entreprises sont régis par le droit du travail polonais, sans aucune exception possible.

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Les prognostics sur le chômage dans les années à venir sont très divergeants. Basé sur les indices économiques favorables (l'accroissement du PNB de 4% en 1993) et démographiques (une croissance importante du nombre de la population active), le programme gouvernemental suppose qu'en 1994 le nombre de chômeurs va croître de 200.000 personnes environ. Mais ce sera la dernière année où le chômage ira croissant. A partir de 1995, il doit décroître jusqu'à un certain seuil constant, en tant que phénomène permanent de l'economie de marché. Cette limite va être sans doute supérieure au chômage dit *frictif*. Cependant, si l'on veut faire baisser le chômage jusqu'à ce seuil et de l'y maintenir, il faut exploiter au maximum tous les outils et tous les moyens disponibles, juridiques et extrajuridiques, ainsi que déployer l'action intégrée de tous les acteurs présents sur le marché du travail pour promouvoir l'emploi.

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THE IMPACT OF THE SUBSIDIARITY PRINCIPLE ON POLISH DEMOCRATIC REFORMS

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I. Introduction

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

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

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

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

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

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

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

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

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

[2] *Subsidiarité: défi du changement,* Actes du colloque J. De1ors, Maastricht 1991; V. Constantinesco, *La subsidiarité comme principe constitutionnel de l'intégration européenne,* Aussenwirtschaft 1991, pp. 439-459.

[3] R. Dehousse, „Does Subsidiarity Really Matter?", European University Institute of Florence, Working Paper, *LAW,* 1992, Nº 32.

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

II. Philosophical background of subsidiarity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Constitutional provisions regarding subsidiarity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Legal provisions regarding pluralism as element of subsidiarity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Criteria for allocating decision-making power

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

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

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

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

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

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[12] See more: B. Zawadzka, „Pozycja ustrojowa samorządu terytorialnego w świetle regulacji ustawowych" [Systemie Position of Local Government in the Light of Legal Provisions], *Państwo i Prawo,* 1990, Nº 8, p. 22; Z. Niewiadomski, „Kierunki rozwoju samorządu terytorialnego" [Developing Trends of Self-Government], *Samorząd Terytorialny,* 1991, Nº 1 -2, pp. 81 -86.

[13] See more: M. Ku1esza, „Zagrożenia reformy (w sprawie zadań i kompetencji samorządu terytorialnego)" [Threats to the Reform (About the Issue of Tasks and Competences of Local Government)], *Samorząd Terytorialny,* 1991, Nº 1 -2, pp. 86-91.

VI. The allocating of decision-making power

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

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

Under the ''Small Constitution", the tasks of local government include, first,

''their own due public tasks performed in their own name and on their own responsibility with the aim to satisfy the inhabitants' need and second, tasks of state administration"

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

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

[14] J. Regulski, „Samorząd terytorialny: skąd i dokąd?" [Local Government: Where From and Where To?], *Samorząd Terytorialny,* 1991, Nº 1—2, pp. 104 - 109.

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

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

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

[15] M. Kulesza, op. cit.

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

VII. Control of subsidiarity

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

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

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

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

— the right to acquire municipal property.

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

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

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

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[16] See more: T. Rabska, „Sądowa kontrola samodzielności gminy" [Judicial Control of Community's Autonomy], *Samorząd Terytorialny,* 1991, Nº 1-2, pp. 46-51.

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

VIII. Conclusions

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

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

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CIVIC RIGHTS IN POLAND IN THE FACE OF EUROPEAN STANDARDS

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1. The process of adjusting human and citizen's rights and freedoms — to the European standards remains in Poland in *statu nascendi*. The degree of advancement of this process should not be evaluated only by the state of regulation of rights and freedoms in the Constitution of the Republic of Poland, since it is a process connected with the transformation of the state's political system, transformations in social and economic life, and with formation of new relations between the individual, society and the state. In some spheres the process is but initiated, whereas in others it is either advanced or continued.

Even confined to the constitutional regulations, such evaluation would have turned out inadequate, since some of constitutional provisions regulating rights and freedoms come from section 8 of the Constitution of 1952. [1] Such assumption confined to the legal sphere only would also be inappropriate and incomplete; since there occurred changes enabling guarantees and extention of rights and freedoms, and also creating new grounds to enact rights and freedoms in the new constitutional order.

The process of adjusting rights and freedoms to the norms binding in the democratic states of Europe is of a complex and multiform nature. It started together with the process of reforming the state in the 80s and hasn't been accomplished yet. It is being completed both within the framework of constitutional regulations and other legal acts as well as by changes of political, economic and social nature being continued in Poland.

2. The future model of the State is shaped by Poland's political transformations. The present model of the state has been defined in the article 1 of the Constitution of the Republic of Poland (''Small Constitution") as follows: ''the Republic of Poland is a democratic lawful state, realizing the rules of social justice". The Constitution esta-

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[1] The 1952 Constitution as an uniform legal act stopped to be in force under article 77 of 17 October 1992 Constitutional Act on mutual relations between the legislative and executive power of the Republic of Poland, as well as on local government (Journal of Laws Nº 84, item 426). However, some regulations remained in power — including section 8 regulating fundamental rights and freedoms of foe citizens. The way in which the 1952 Constitution was annuled is sometimes criticized from the legislative technique point of view. See *Konstytucja Rzeczypospolitej Polskiej. Wybór źródeł* [Constitution of the Republic of Poland. Selection of Sources], Lublin 1992, p. 4.

blishes nation's supreme control over the state as well as definite guarantees determining the concept of the state. They are as follows: the guarantee of local government's participation in exercising power and the freedom of activity undertaken by other self-government bodies, the guarantee of freedom of economic activity regardless of a form of ownership and the guarantee to protect property and the right to succession. As the process of shaping the concept of the State has not yet been completed, the concept of rights and freedoms is an incomplete deed as well. Undoubtedly, there exist close connections between both these concepts. The consequence of these links is that accepting certain concept of the state determines the status of the individual and his rights in the state, as well as assuming a certain model of rights and freedoms influences the concept of the state.[2]

The experiences arising from the contemporary political history of Poland saying that the efforts to create a state guided by democratic principles managed to shape equally democratic human and citizen rights and freedoms, making the individual the legitimate subject participating in state's and society's life. Rights and freedoms in the reborn Polish State, under the rule of 1921 constitution, were formed in such a manner.[3] On the other hand an attempt to build an omnipotent state resulted in drastic civic rights restrictions. By means of the subsequent 1935 constitution, the status of the individual was explicitly subordinated to the objectives of the state authorities who manifested authoritarian ambitions.[4] The functioning of these constitutions, an affirmative attitude of society towards the constitution of 1921 and the disapproval of the 1935 constitution gave rise to a wide scale of experiences.[5] It was common to borrow good experiences and traditions while creating the concept of the status of the individual in the post-war Polish State during the conceptual works carried out by the émigré Legislative Works Commission acting in the time of the Second World War period in London.[6] The 1952 constitution passed in post-war Poland and marked with the features of the authoritarian state did not revert to those good traditions and legacy[7]. Nowadays, a process of democratization and reforming the state is a process a rebours from authoritarianizm to democracy.

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[2] See Z. Kędzia, „Konstytucyjna koncepcja praw, wolności, obowiązków człowieka i obywatela" [Constitutional Outline of Rights, Freedoms and Obligations of a Human and of Citizen], (in:) *Prawa, wolności i obowiązki człowieka i obywatela w nowej polskiej konstytucji* [Rights, Freedoms and Obligations of a Human and Citizen in the New Polish Constitution], Poznan 1990, pp. 7-8.

[3] Thus W. Komarnicki, *Ustrój państwowy Rzeczpospolitej Polskiej* [Constitutional System of the Republic of Poland], Warszawa 1934, pp. 161 - 163, and passim.

[4] See E. Gdu1ewicz, „Niektóre koncepcje ustroju politycznego w Konstytucji Rzeczypospolitej Polskiej z 23 kwietnia 1935 r."[Some Concepts of Political System in the Constitution of the Republic, of Poland of 23 April 1935], *Państwo i Prawo* 1975, Nº 3, p. 77 and following.

[5] See J. Zakrzewska, *Spór o konstytucję* [Dispute over Constitution], Warszawa 1993, p. 43 and following.

[6] See A. Jankiewicz, *W poszukiwaniu idei państwa i prawa* [In search for an Idea of State and Law. The Concepts of the Commission of Legislative Works of Ministry of Justice of the Government of the Republic of Poland (1942-1945)], Warszawa 1992, pp. 136- 138, 216, 221, 224-225, and passim.

[7] Until passing the 1952 Constitution, the post-war Poland had a constitutional act of 1947 on political system and on activités of supreme bodies authorities of the Republic of Poland (called at that time the ''Small Constitution").

A process that is being realized nowadays cannot be a simple return to democratic standards of the 1921 constitution regulating rights and freedoms. A setting up a catalogue of rights and freedoms will be the task of authors of a future Polish constitution. However, in the light of the going on discussions, social opinions and drafts of the constitution lodged to the National Assembly, it becomes obvious that the catalogue of rights and freedoms will be considerably different from the standards set forth in the 1921 constitution. Without any doubt, an extension of the catalogue of the rights and freedoms beneficial for a citizen and for the individual may be expected. For Poland integrating with the European democratic states it is impossible not to take into account both European standards in the sphere of rights and freedoms, as well as accepted in the constitutions of these countries regulations of rights and freedoms being a part of democratic system. In new European democratic states' constitutions passed after the Second World War, a tendency has to be noticed to an extension of a catalogue of rights and freedoms. In connection with that appeared new rights, and the extension of the objective scope of rights and freedoms already generalized.[8] There also has been an extension of the subjective scope of those rights and freedoms, covering not only the citizens of a specified state, but also all persons subordinate to its jurisdiction. Considerable influence on these changes had the fact of adoption of international agreements establishing human rights and freedoms in global or regional scale. The former guarantees of rights and freedoms having previously the internal implementation were extended by creating international forms of supervising rights and freedoms observance, as well as by functioning of protection mechanisms allowing effective vindication of rights in case of their violation.

3. Restitution of democratic character to rights and freedoms will not only be limited to some corrections, but will require their totally different wording than that of the 1952 Constitution. Let's put aside all historical context and the analysis of the sources the creators of this constitution drew models from while establishing the catalogue of rights and freedoms, although both of these issues had vital impact on legal character of the regulations and on the way of realizing rights and freedoms in post-war Poland.[9] On the other hand, an enhancement of the most important principles, ways of wording and accomplishment of rights and freedoms basing on the 1952 Constitution seems to be necessary from the point of view of comparative analysis of changes that are currently taking place.

The collectivistic approach giving the priority to the community predominated in the thinking of those days, the value of the individual's rights was recognized in the context of community members organized into a state. Due to this fact the rights

[8] As an example the following rights and freedoms may be mentioned: freedom of expression and freedom to receive information, right of participation, right to cultural heritage, right to healthy natural environment. Also see Z. Kędzia, „Konstytucyjna ...", op. cit., pp. 28-29.

[9] See K. Opalek, *Podstawowe prawa i obowiązki obywatelskie w świetle konstytucji PRL* [Basic Civic Rights and Duties in the Light of Polish People's Republic Constitutions], Warszawa 1955, p. 49.

which might be used in a collective way were accentuated. The principle to subordinate rights and freedoms to the interest of working people was a binding one in the state. Out of this resulted the principles of concertation of interests of the individual, the society, and the socialist State, as well as correlations of rights and duties. A class sense of freedom was based on the fact that its scope has been reduced to participating in realization of social and political aims of the State. Freedom was not assigned to the opponents of the socialist political system and civic rights could not be abused to accomplish the anti-socialist goals. Legal status of an individual was therefore determined both by the catalogue of rights and freedoms, as well as by the duties. The accomplishment of duties equal to all was to contribute to realization of civic rights guarantees.[10]

Both a community and the individual were entitled to as many rights as they were granted with State's consent. These rights were limited to the degree to which this restriction was in the State's interest. It should be added that the restrictions expressed by the constitution were without doubt motivated by the ideological and class reasons. However, these restrictions were not anchored exclusively in the constitutional norms but they mainly resulted from the political system's principles and the current policy of the state.[11] This kind of approach expressed the divergence between the officially pro-freedom character of constitutional standards and the actual possibility to exercise the declared rights and freedoms.

Subordination of the individual to state's interests resulted in the fact that the constitutional norms defining the status of the individual and his rights were addressed to the citizen, not to the individual. State's doctrine of that time did not however perceive an essential contradiction between the interest of the individual and the interest of that individual as a citizen.[12] The ideal had to be the political integration of society assigning to the individual the role of a loyal, good and active socialist state citizen.[13]

The 1952 constitution favoured economic, social and cultural rights. Political freedoms and personal rights were in the hierarchy of values considered to have less importance, since it was assumed that the extension of freedom will result from of the development of the economic base and improving material well-being of

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[10] Ibidem, p. 87 and 141. Also see L. Wiśniewski, „Podstawowe prawa, wolności i obowiązki obywateli PRL na tle nowych konstytucji socjalistycznych" [Basic Rights, Freedoms and Duties of Polish People's Republic's Citizens on a Background of New Socialist Constitutions], *Państwo i Prawo,* 1977. Nº 12, pp. 12 - 15; also R. Wieruszewski, „Zasada współzależności praw i obowiązków obywatelskich w państwie socjalistycznym" [The Principle of Correlation of Citizens' Rights and Duties in a Socialist State], *Państwo i Prawo,* 1977, Nº 10, pp. 94- 104.

[11] Restrictions and prohibitions conceired *expressis verbis* concerned abuses of freedom of conscience and creed as well as freedom of association which goals and activities were treatening the ruling political system and legal order. Also see J. Zakrzewska, *Spór* ..., op. cit., pp. 18-19.

[12] See M. Mane1i, „Jednostka i obywatel" [An Individual and a Citizen], *Państwo i Prawo,* 1958, Nº 11, p. 740.

[13] Ibidem, pp. 741 -742.

society.[14] The enhancement of social, economic and cultural rights was accompanied by the theory of feasibility of fulfilling these rights by the system of material guarantees, often being of a purely declarative character, while legal guarantees have been almost entirely omitted. Such way of regulation made the implementation of social, economic and cultural rights dependent on state's economic condition and it precluded the execution of rights by means of legal procedures. In reality, as a result of increasing economic difficulties in the mid 1970s and later of a long-lasting economic crisis, state's abilities to assure the implementation of social rights shrank, reducing considerably the reality of constitutionaly declared civic rights.

The lack of legal guarantees, the declarative wording of regulations, the divergence between the contents of the constitution and methods of ruling as well as economic inefficiency of the State created a state of fiction, consisting in the fact that rights and freedoms assembled in the constitution were for political causes, breached and not performed, or of the economic reasons, became impossible to be fulfilled.[15]

4. At it was stated before, the regulation of rights and freedoms in Poland in its fundamental outline is based on still binding regulations of the 1952 Constitution. However, it does not mean that over 40 years the contents of the regulations was not subject of changes. Within the framework of subsequent nine amendments between 1954 and 1976 there were no direct modifications concerning rights and freedoms. Only as a result of the amendment introduced in 1976[16] changes of a formal nature were accomplished (new numbering of the section regulating rights and freedoms, new numbering of the particular regulations, change of order of the regulations and forming new regulations out of already existing ones), yet especially the contents of the regulations was changed and supplemented, new provisions were added and some of the formerly binding ones were annuled. The changes carried out until 1989 didn't have an impact on State's nature and on the concept of rights and freedoms. They were first of all subordinated to the current and prospective goals of the State, or they were to reflect the development of the socialist political system.[17] While amending the Constitution in 1976, the State authorities introduced regulations expanding social rights, declaring free medical care for all employees and their families, free education on all levels and making of the secondary schooling system general, state's guarantee was secured for alimony rights and obligations. War veterans were granted state's protection in every respect.

On the basis of the 1976 constitutional amendment the right was introduced to take advantage of the values of healthy environment and at the same time an obliga tion was imposed on citizens to protect the environment.

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[14] See Z. Ga1icki, „Ratyfikacja konwencji o ochronie praw człowieka i podstawowych wolności" [Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms], (in:) *Biuletyn. Ekspertyzy i Opinie Prawne,* Wydawnictwo Sejmowe, 1992, Nº 1/4, p. 36.

[15] See J. Zakrzewska, *Spór* ..., *op.* cit., p. 11 passim.

[16] Journal of Laws, 1976, Nº 5, item 29.

[17] See L. Wiśniewski, *Podstawowe* ..., op. cit., pp. 21 - 22.

A norm of a programmatic character got a form of a constitutional regulation, indicating ways of improving housing problems; the same norm was considered to be a sign of State's care for family's welfare.

The change of views social stratification issue was reflected in the constitutional norms. The division of the society into well-defined social strata entitled to benefits on the basis of belonging to the respective social stratum was abandoned. However, stress was laid on a participation and co-responsibility of youth for country's development, making parents responsible for bringing up children to become righteous and conscious citizens. State's contribution to strengthening social position of women, especially of mothers and women active professionally was also declared.

The catalogue of personal rights was extended by State's care over Polish citizens staying abroad.

The 1976 amendment extended formal rights of citizens to perform social control in a form of engaging in consultations, discussions and submitting appropriate proposals. The constitutional right of appeal to state administration by the citizens was also introduced.

The idea was enhanced of constitutionalisation of a role of trade unions, which were to be not only the representative of employee's interests, but also a ''school (...) of involvement in building socialist society". The said regulation alongside with others introduced by the 1976 amendment arc the examples of the efforts of the then in power authorities to further ideologization of the norms regulating rights and freedoms.[18] The ideological meaning of these regulations was changed only as a result of the amendment to the constitution of 29 December, 1989.

However, two extremely restrictive regulations being a relict from the repressive phase of the authoritarian system were annuled by the 1976 amending act. They provided severe criminal responsibility for abusing freedom of conscience and religion, sabotage, diversion, harmful activities or other attempts against social property.

Further changes in regulation of rights and freedoms took place as a result of the amendment to the constitution accomplished in 1989 and in 1991.[19] There were changes within the rules directly regulating rights and freedoms as well as new regulations of a political nature extending the catalogue of rights and freedoms and defining the status of the individual in the state and in society. The most important changes in the constitution concerned confirmation of freedom of association in political parties, guarantees given to local government for exercising power and freedom of activity of other self-government bodies, guarantees of freedom of economic activity and the introduction of succession and property protection.

Both formal and substantial changes took place within the framework of the section regulating rights and freedoms. Some regulations of propaganda, ideological

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[18] See W. Wołpiuk, „Konstytucyjna charakterystyka ustroju politycznego państwa a rzeczywisty etap przeobrażeń społecznych w Polsce" [Constitutional Characteristic of State's Political System and Actual Stage of Social Transformations in Poland], (in:) *Studia Prawnicze*, 1989, Nº 2 - 3, p. 278.

[19] Journal of Laws, 1989, Nº 75, item 444, Journal of Laws, 1991, Nº 41, item 176 and Nº 119, item 514.

and purely declarative nature were eliminated. The wording of some regulations formerly having class and ideological sense and of which contents didn't generate any real rights was changed. Formal transformations of constitutional regulations concerned primarily the name of the State, which was changed from the Polish People's Republic into the Republic of Poland.

5. The characteristics of changes of the constitutional regulations of the individual's position would be incomplete if its scope was to be limited to the regulations of the fundamental act directly establishing rights and freedoms. It can be assumed that in the democratic state a complexe of institutions created by the state and society as well as the international institutions and relations linking the state with international law and international community influence the implementation of rights and freedoms of an individual. It is composed of political and economic system, legal order, democratic system of legal protection bodies, way of execution of state's authority, way of realization of rights and freedoms, application and observance of international law. The majority of those conditions and institutions may be and are anchored in the constitutional norms. Constitutionalization of the institutions responsible for realization and protection of rights and freedoms of the individual or establishing these institutions by virtue of law provisions *eo ipso* do not guarantee observance of rights and freedoms. The experience acquired in the past years, especially lack of coherence between the constitutional norm and the reality, proved that besides established rights and freedoms and institutions called into being to implement them, change of way of ruling is necessary and in this context improvement in the realization of rights and freedoms.[20] In other words, there exists a necessity to combine lawful ways of implementing the rights and freedoms with the functioning of the institutions called into being to implement these laws.

The moment of starting the formation process of such institutions and conditions as well as question what forces influenced stimulatingly this process may be recognized as discutable. Undoubtedly, any changes carried out until 1989 were initiated by the authorities and the immutability of State's political system conditionned their substance. Equally undoubtful seems to be the fact that starting from the socio-economic depression in 1980, social pressure became an important factor forcing the authorities into concessions. The authorities were also forced to create the system of institutions intended to serve rights and freedoms protection.[21]

At the beginning of the 1980s the process of forming these institutions was initiated. On 31 January, 1980 an act on establishing the Supreme Administrative Court came into force and so did the amendment to the Code of Administrative Procedure. In such a way arised an essential change within the political structure of the Polish administrative control system, enabling the citizens to lodge complaints concerning administrative decisions. The other institutions of substantial influence on human

[20] J. Zakrzewska defines such change as ''another philosophy of ruling", op. cit., p. 24.

[21] Ibidem, pp. 10-11,23.

and citizens' rights were progressively formed, namely the Constitutional Tribunal (1985) and the Spokesman for Civic Rights (ombudsman) (1987). Both *sui generis* State's agencies, unlike the Supreme Administrative Court were anchored in the regulations of the constitution, what favourably contributed to strengthening their position. The activity of these institutions until the essential political turnover after the 1989 elections, was limited by the then existing political and social system and by the way of exercising power by the State. However, there is no way to diminish the importance of their function and activities, since they initiated mechanisms of the rule of law and became a truly existing entities, functioning in reality, which moreover, succeeded to obtain a high degree of independence from State's authority. The possibility of full development of their activity for the rights and freedoms protection arised in democracy and in the rule of law conditions.

The following changes were inspired by the contents of the ''Round Table" agreement negotiated between the representatives of the opposition and the ruling Party.[22] The statutory guarantee of freedom of association was introduced while formerly binding faulty regulations were cancelled. The trade unions act was amended, extending the range of unions' freedoms. The act regulating relations between the State and the Catholic Church was passed, as well as the new appropriate act guaranteeing freedom of conscience and religion.

The turnover of the political system occured after the elections in June 1989, in result of which Poland became a state of a different type. It was expressed by the constitutional and legislative amendments. The imperative of the transformations was not only the change of state's name but also a new regulation of the first article of the Constitution defining the character of the state and establishing the set of basic values, having vital importance for human and citizens' rights and freedoms. The regulation established the democratic character of the state guided by rules of law and realizing the canons of social justice.

The constitutional regulation establishing the democratic legal state became a ground for further changes. The rules of political pluralism and the guarantees of freedoms of forming political parties became guaranteed in the Constitution and in regular legislation. An act guaranteeing freedom of trade unions was amended. Legal rules of forming employer's organisations and of settling collective disputes were established. Election law and practice which enabled carrying out fully free and democratic parliamentary and local government elections were shaped in a new manner. The regulations on censorship and other restricting freedom of speech, expression and information and access to media were cancelled. Independence of the courts of law and their statutory supervising rights in relation to other bodies appointed to guard legality and to protect rights and freedoms were guaranteed. Some criminal, petty offences, labour, administrative and civil law regulations which might possibly restrict rights and freedoms of the individual were modified or cancelled. The princi-

[22] *Porozumienia „Okrągłego Stołu"* [''Round Table" Agreements, Set of Documents], Warszawa 1989.

pies of applying law were amended. The penalisation of deeds formerly regarded as crimes against the State was limited. Repressions for political reasons were abolished.

The list of changes would be incomplete if two important for rights and freedoms institutions were not mentioned: the National Council of the Judiciary, responsible for guarding judiciary independence and the National Council for Radio and Television which is to guard freedom of speech in radio and television broadcastings, independence of the broadcasters' and receivers' interests and to ensure open and pluralistic character of radiophony and television.

Both political system turnover and the changes in the sphere of rights and freedoms protection offered premises for a gradual integration of Poland with the democratic European community. The first important stage of this process was the admission to the Council of Europe. Poland also ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and declared acknowledgement of competence of the European Commission of Human Rights and of the jurisdiction of the European Court of Human Rights.[23] The ratification of the European Convention (1992) doesn't mean only a relative extention of the range of protective rights, but it first of all opens for Polish citizens and persons subject to Polish State's jurisdiction the way of efficient vindication of rights in case of their infringement by submitting claims to the appropriate international bodies. Therefore occured a total change of the concept concerning human rights protection, since until 1989 this matter was considered to belong exclusively to State's internal competence and official opinions were voiced against institutionalisation of international protection of rights and freedoms.[24] Poland also applies for membership in the European Union, what in the next future will mean adoption of standards and obligations concerning rights and freedoms in force within the European Union.

One of the possible conclusions from political and legal changes is that they formed a State's system which considerably limited interference of State's organs in the individual's and community's life. As the result of such situation, a noticeable development of self-governing bodies took place, both territorial and other forms of self-government, spontaneous formation of many types of associations, political parties, trade unions and employer's organisations. Moreover, there could be observed wider freedom of individuals. The principle of subsidiarity, although not consolidated expressis verbis in the constitutional norms, is gradually realized as the progress of forming civic society bodies in Poland advances.[25]

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[23] Ratification by Poland on 3 March 1977 of the International Covenant of Civic and Political Rights and gradual adjustment of Polish law to rights and freedoms set forth in the Covenant, considerably contributed to facilitate the consistence of that law with the provisions of the European Convention. See Z. Ga1icki, „Ratyfikacja ...", op. cit., p. 35.

[24] See A. Łopatka, *Nowe podejście do prawa człowieka i korzystania z nich przez obywateli w Polsce* [New Approach to Human Rights and Exercising them by Polish Citizens], Warszawa 1991, p. 157.

[25] See E. Popławska, *Zasada subsydiarności jako zasada polskiego prawa konstytucyjnego* [The Principle of Subsidiarity as a Tenet of Polish Constitutional Law], in this issue.

The mentioned process does not, however, proceed without obstacles, especially taking into account the evolutional character of system changes. There also exist obstacles resulting from the lack of self-government tradition, the restraints originating from slow mentality change of community and of individuals. Many of life and attitude-forming institutions in the new political conditions are still in course of shaping their models and nature. The fact that there exist over two hundred political parties means that Poland is yet far from being a stabilized political system. The principles of political culture are not yet a commonly binding norm both in relations between state's agencies and other subjects, and also between citizens.[26] There still does not exist a satisfactory relation between citizen's interests and their rights, and public interest, which would take into account both States's responsibilities towards citizens, as well as citizen's obligations towards the state. [27]

On the background of unquestionable achievements in perfectioning legal order, two phenomena proving lack of coherence of regulations of rights and freedoms set forth in the constitution and actually existing reality have to be noticed. The first one consists in the practical extention of political and personal freedoms, in spite of the fact that some of the binding constitutional regulations do not correspond to the new legislation and generally speaking to the new reality. On the other hand, the other phenomenon is manifested in the fact that a relative reduction of State's capabilities took place in the sphere of providing citizens with the benefits resulting from social, economic and cultural rights (free medical care, employment, free education, access to cultural goods) to the extent established in still binding constitutional regulations.[28] Above mentioned observations entitle to formulate a conclusion concerning the exhaustion of amendment possibilities of hitherto existing constitutional regulations, as well as the one concerning the necessity to establish totally new regulations guaranteeing rights and freedoms. The new regulations should take into account both political changes already accomplished in Poland and assumed direction of State's development, as well as international standards according to requirements of the process of Poland's integration with European Communities.

6. The above mentioned undertaking requires precise definition of sources and essence of international and European standards. It seems justified to include among sources of standards the general principles of law accepted by the international community, as well as principles established in treaties bringing into existence the supranational organizations and communities, and also established in the international

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[26] Interesting thoughts on this subject were expressed by W. Soko1ewicz, „Konstytucjonalizm europejski i przyszła polska konstytucja" [European Constitutionalism and the Prospective Polish Constitution], *Państwo i Prawo,* 1992, Nº 8, p. 11 and following.

[27] See J. Kurczewski, „Inny kraj, rezurekcja praw w Polsce" [Another Country, Resurrection of Rights in Poland], *Res Publica,* 1990, Nº 6, pp. 82-83.

[28] See K. Łojewski, „Czy w Polsce istnieje jeszcze Konstytucja?" [Does a Constitution still Exist in Poland?], *Rzeczpospolita,* 4. 02. 1992. The author points out infringements of social rights guaranteed in still binding constitutional regulations.

conventions, and agreements, as well as, to certain degree, models contained in constitutions of states guided by the principles of legality and democracy.[29]

A separate problem is what values, principles, rights and freedoms should be qualified as international communities' standards. It can be assumed that the objective scope of standards results both from the above mentioned sources as well as from the practice of democratic states and international communities. Thus, there exists a definite complex of standards which should be observed by a state if the state wishes to be recognized as a entilted to belong to the community of democratic and law-observing states. This very remark remains in a close connection with Poland's claim to membership of the European structures, as well as with the duty to adjust internal law, including constitutional regulations in the sphere of rights and freedoms — to the European standards.[30] Although the European standards defining the system of values and assigning aims do not impose a political system subordinated to said values and aims, nevertheless a home legislator is obligated to establish lawful and constitutional regulations assuring certain minimum resulting from the essence of the said standards.[31] A sphere reserved for expressing and guaranteeing sovereign national identity is expanded beyond the limits of this minimum. However, the border lines between these two spheres are not exactly defined.

Poland has already introduced in the Constitution and in the legal order the following fundamental values and principles included in European standards and serving to secure the individual's rights and freedoms: democratic system of State's authorities; the recognition of law as a fundamental regulator of relations between the state and a citizen; political pluralism; observance of the provisions resulting from the European Convention on Protection of Human Rights and Fundamental Freedoms. Thus the internationalisation of guarantee mechanisms has been accomplished conditions for realization of the subsidiarity principle were created.[32]

7. The above considerations concern a formal aspect of the issue (putting aside the axiological aspects of functioning of the implemented standards within the State and the society) and the existing state of legislation. Whereas, here we deal with the process concerning both the present State of law, as well as works on the new constitution and the contents of its prospective provisions.

The works of the Constitutional Committee of the National Assembly are in 1995 still in progress, and on the basis of hitherto results it is difficult to draw conclusions as to the form and contents of future constitution provisions and about the degree of

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[29] Art F of European Union Treaty confirms that the Union recognizes the rights deriving from constitu tional traditions of Member States, as general principles of Community's law.

[30] According to Art. 68 of the Association Treaty concluded by Poland with the European Communities ''the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community".

[31] See W. Sokolewicz, „Konstytucjonalizm op. cit, p. 4.

[32] See Preamble and Art. A on the European Union Treaty. See also N. Emi1iou, ''Subsidiarity: An Effective Barrier Against ''the Enterprises of Ambition"?", *European Law Review,* 1992, Nº 43, pp. 383 - 384. On realization of the subsidiarity principle in Poland see: E. Popławska, *Zasada* ..., in the present issue.

compliance with European standards. The orientation of these works may however be evaluated in the context of seven drafts of constitution submitted to the Constitutional Committee acting during the period of the previous parliamentary term.[33] It is the more so justified that the Constitutional Committee of the present (1993 - 1995) parliamentary term decided that these drafts will be taken into account in the course of its work.

An indisputable change in the direction of considering European standards is the abandonning of the class and collectivistic expression of the individual's rights and guaranteeing rights and freedoms as the ones each citizen is entitled to because of human dignity reasons. The drafts also provide for guarantees of human collectivites rights: national, ethnic and linguistic minorities. Only some of the drafts provide for the guarantee of the collective right to participate in managing the enterprise by its employees.

The constitutional drafts lay particular stress on ensuring institutional and procedural guarantees of rights and freedoms. However, this trend doesn't fully find its confirmation in the form and in the contents of the overly declarative and not sufficiently juridical regulations. It seems necessary to introduce to the future Constitution the principle of direct implementation of the constitutional regulations and guaranteeing the right to judicial protection based directly on constitutional norms. This would be an important symptom of adjusting Polish Constitution regulations to the European standards.

An internationalization of guarantee mechanisms on the basis on, among others the European Convention provisions, seems to require first of all: the establishing in the new Constitution of a relation between the internal and the international law, what would enable the individual to vindicate his rights deriving from ratified international standards before Polish common courts of law[34] and moreover the Constitutional Tribunal should be granted a cognition as regards the conformity of national legislative and normative acts with international agreements ratified by Poland, conformity of international agreements with the Constitution and competence to examine constitutional complaints concerning the infringement by State's organs of rights and freedoms established in an international agreement ratified by Poland.[35] Second: there is a need to establish in the Constitution the procedure providing for

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[33] *Komisja Konstytucyjna Zgromadzenia Narodowego. Projekty Konstytucji Rzeczypospolitej Polskiej* [Constitutional Committee of National Assembly. Drafts of the Republic of Poland Constitution], Warszawa 1993.

[34] See M. Masternak-Kubiak, „Stosunek prawa międzynarodowego do prawa krajowego w projektach konstytucji RP" [The Relation of International Law to National Law in the Drafts of the Republic of Poland Constitution], *Państwo i Prawo*. 1992, Nº 8, p. 85.

[35] See M. Łabor-Soroka, *Orzecznictwo Trybunału Konstytucyjnego a ochrona praw człowieka* [Constitutional Tribunal Judicial Decisions and Human Rights Protection], (typescript), p. 2 and following; W. J. Wołpiuk, „Uprawnienia Prezydenta RP z artykułu 28 »Małej Konstytucji«" [The Competences of the President of the Republic of Poland arising from Art. 28 of ''Small Constitution"], (in:) *Mała Konstytucja w procesie przemian ustrojowych w Polsce* [''Small Constitution" in the Process of Political System Transformations in Poland], pod red. M. Kruk, Warszawa 1993, p. 196.

the possibility of transfer to international communities of a part of sovereign state's competences,[36] creating basis to applying the guaranteeing mechanism by the European Commission of Human Rights, by the Committee of Ministers of the Council of Europe and by other international bodies engaged in rights and freedoms protection. Third: constitutionalization of the individual's right to submit petitions to appropriate international bodies competent to protect rights and freedoms is needed as well.[37]

The characteristic feature of constitutional drafts is a quite considerable variety of concepts in the sphere of social, economic and cultural rights. The question is closely connected with the concept of State and with assumed influence of public authority on the extent and manner of guaranteeing social, economic and cultural rights. The drafts reflect many different attitudes, starting from the ones inspired by the liberal doctrine — the State indifferent towards human needs — and finishing with the protective State obliged to secure employment, health care, free education and other benefits.[38] The political system founders will have to establish the range of guaranteed rights in compliance with public expectations, as well as to choose the ways to guarantee them, considering international standards and tendencies of social progress in the democratic European countries, where the attentiveness to realize the above mentioned rights is manifested.[39]

The European Convention's standards referred to by the European Union Treaty does not impose upon the state clearly defined obligations to guarantee social, economic and cultural rights. However, such obligations arise from the European Social Charter, from the Common Declaration of Human Rights and from the International Covenant of Economic, Social and Cultural Rights. The basic acts constituting the European Union nevertheless clearly define the directions of the Member States policies, requiring cohesion between economic growth and high level of employment, social care, health care, increase in quality of education and full development of cultures.

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[36] Some new European constitutions and amending regulations introduced to older constitutions provide for such procedures. See Art. 93 of the Constitution of the Kingdom of Norway, Art. 79 of the Constitution of Russian Federation, § 5 art. 10 of Swedish Constitutional act. See also W.J. Wołpiuk, „Umowa międzynarodowa jako źródło prawa w Szwecji" [International Agreement as a Source of Law in Sweden], (in:) *Prawo na Zachodzie,* Wrocław-Warszawa-Kraków 1992, p. 208.

[37] Emphasizing importance of the European standards does not diminish neither the role nor importance of other international agreements regulating rights and freedoms as well as guarantee and protection mechanisms. A fact that Polish citizens may lodge complaints in case of infringing their rights, is among others a result of Poland joining the Facultative Protocol to the International Covenant on Civic and Political Rights. (Journal of Laws, 1994, № 23, item 80). On problems of rights protection see more P. Daranowski, „Międzynarodowe prawo praw człowieka i ich konstytucyjna ochrona" [International Law of Human Rights and their Constitutional Protection], *Państwo i Prawo,* 1993, № 4, p. 32 and following.

[38] The Catholic Church in its social thinking has since a long time paid attention to inseparability of political rights and freedoms with social, economic and cultural rights. An inefficiency of legal and procedural guarantees in the situation of lack of state's care to provide with welfare level capable of meeting social rights was noticed. See Priest F.J. Mazurek, *Prawa człowieka w nauczaniu społecznym Kościoła* [Human Rights in Church Social Teaching], Lublin 1991, pp. 184- 187.

[39] On guaranteeing human rights in an all-European meaning of these rights, also in the context of social rights, see W. Sokolewicz, *Konstytucjonalizm* ..., op. cit., pp. 6 - 7 and 10.

Alongside with the requirements of the European standards, there also exists a set of internal factors making impossible drastic limitations of social rights or resignation from the state's guarantees of their realization. These factors were formed by constitutional regulations coming from the former period, they were also formed by social fears evoked by the perspective of forfeiture in many cases illusive, of acquired rights, the appreciation of which in the period of political system transformations has markedly increased.[40] It seems necessary from this point of view to lay stress on the close connection between political freedoms and social rights, especially in the meaning of feasibility of political freedoms and social rights in the situation of limitation and lack of social rights guarantees.[41] The regulation of social, economic and cultural rights may be expressed in the future constitution, both in the form of general aims/directions of State's activities,[42] and by the norms enabling their realization by the means of the procedure provided for by law.

There are many other problems arising from the analysis of the constitutional drafts which will have to be considered in the future Constitution. They concern both ''traditional" and new rights i.e. consumer rights which are part of European standards, but were so far not provided for in the contents of the drafts. The problems mentioned here are of an exemplary character, but it has to be stressed that in most of drafts the extent of observance of European standards is impressive.

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[40] On controversies concerning social rights in the context of planned constitutional regulations and problems of perceiving these projects by the society, see D. Gomien, ''Human Rights and Freedoms in Constitutions and Draft Constitutions of Central and Eastern Europe", (in:) *Human Rights and Freedoms in New Constitutions in Central and Eastern Europe,* edited by A. Rzep1ińskı, Warszawa 1992, p. 157. For drafted constitutional regulations and problems of perceiving these projects by the society see J. Jończyк, „Spór o socjalne prawa i wolności" [Dispute over Social Rights and Freedoms], (in:) *Rzeczpospolita* dated from 22. 01. 1993. As the result of a social research on ''Constitution in Polish citizens' consciousness" carried out by the Public Opinion Research Centre on 18-24 November, 1993 some information was gathered concerning matters which according to the opinion poll responders should be necessarily contained in the new Constitution. The most frequently mentioned matter the constitution should deal with is securing a citizen with the right to work. This issue was assumed to be most vital and it was placed in the highest position in the hierarchy of matters and problems which need to be Constitutionally regulated (87 %). High percentage of the respondents (43 %) paid attention to infringement of social matters resulting in unemployment (22 %) and to deprivation or reduction of old age pensions (17 %). The sign of an interest concerning social problems as a constitutional matter was a postulate to introduce in the constitution regulations deciding about the minimum old age pension (41 %) as well as minimum wage (39 %). See Report *Konstytucja w świadomości Polaków* [Constitution in Polish Citizens' Consciousness], CBOS, Warszawa 1994, pp. 3, 11, 17 and 24.

[41] So J. Zaкrzewsкa, *Spór* ..., op. cit., pp. 149 - 159; Moreover B. Zawadzka pays attention to vagueness of the dividing line between political freedoms and social rights; B. Zawadzka, „Rozwój konstytucyjnych praw społecznych obywateli" [The Development of Citizens' Constitutional Social Rights], *Studia Prawnicze,* 1993, № 2 - 3, pp. 4 - 5.

[42] See W. Sokolewicz, „Uwagi o projekcie Karty Praw i Wolności" [Comments on the Draft Charter of Rights and Freedoms], *Państwo i Prawo,* 1993, № 4, p. 71; also J. Zakrzewska, *Spór*..., op. cit., pp. 149 - 150.

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Ewa Łętowska: Jak zaczynał Rzecznik Praw Obywatelskich (Les débuts du Défenseur des Droits Civiques) Łódź 1992, Agence MASTER, 543 pages,

Le Défenseur des Droits Civiques — l'ombudsman — est devenu en Pologne une ''institution" particulière.[1] Si nous le qualifions d'institution, c'est parce qu'il s'avère l'un des piliers de notre Etat, universellement regardé comme ''sien" par le citoyen, présent dans notre vie quotidienne au point que sans lui notre paysage social, juridique et peut-être même politique, n'est plus concevable.

Dès qu'il fut institué, l'ombudsman a cherché à expliquer aux citoyens en quoi consistait l'essentiel de sa fonction, quelles étaient ses compétences, comment il remplissait sa mission, ce qu'il pouvait et ne pouvait pas faire — bref, tout ce qu'on pouvait attendre de lui. Dès le début également il a pris soin de la documentation officielle de son activité, en publiant régulièrement le Bulletin du Défenseur des Droits Civiques, qui contient entre autres les textes de scs interventions, leurs résumés thématiques et, chose très importante, les index des noms et matières, ainsi que des actes juridiques relatifs aux interventions du Défenseur, rapportées dans les éditions successives du Bulletin. A part le Bulletin, le Défenseur continue d'éditer la publication intitulée ''Informations" et divers bulletins-matières, consacrés à des problèmes concrets, tels que, par exemple, la protection des droits acquis, les prétentions de revendication, les droits des étrangers, la promotion des droits de l'homme ou certaines questions militaires. On y trouve également les textes des interventions du Défenseur à la Diète. Tous ces matériaux sont le reflet fidèle de son activité.

Les feuilletons dont nous nous occupons ici ont une forme inofficielle, plutôt personnelle, sont comme une profession de foi, compréhensible aussi pour ceux qui ne sont pas juristes. Aussi éveillent - ils une forte résonance non seulement auprès des professionnels. Ce n'est point par hasard que ce recueil est suivi d'un imposant index des matières, strictement juridique, concernant la protection du droit (dans l'Etat totalitaire et l'Etat démocratique), le droit à la justice, la confiscation d'objets, les dispositions transitoires, l'autogestion locale, la juste procédure, la justice sociale, les fonctions confiées à l'administration, le pouvoir discrétionnaire, le pourvoi en révision extraordinaire, et bien d'autres questions. C'est une preuve solide de l'activité éducative du Défenseur, conçue d'ailleurs conformément aux dispositions légales. Bien que les dispositions constitutionnelles en vigueur soient plutôt laconiques ("Le Défenseur

[1] Cette institution, avant même d'être créée, avait ses fervents partisans, dont Jerzy Stembrowicz et les signataires de la résolution du Comité des Sciences Juridiques de l'Académie Polonaise des Sciences de 1981 (la date est significative) — pour n'évoquer que ces deux exemples.

des Droits Civiques veille au respect des droits et libertés des citoyens, définis par la Constitution et autres dispositions légales"), la loi sur le Défenseur des Droits Civiques en dit davantage. La réglemention relative au rapport que le Defenteur des Droits Civiques doit présenter annuellement à la Diète et au Sénat, évoque entre autres les observations du Défenseur sur le respect des droits et libertés des citoyens et guarantit la publication de ce rapport. C'est logique, car l'observation du droit dans l'Etat exerce une influence directe sur la qualité des droits et libertés du citoyen. Aussi faut-il partager les réserves des scientifiques qui soutiennent que l'art. 66, al. 24 du Reglement de la Diète ''rétrécit partiellement et sans fondement, en dépit de la loi concernant le Défenseur des Droits Civiques, l'étendue substantielle de son rapport — la loi l'oblige à présenter ses observations sur le respect du droit, alors que le Règlement restreint l'objet de ses observations au respect des droits et libertés des citoyens. Cette différence, quoi-que subtile, est essentielle.[2]

Mais le lecteur de l'ouvrage de Mme Łętowska se rendra vite compte qu'elle a toujours pris la défense des droits civiques au sens large de ce terme (donc, à vrai dire, le seul possible), voire avant tout du respect des droits. Cette notion de ''droits", mérite d'être soulignée, puisque le Défenseur ne peut intervenir que s'ils sont enfreints. Dans son texte intitulé ''L'Etranger", Ewa Łętowska démontre, d'une part, que les étrangers sont traités par le Défenseur sur un pied d'égalité avec les citoyens polonais, et de l'autre, à quelles difficultés se heurte parfois la défense des intérêts des citoyens polonais à l'étranger. Il ressort de son ouvrage, notons le à l'occasion, que certains ombudsmans étrangers ne sont pas toujours enclins à coopérer avec le nôtre.

En lisant certains passages du livre de Mme Łętowska, on a l'intention de dire que les questions que lui posent parfois ses correspondants — par exemple sur l'adresse d'un tribunal — nous sont bien connues. On en posait aussi aux juges membres de la Commission Electorale Nationale. Nous en connaissons d'autres, concernant par exemple les activités des députés, membres du gouvernement. Ce qui semble le plus intéressant dans cet ouvrage, ce sont surtout les opinions et informations sur l'essentiel du travail de l'ombudsman polonais, ce qui semble susciter toujours quelques doutes et interrogations. Comme en témoigne le deuxième mandat du Défenseur des Droits Civiques, certains aimeraient voir en sa personne — heureusement sans effet — un ''défenseur des droits des pouvoirs publics".

Certaines opinions du Défenseur, exposées dans cet ouvrage, incitent à la discussion. Du reste, difficile d'imaginer qu'il en soit autrement. Il ne s'agit même pas de différences naturelles entre les opinions du Défenseur et celles du Tribunal Constitutionnel, qui se sont manifestées parfois au cours de longues années de leur coopération, mais de certaines différences d'optique globale. Ce que nous concevons quelque peu autrement que le premier Défenseur concerne, par exemple, les questions telles que la position envers les standards internationaux, les relations entre les valeurs, la procédure formelle et le problème dit de la juste procédure, la justice sociale, la notion de libéralisme ou de démocratie libérale. Je ne partagerais même pas la proposition prudente que le Défenseur prête le serment de fidélité au parlement. Par ailleurs, je suis moins impressionnée par l'Occident que Ewa Łętowska. Je sais que cette opinion n'est pas populaire, aussi aimerai-je la justifier. Les fameux standards internationaux, certainement très appréciables en tant qu'objectifs que nous nous proposons d'atteindre (je n'en doute point, ni que les traités internationaux ratifiés doivent avoir la priorité sur le droit interne), me paraissent parfois quelque peu équivoques, surtout du point de vue de leurs

[2] Z. Witkowski, dans *Prawo konstytucyjne* [Droit constitutionnel], Toruń 1994, p. 188.

destinataires. D'autre part, la notion même de l'Europe m'inquiète parfois, quand je pense que pendant si longtemps les démocraties occidentales avaient accepté qu'elle n'englobe pas les territoires situés entre l'Elbe et l'Oural, et qu'à présent elle ne concerne pas les territoires de l'ancienne Yougoslavie, car une telle façon de voir le monde est plus commode et assure plus de sécurité. De l'avis de Ewa Łętowska "le problème fondamental en Pologne c'est l'absence d'une tradition de recourir au droit international, dès qu'on est en présence d'un problème juridique concret (par exemple les questions d'égalité en droit, le problème d'association, etc.). C'est même un problème général de la jurisprudence, car les tribunaux sont très peu enclins à se référer même à la Constitution" (p. 391). Voilà qui est très juste. Mais il faudrait justement commencer par la Constitution, qui garantit l'égalité devant la loi et la liberté d'association, et c'est seulement au cas où la Constitution ne suffirait pas, qu'on pourrait recourir aux pactes et conventions internationaux. Quant au principe, tout à fait d'accord. Seulement il ne faut pas oublier que l'aversion pour le droit polycopié manifestée par le Défenseur des Droits Civiques, le Tribunal Constitutionnel, la science et la doctrine, ne semble pas être partagée par l'administration ni, comme l'écrit Ewa Łętowska, par les tribunaux.

Ni les efforts du Défenseur et du Tribunal Constitutionnel, ni l'opinion universelle des milieux scientifiques sur la loi fatale concernant la publication du Journal des Lois et du Moniteur Polonais, c'est-à-dire sur la publication des actes légaux, n'ont servi à rien. Tout récemment, Anna Michalska a rappelé les pratiques compromettantes du ministre des Affaires Etrangères (datant encore de l'époque de la République Populaire de Pologne), liées à la publication des actes du droit international eu vigueur, concernant les droits du citoyen. On verra bien ce qui en résultera.

Ewa Łętowska clôture ses feuilletons, ou plus exactement son mandat, par cet adage: *Feci quod potui faciant meliora potentes.* Nous avons de quoi remercier notre premier Défenseur des Droits Civiques. La meilleure preuve en a été donnée par Tadeusz Zielinski, notre deuxième Défenseur, qui, à la veille des élections — en risquant beaucoup — avait déclaré qu'il avait l'intention de continuer la ligne de son prédécesseur. Une chose encore est certaine: à cette époque difficile d'édification d'un nouveau modèle d'Etat et de droit, de sollicitude pour les droits de l'homme, pour que le droit signifie toujours droit et la justice —justice, il faut des institutions dont les représentants titulaires ne cèdent pas aux pressions ni conjonctures, et dont les actions nous remplissent d'optimisme et d'espoir, lesquels constituent les fondements de l'Etat de droit. Telle est, à n'en point douter, l'institution du Défenseur des Droits Civiques.

Janina Zakrzewska

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Małgosia Fitzmaurice: International Legal Problems of the Environmental Protection of the Baltic Sea. London 1992, Martinus Nijhoff, Graham and Trotman, Dordrecht (Boston), pp. 313 + index.

Nobody needs to be persuaded nowadays as to the weight of the problem of environmental protection in the modern world, including in particular the region of Europe of which Poland is a part. In a way, all such problems tend to focus on precisely this region, that is — on the international scale — on the issue of protection of the natural environment of the Baltic Sea, a part of which is already dead today. For this reason, it is with obvious interest and satisfaction that we welcome the publication of a monograph by Małgorzata Lachs-Fitzmaurice, Ph.D., which deals with the international legal aspects of those very problems.

The first two chapters discuss introductory questions such as the general characteristics of the Baltic Sea; sea regions and the concept of semi closed sea; the global vs. regional approach to marine environmental protection; the definition of pollution; and the causes and types of pollution of the Baltic ecosystem. Two further chapters deal with the Helsinki Convention on the protection of maritime environment of the Baltic Sea area of 1974. Both provisions of the Convention and its application in practice have been submitted to detailed and thorough analysis. Demonstrating the significant role played by the Convention and by the Commission for the Protection of Maritime Environment of the Baltic Sea, appointed on the basis of the Convention (so-called Helsinki Commission), the Author argues that in cases of conflict between international legal obligations of the Baltic states and the relevant provisions of their domestic law, Art. 27 of the Vienna Convention on the Law of Treaties of 1969 should apply (pp. 92 - 93). It seems that this principle cannot possibly be repeated too often. Further, discussing the advisability of granting to the Helsinki Commission the right to pass acts legally binding for the Baltic states, M. Fitzmaurice considers this step futile unless followed by ''economic and political reality to implement them" (p. 228).

Chapter V contains a review of international documents dealing with protection of the natural environment of the Baltic Sea, other than the Helsinki Convention. Included in the discussion have been such documents as: International convention for the prevention pollution of the sea by oil of 1954; International convention on prevention of pollution by ships of 1973; Convention on prevention of marine pollution by dumping of wastes and other substances of 1973; International convention on intervention in the high seas in cases of oil pollution casualties of 1969; International convention on civil liability for oil pollution damage of 1969; Convention on long-distance trans-frontier air pollution of 1979; Convention on the conservation of European wild life and natural habitats of 1979. The Author also discusses the relevant bi- and trilateral treaties. Recently, states have started to conclude second generation treaties in the discussed domain. According to the Author, this was made possible by the recent changes in Eastern Europe. As a result, states of the region began to treat environmental protection as a priority.

Chapter VI discusses the regulation of environmental protection in national legal systems of the Baltic states. The regulations of Denmark, Finland, Germany, Poland, Sweden, and the USSR have been discussed. Inspiring is the statement that all Baltic states have created within their respective legal systems a framework for transformation of the Helsinki Commission's recommendations into their domestic law. However, as the Authoress proceeds to mention, the implementation of those recommendations in East-European states leaves much to be desired for the lack of financial resources.

The last chapter VII discusses the law and practice of the European Community with respect to protection of the natural environment of the Baltic Sea area. According to the Author it is indispensable, that the European Community/the European Union should join the Helsinki Convention. It should be added that this step will gain even a stronger justification once Sweden and Finland (as well as Poland in a more distant future) become members of the European Community/European Union. Of course, the Union's/Community's accession to the Helsinki Convention would necessarily lead to changes in the composition of the Helsinki Convention.

The general conclusion formulated in the book is as follows: "... the Baltic States have a well developed regional system with a great potential if properly implemented. The network of bilateral and multilateral treaties and the major conventions (Helsinki and Gdansk Conventions) give a very sophisticated legal framework for co-operation. The problem which is going to be the major obstacle to full achievement of the aims of the Baltic States is of an economic nature" (p. 229). We can do nothing but subscribe to this conclusion.

The values of the monograph under review — those as to the merits as well as the formal ones, the sound set of research tools included — make it a valuable publication both for researchers and for practicioners in the field of the environmental protection.

Renata Szafarz

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Jan Wawrzyniak, La Polonia e le sue costituzioni dal 1791 ad oggi, Le radici istitutionali della scolta polacca, Roma 1992, Centro italiano per lo sviluppo della ricerca, 273 Pages.

Destiné principalement aux lecteurs italiens, cet ouvrage couvre plus de 200 ans d'histoire du constitutionnalisme polonais (au sens strict de ce terme) — depuis la Constitution du 3 mai 1791, jusqu'à la ''Petite Constitution" du 17 octobre 1992. Dans un chapitre préliminaire, Γ auteur —juriste et politologue qui penche à l'historien — expose le modèle de la République de la noblesse, où les éléments de la démocratie des nobles s'opposaient à l'oligarchie des magnats. Limité à l'état privilégié, le dilemme du choix inter libertatem et maiestatem se posait au cours de la formation, à l'époque de la Grande Diète, de la monarchie parlementaire.

L'auteur laisse de côté la constitution et la pratique du Royaume de Pologne autonome (1815-1831), le régime de la Galicie autonome après 1860, pour passer directement aux deux Constitutions de la IIe République. A juste titre il leur consacre beaucoup d'attention. Ses appréciations de la Constitution d'avril 1935 sont intéressantes, quoique discutables. Il qualifie le régime fondé sur cet acte d'«autoritarisme pluraliste», en soulignant que sous ce régime également la Pologne était proche, par son système juridique, des Etats de démocratie parlementaire. Cette opinion, qui rejoint celle d'Oskar Halecki (p. 105), exigerait, à mon avis, d'être complétée. Il faudrait en effet signaler que les changements intervenus après 1935 allaient à l'encontre de cette démocratie. Ces changements étaient freinés par la résistance de la majorité de la population et aussi par le danger menaçant la Pologne du côté du IIIe Reich et situant notre pays dans le camp opposé à l'axe Berlin - Rome.

L'auteur — et nous y voyons son mérite — ne glisse pas sur les transformations constitutionnelles de la République Populaire de Pologne, mais commente de façon circonstanciée aussi bien la période 1944 - 1952 que la Constitution de 1952, qu'il place dans les Constitutions staliniennes, inspirées de la Constitution soviétique de 1936. Pour le lecteur étranger il sera intéressant de connaître les nombreuses révisions de cette Constituion, décrites de façon précise, leurs motivations et méandres, résultant des tendances qui, à diverses étapes, avaient prédominé dans les milieux décideurs de la R.P.P., et aussi des pressions sociales dont il fallait tenir compte, en y cédant ne fût-ce que partiellement. De là, entre autres, la création de la Haute Cour Administrative, du Tribunal Constitutionnel, du Tribunal d'Etat et de l'institution du Défenseur des Droits Civiques (l'ombudsman) ou la restitution de la Chambre Suprême de Contrôle en tant qu'organe indépendant du gouvernement.

L'auteur traite conjointement toutes les révisions survenues entre 1954 et 1992, alors que, semble-t-il, il aurait été plus juste de séparer les changements positifs susmentionnés des révisions intervenues après 1989, qui aboutirent au changement substantiel du système de l'Etat, bien qu'il ne soit pas encore pleinement formulé dans le nouveau projet de la Constitution. Les différents projets de Constitution, les discussions sur le modèle de l'Etat démocratique de droit font l'objet du dernier chapitre, qui relate exactement toutes les opinions et les prises de position représentatives des constitutionnalistes.

Cet ouvrage est nécessaire et d'autant plus utile que, édité par le Centre Italien de Promotion de la Recherche Scientifique, il atteint les milieux les plus intéressés et compétents. L'auteur
s'est bien acquitté de sa tâche, faisant preuve du sens de synthèse et de la faculté d'exposer les faits d'une façon à la fois précise et intelligible pour le lecteur cultivé.

L'avant-propos du Professeur Girigio Lombardi met accent et reconnaît à cet ouvrage la valeur de saisir ''sur le vif' la transformation constitutionnelle, de présenter la gestation du modèle de la IIIe République par la confrontation de l'ancien avec le nouveau et aussi le besoin que le nouveau corresponde à l'esprit des temps qui approchent, car- comme le rappelle Lombardi après Baudelaire — "Le temps ne respecte pas ce que l'on fait sans lui".

Juliusz Bardach

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LAW OF APRIL 30, 1993 ON NATIONAL INVESTMENT FUNDS AND THEIR PRIVATIZATION

(Journal of Laws of the Republic of Poland, 1993 Nº 44, Item 202)

CHAPTER 1

GENERAL PROVISIONS

Art. 1

This law sets forth principles for the establishment, operation and privatization of national investment funds.

Art. 2

1. Whenever this law refers to:
   1) the statutes, shares, share capital, supervisory board, shareholders or general meeting of a joint stock company, the shares of which are contributed to a national investment fund or of which a national investment fund is a shareholder, it shall be deemed to refer, respectively, to the company agreement, shares, stated capital, supervisory board, shareholders or general meeting of a limited liability company, unless the given provision of this law states otherwise,
   2) a share certificate, it shall be deemed to rafer to both a compensation share certificate and a universal share certificate.
2. To the extent nor otherwise regulated by this law, provisions of the Commercial Code applicable to joint stock companies shell apply to rational investment funds.

CHAPTER 2

PURPOSE OF AND PRINCIPLES FOR THE ESTABLISHMENT OF NATIONAL INVESTMENT FUNDS

Art. 3

1. The national investment funds, hereinafter referred to as the ''funds", shall be established by the State Treasury in the form of joint stock companies.

2. The rights of the State Treasury as the founder and shareholder of a fund shall be exercised by the appropriate minister being a member of the Council of Ministers.

Art. 4

1. The purpose of the funds is to increase the value of their assets, in particular by enhancing the value of shares of companies of which the funds are shareholders.
2. The funds endeavor to achieve the purpose stated in Sec. 1 above in particular through:
   1) exercising rights with respect to the shares of companies established as a result of transformation of state-owned enterprises into companies wholly owned by the State Treasury, pursuant to the Law dated July 13, 1990 on Privatization of State-Owned Enterprises (Journal of Laws, Nº 51, Item 298 and 1991 Nº 60, Item 253 and Nº 111, Item 480), and shares of other joint stock and limited liability companies, in particular for the purpose of improving the management of the companies in which the funds have a substantial shareholding, including the strengthening of their position in the market and obtaining new technologies and loans for the companies,
   2) conducting economic activity through purchase and sale of shares of companies and exercise of acquired rights; and
   3) granting and obtaining loans for the accomplishment of the tasks set forth in Items 1 and 2 above, as well as other tasks defined in the statutes.

Art. 5

1. The business name of a fund may be chosen freely; however, it should contain the phrase ''National Investment Fund — Joint Stock Company". The use of the abbreviation ''N.I.F. — J.S.C." is permitted. The business name of a fund should be sufficiently different from the business names of other funds.
2. Business names including the phrase or the abbreviation referred to in Sec. 1 above, may be used exclusively by a joint stock company established pursuant to this law.

Art. 6

1. The State Treasury may make non-monetary contributions to a fund in the form of shares of joint stock companies, hereinafter referred to as ''companies", in accordance with the principles set forth in Art. 10 below, so long as it remains the sole shareholder of the fund.
2. The State Treasury may make the monetary contributions to a fund needed for the registration of the fund.

Art. 7

1. The Council of Ministers shall designate, by ordinance, state-owned enterprises which shall be transformed into companies, and companies wholly owned by the State Treasury, in order to have shares of all such companies contributed to the funds, as well as those funds to which such shares shall be contributed, and the procedure for contributing the shares to the funds.
2. The appropriate minister shall submit to the Council of Ministers motions in matters referred to in Sec. 1 above. Motions concerning the transformation of state-owned enterprises into companies in order to have their shares contributed to the funds shall be submitted if neither the director nor the workers council has forwarded an objection with reasons within

45 days of their notification. The workers council shall take its stand after obtaining the opinion of the general meeting of workers (delegates). The absence of an objection within 45 days of the notification of the organs of the enterprise shall be regarded as an expression of consent.

3. The appropriate minister shall transform a state-owned enterprise designated in accordance with Secs. 1 and 2 above. The transformation shall be effected — unless the provisions of this law state otherwise — according to the principles specified in Chapter 2 of the Law on Privatization of State-Owned Enterprises, and, in the part concerning the transformation of a state-owned enterprise, without needing to observe the requirements of Art. 11 of the Law dated February 24, 1990 on Counteracting Monopolistic Practices (Journal of Laws 1991 Nº 89, Item 403).

Art. 8

1. The Council of Ministers shall designate, by ordinance, those companies shares of which shall be contributed to funds established for the purpose of compensating the persons referred to in Art. 30 Sec. 1 below by means of ''compensation share certificates".
2. The value of the capital of the companies referred to in Sec. 1 above may not be less than fifty trillion (50,000,000,000,000) Zlotys.

Art 9

1. So long as the State Treasury remains the sole shareholder of a fund, the contributions referred to in Art. 6 above shall be used to cover the share capital and the reserve capital of the fund; the apportionment between share capital and reserve capital shall be determined in the statutes of the fund.
2. The value of non-monetary contributions of the State Treasury to a fund wholly owned by the State Treasury shall equal the aggregate value of the company shares contributed.
3. The value of a share of a company shall be calculated:
   1) by dividing the total capital of the company as of the date of the last balance sheet by the number of shares of such company at the time of contribution of its shares to the fund, if after its transformation the company has prepared an annual balance sheet for the previous financial year,
   2) by dividing the total capital of such company at the time of either the transformation of a state-owned enterprise into such company or the establishment of such company, by the number of shares provided in the statutes of such company at the time of the contribution of such shares to the fund, in the remaining cases.
4. When the annual balance sheet of a fund is prepared, the value of company shares determined in accordance with Sec. 3 above shall be deemed to be the purchase price of such shares and Art. 425 of the Commercial Code shall apply accordingly.
5. In return for its contributions the State Treasury shall receive the shares of the funds. The State Treasury shall remain the sole owner of the shares of a fund until such shares are made available to entitled entities in accordance with the provisions of this law.

Art. 10

1. The State Treasury shall contribute to the established funds 60% of the shares of each company of which it is the sole shareholder, provided, however, that 27% of the shares of each company should be held in approximately equal parts by all designated funds, except for one such fund which shall receive as a whole a package of 33% of the shares of a given company; with respect to each such company, there shall be only one such package of shares which shall be contributed as a whole to one fund. These principles apply only to the distribution of shares of companies among funds wholly owned by the State Treasury.
2. The State Treasury may also contribute to the funds wholly owned by the State Treasury all or a portion of the shares it owns in a company not wholly owned by the State Treasury; such shares should be divided among designated funds, provided that one fund may receive no more than 33% of the total number of shares of a given company.

Art. 11

Part of the shares of a fund owned by the State Treasury may by cancelled; provided, however, that such cancellation shall be effected without any obligation on the part of the fund to return to the State Treasury the relevant part of its contribution. In this respect, Arts. 440 - 442 of the Commercial Code shall not apply. The reserve capital of the fund shall be increased by the value of the redeemed shares.

Art. 12

1. At the moment of contribution by the State Treasury to the funds of the shares of a company, the share capital of such company wholly owned by the State Treasury shall, by operation of law, be set at the level of 15% of the capital of the company on the date of its entry in the commercial register. In this respect, Art. 311 Para. I of the Commercial Code shall not apply.
2. The amount of decrease of the share capital referred to in Sec. 1 above shall be transferred to the reserve capital of the company.
3. Not later that 14 days after the date of the contribution of the shares of a company to the funds, the management board of such company shall notify the proper court of registration of the adjustment of its share capital in accordance with Sec. 1 above. Within the same period, the management board of the company shall make appropriate adjustments to the apportionment of capital between share capital and reserve capital, as well as a corresponding reduction in the nominal value of the shares of the company. In this respect, Art. 431 Para. 1 of the Commercial Code shall not apply.
4. Immediately upon receiving the notification referred to in Sec. 3 above, the proper courts of registration shall make appropriate adjustments in the commercial registers.
5. With respect to the matters referred to in Secs. 1 - 4 above, the provisions of the Commercial Code relating to the decrease of share capital of a joint stock company shall not apply.

Art. 13

1. The nominal value of fund shares, shares of a joint stock company and shares of a limited liability company shall be not less than one-tenth of the minimum nominal value referred to respectively in Art. 340 Para. 1 and Art. 159 Para. 2 of the Commercial Code.

2. With respect to contributions of the State Treasury to funds wholly owned by the State Treasury, the provisions of Arts. 312, 313 and 315 of the Commercial Code shall not apply.
3. With respect to fund shares received by the State Treasury, the provisions of Art. 347 of the Commercial Code shall not apply.

CHAPTER 3

GOVERNING BODIES OF A NATIONAL INVESTMENT FUND

Art. 14

The governing bodies of a fund shall be: the general meeting, the supervisory board and the management board.

Art. 15

1. Until the first general meeting is convened in which shareholders other than the State Treasury may participate, the members of the supervisory board of a fund shall be appointed and recalled, and their remuneration determined, by the appropriate minister with the consent of the President of the Council of Ministers.
2. The members of the supervisory board of a fund shall be appointed by the appropriate minister from among persons selected through a competition conducted by a Selection Commission.
3. The Selection Commission shall be composed of:
   1) four persons elected by the Sejm,
   2) one person elected by the Senate,
   3) one person designated in each case by the national inter-union organizations and national trade unions being representative of employees of the majority of state places of employment,
   4) twelve persons appointed by the President of the Council of Ministers.
4. The President of the Council of Ministers shall appoint the Chairman of the Selection Commission and determine its rules of procedure.

Art. 16

1. The statutes of a fund shall determine the number of members of its supervisory board; such number shall be an odd number and shall not be greater than nine until the first general meeting is convened in which shareholders other than the State Treasury may participate.
2. At least two thirds of the members of a supervisory board of a fund, including its chairman, should be Polish citizens.

Art. 17

The term of the first supervisory board shall expire on the day the first ordinary general meeting of the fund has been held in which shareholders other than the State Treasury may participate. In this respect, Art. 381 Para. 1 of the Commercial Code shall not apply.

Art. 18

1. Until the first general meeting is convened in which shareholders other than the State Treasury may participate, powers of the general meeting which are not reserved by this law or the statutes of a fund to the exclusive competence of the general meeting, shall be exercised by the supervisory board.
2. Within the period referred to in Sec. 1 above, the statutes of a fund may not grant the supervisory board powers to decide in the following matters:
   1) change of statutes,
   2) issuance of new shares,
   3) merger of the fund with another company,
   4) dissolution of the fund.
3. In addition to its powers arising under the Commercial Code, the supervisory board shall have the exclusive power to appoint the members of the management board, and, subject to Art. 21 Sec. 2 below, to select a legal entity performing management services, hereinafter referred to as the ''management firm", and to conclude the contract referred to in Art. 21 below.

Art. 19

The management board of a fund shall be appointed for a period of no longer than two years. In this respect, Art. 367 Para. 1 of the Commercial Code shall not apply. So long as the State Treasury remains the sole shareholder of a fund, only a Polish citizen may be a member of the management board.

Art. 20

1. Within eight months after the end of each fiscal year of a fund, the management board shall be obliged to prepare and present to the supervisory board a balance sheet as at the last day of the fiscal year (the balance sheet date), an account of profits and losses for the previous year and a written report on the activities of the fund in the given year. In this respect, Art. 420 Para. 1 of the Commercial Code shall not apply.
2. The Minister of Finance may, by ordinance, determine specific accounting requirements for national investment funds.
3. The management board of a fund shall convene a general meeting within ten months after the end of each fiscal year. In this respect, Art. 390 Para. 1 of the Commercial Code shall not apply.

CHAPTER 4

MANAGEMENT OF THE ASSETS OF A NATIONAL INVESTMENT FUND

Art. 21

1. A fund may conclude a contract for the management of its assets with a management firm. The contract shall be executed on behalf of the fund by its supervisory board.

2. Funds wholly owned by the State Treasury may conclude management contracts exclusively with management firms selected by way of competitive tender by the Selection Commission referred to in Art. 15 Sec. 3 above.

3. The tender referred to in Sec. 2 above shall be a public tender and the selection criteria shall be made public. The detailed procedure for conducting the tender shall be determined, by ordinance, by the Council of Ministers.

Art. 22

1. The contract between a fund and a management firm may provide that the fund will grant a power of commercial representation (''prokura") to the management firm. In the case of granting a power of commercial representation to the management firm, the name of the management firm and the names of individuals exercising the rights of commercial representation shall be disclosed in the commercial register.

2. The contract may not release the management firm from the duty to cover all costs and expenses incurred by the fund for the account of the management firm, or by the management firm or its representatives and advisors, in connection with the carrying out by the management firm of its obligations.

3. A legal act between a third party and a person exercising the rights of a legal person holding a power of commercial representation is binding, even if the name of the person holding the power of commercial representation or the name of the person exercising the rights of commercial representation is not disclosed in the commercial register at the time of execution of such legal act.

4. Acting without or exceeding the scope of authorization by a person who is disclosed in the commercial register and is exercising the rights on behalf of a legal person holding a power of commercial representation does not affect the validity of legal acts performed by such person with respect to third parties, unless a third party has acted in bad faith.

Art. 23

1. The duties and powers of the management firm shall be determined in the statutes of a fund and in the contract between the fund and the management firm.

2. Neither the statutes of a fund nor any contract between such fund and a management firm shall exclude or limit the liability of the management firm for the damage or loss caused to the fund by intentional wrong or gross negligence of the management firm.

Art. 24

1. Any modification of a material term of a contract between a fund and a management firm, in particular any modification of the terms and conditions of the remuneration of the management firm, shall require ratification by the general meeting of the fund.

2. The fund may terminate the contract with the management firm without giving cause with no more than 180 days notice; in case of termination by the fund of the contract in circumstances for which the management firm is not responsible, the possible penalty for termination to which the management firm will be entitled shall not exceed in amount one half of the annual fixed management fee.

3. If a contract between a fund which is wholly owned by the State Treasury and a management firm provides for an annual fixed management fee, annual performance fee or a final performance fee, then the following principles regarding the remuneration of the management firm shall apply:
   1) the annual fixed management fee shall be established by way of tender referred to in Art. 21 Sec. 2 above;
   2) the annual performance fee, including any fee expressed in terms of a percentage of fund shares, shall be determined in an amount not to exceed the value of 1% of the fund shares for each year of rendering services by the management firm, in an amount obtained from the sale of shares and the value of due dividends;
   3) the final performance fee, including any fee expressed in terms of a percentage of fund shares, shall be determined in both cases in an amount not to exceed the value of 0,5% of fund shares multiplied by the number of years of service of a management firm, in an amount obtained from the sale of shares and the value of due dividends; such fee shall be payable only after the termination of the contract with the management firm.
4. The fee referred to in Sec. 3 above shall not exceed an amount determined in proportion to the period for which the management firm provided services to the fund.
5. Once any shares of a fund are held by shareholders other than the State Treasury, the principles of remuneration of a management firm which renders services to the fund must satisfy the condition that the portion of fees paid to the management firm which is dependent on the financial performance of the fund, even when expressed in terms of a percentage of fund shares, in no event may exceed the value of 2% of the shares of the fund with respect to each year of service of the management firm.

CHAPTER 5

ANTI-MONOPOLY PROVISIONS

Art. 25

1. All agreements among funds, or among one or more funds and third parties, regarding acquisitions of shares shall be notified to the Anti-Monopoly Office within 14 days from the date of the conclusion of the agreement. The notification obligation shall not apply to an agreement, as a result of which a fund acquires or obtains, in total, less than 10% of the shares of a given company.
2. The duty of notification referred to in Sec. 1 above rests upon the management board of the fund.
3. Unless the prior approval of the Anti-Monopoly Office is obtained, no management firm shall simultaneously provide management services to two or more funds and no management firm shall own shares in any fund to which it is then providing management services.
4. No member of the supervisory board or management board of any fund shall simultaneously serve as a member of the supervisory board or management board of another fund. This prohibition applies accordingly to persons exercising the power of commercial representation (''prokura") on behalf of a fund.

5. In the event of non-compliance with the requirements and prohibitions determined in Secs. 2-4 above, the Anti-Monopoly Office may issue a decision imposing upon the responsible member of the management board of the relevant fund or management firm a fine not exceeding half of such person's annual income for the previous fiscal year. Appeals from decisions of the Anti-Monopoly Office shall be conducted in accordance with Art. 10 of the Law on Counteracting Monopolistic Practices.

Art. 26

The provisions of Art. 375 of the Commercial Code shall apply accordingly to the management firm, its employees and its subcontractors.

Art. 27

The prohibitions referred to in Art. 25 Secs. 3 and 4 and Art. 26 above shall also apply to entities which occupy a ''dominant" or ''dependent" position with respect to the management firm, as such terms are defined in Art. 2 Item 9 of the Law dated March 22, 1991, on Public Trading in Securities and Trust Funds (Journal of Laws № 35, Item 155 and № 103, Item 447).

Art. 28

1. Within three years from the date of registration of a fund, parliamentary deputies and senators shall not be members of the supervisory board or the management board of the fund or of a company in which the fund holds at least 20% of the shares,
2. In this respect, the provisions of Sec. 1 above shall not exclude the provisions of Art. 4 Sec. 1 of the Law dated June 5, 1992, on Restrictions in Economic Activity by Persons Exercising Public Functions (Journal of Laws N^{o} 56, Item 274).
3. The election or appointment of persons referred to in Sec. 1 above, which violates the prohibitions set out in that Section, shall be void by law and shall not be entered into the commercial register.

CHAPTER 6

SHARE CERTIFICATES

Art. 29

1. A share certificate shall be a bearer security within the meaning of Art. 2 Sec. 1 of the Law referred to in Art. 27 above. A share certificate represents the property rights referred to in Art. 37 and Art. 38 Sec. 5 below.
2. Share certificates shall be issued by the State Treasury for which the appropriate minister shall act.
3. Share certificates may be issued in multiple form.
4. The appropriate minister may entrust to one or more banks or another institution activities relating to the issuance of share certificates.

Art. 30

1. The following persons shall be entitled to compensation share certificates, which may be exchanged for shares of the funds referred to in Art. 8 above:

   1) persons referred to in Art. 24 of the 1992 Budget Law dated June 5, 1992 (Journal of Laws, Nº 50, Item 229 and Nº 88, Item 443):

      a) persons employed by state budgetary entities from July 1, 1991 to December 31, 1991,

      b) soldiers and officers of the Police, Penitentiary Service, State Security Office and Border Guard, who performed their duties in the period from July 1, 1991 to December 31, 1991,

      c) persons who in the period from July 1 to December 31, 1991 held the positions of judges, public prosecutors or held state management positions, except for persons whose claims on the above basis have already been fully satisfied;

   2) retirement and disability pensioners entitled before November 15, 1991 to pension increases due to their having worked in special conditions or having performed work of a special character, pursuant to Art. 54 Sec. 1, Item 2 of the Law dated December 14, 1982 on Pensions for Employees and Their Families (Journal of Laws Nº 40, Item 267, 1984 Nº 52, Items 268 and 270, 1986 Nº l, Item 1, 1989 Nº 35, Items 190 and 192, 1990 Nº 10, Items 58 and 60, Nº 36, Item 206, No 66, Item 390 and Nº 87, Item 506, 1991 Nº 7, Item 24, Nº 80, Item 350, and Nº 94, Item 442 and 1992 Nº 21, Item 84 and Nº 64, Item 321), except for retirement and disability pensioners whose pensions were increased pursuant to Art. 6 Sec. 5 of the Law dated October 17, 1991 on the Revaluation of Pensions, Principles of Determining Pensions and the Change of Certain Laws (Journal of Laws, Nº 104, Item 450 and 1992 Nº 21, Item 84).

2. The Council of Ministers shall determine, by ordinance:

   1) the method of calculating the number of compensation share certificates for:

      a) persons referred to in Sec. 1 Item 1, depending on the status of employment and the number of full months that a person was employed in the period referred to in Sec. 1 Item 1,

      b) retirement and disability pensioners referred to in Sec. 1 Item 2, depending on their age, the value of sector premia, and the value basis of their pension;

   2) the method of using compensation share certificates for this purpose.

3. The preparation of lists of persons entitled to receive compensations share certificates shall be the task of the appropriate places of employment and pension organs. The Minister of Labor and Social Policy shall exercise supervision and control over the preparation of the lists of entitled persons. The Minister of Labor and Social Policy shall, by decree, determine the detailed principles and procedure of preparing such lists and the ways of exercising supervision and control.

4. Disputes concerning rights to receive compensation share certificates shall be settled according to the rules regulating the procedure of settling labor and social security disputes. The

Council of Ministers shall, by ordinance, determine the detailed procedures for bringing claims by entitled persons.

Art. 31

1. All citizens of the Republic of Poland who are registered as permanent residents in Poland and who by December 31 of the year preceding the year of issuance of share certificates shall be at least 18 years old, shall be entitled to receive an equal number of share certificates, hereinafter referred to as ''universal share certificates", which may be exchanged for shares of funds other than those referred to in Art. 8 above.
2. The preparation of lists of persons entitled to receive universal share certificates shall constitute a task delegated to the gminas.
3. Within the period set for the distribution of universal share certificates, every citizen may bring to the gmina's office, in writing or orally for the record, a claim relating to inaccuracy in the preparation of a list of entitled persons.
4. The director (or mayor or president) of a gmina shall be obliged to examine the claim within 30 days from its submission and to issue a decision on amending the list of entitled persons.
5. The decision shall be delivered, without delay, to the person who submitted the claim and if such decision refers to any other persons, it shall be delivered also to such other persons.
6. With respect to a decision which dismisses the claim or which results in the deletion of a person's name from the list of eligible persons, any person having a legal interest may, within 14 days from the date the decision is issued, bring an appeal to the appropriate regional court through the director (or mayor or president) of the gmina. The decision and all documentation of the case shall be attached to the appeal.
7. The court shall examine the case in a summary proceeding. A decision of the regional court may be appealed to the voivodship court.

Art. 32

1. The Council of Ministers shall determine, by ordinance, the specimen of share certificates, the procedure of distribution of share certificates, and the dates of commencement and termination of distribution of share certificates.
2. The distribution of share certificates shall be the task of the appropriate minister.

Art. 33

1. The delivery of a universal share certificate during the period specified in the ordinance referred to in Art. 32 Sec. 1 above shall be subject to a fee. The amount of such fee and the procedures for payment shall be set forth by an ordinance of the Council of Ministers.
2. The amount of the fee referred to in Sec. 1 above payable for a universal share certificate shall not exceed 10% of the average monthly wage in the national economy announced by the President of the Central Statistical Office for the last month covered by the available statistics.
3. The delivery of a compensation share certificate shall not be subject to a fee.

Art. 34

1. The right to receive a share certificate shall not be transferable or inheritable.
2. After the expiry of the period of delivery of share certificates in accordance with the ordinance referred to in Art. 32 Sec. 1 above, the Council of Ministers may, by ordinance, determine an expiry date for share certificates referred to in the ordinance. The expiry date of share certificates shall be announced no later than a year before such date. The power of the Council of Ministers to declare such an expiry date shall be described on the face of the share certificate.

Art 35

1. Subject to Sec. 3 below, the provisions of Art. 1 Sec. 2, Art. 39 and Art. 54 Sec. 1 of the Law referred to in Art. 27 above shall not apply to secondary public trading in share certificates.
2. In order to introduce a share certificate into stock exchange trading or regulated non-stock exchange trading, a holder of the share certificate shall deposit it in accordance with the provisions of Art. 5 of the Law referred to in Art. 27 above.
3. The Warsaw Stock Exchange shall admit to stock exchange trading share certificates presented by an entity conducting a brokerage business in accordance with Art. 71 of the Law referred to in Art. 27 above.

Art. 36

The transfer of ownership of a share certificate shall be exempt from stamp duty.

CHAPTER 7

EXCHANGE OF SHARE CERTIFICATES FOR SHARES OF NATIONAL INVESTMENT FUNDS

Art. 37

A share certificate shall be exchangeable at the National Depository of Securities, through an entity conducting a brokerage business, for an equal number of shares in every fund existing at the time of issuance of the share certificate and designated by the appropriate minister for the realization of such exchange, provided that such exchange shall take place only after shares in all such funds have been admitted to public trading on the basis of Art. 49 of the Law referred to in Art. 27 above.

Art. 38

1. The appropriate minister shall designate, by ordinance, the funds referred to in Art. 37 above, the date from which the share certificates may be exchanged for shares of funds and the procedures of such exchange.
2. The appropriate minister shall make all the shares of a given fund available for exchange for share certificates, except for a package of 15% of shares in every fund reserved for other purposes.
3. Upon exchange of a share certificate into shares of the funds, all rights relating to the share certificate shall expire.

4. The appropriate minister, acting for the State Treasury, shall be obliged to retain and collect separately any amounts received in connection with ownership of fund shares, including dividends and liquidation proceeds and interest earned on such amounts, as well as amounts obtained from the sale of fund shares referred to in Sec. 2 above.
5. The appropriate minister may decree the distribution of the amounts referred to in Sec. 4 above, obtained in connection with fund shares reserved for exchange for share certificates, to the holders of such share certificates, in proportion to the number of share certificates held, at any time before or after the exchange of such share certificates for fund shares.
6. The appropriate minister, acting for the State Treasury, is entitled to pay to the management firms the remuneration and dividends relating to the shares, which constitute remuneration paid to them in accordance with Art. 24 Sec. 3 Items 2 and 3 and Secs. 4 and 5.
7. The proceeds referred to in Sec. 4 above, less the amounts paid out referred to in Secs. 5 and 6 above, shall constitute revenue of the State Treasury.
8. The appropriate minister may entrust to one or more banks or another institution activities relating to the exchange of share certificates for shares of the funds and the distribution of the amounts referred to in Secs. 4 and 6 above.

CHAPTER 8

PRIVATIZATION FUND AND PRIVATIZATION AGENCY

Art. 39

1. A fund, hereinafter referred to as the ''Privatization Fund", designated to cover the costs of implementation of Privatization according to the provisions of this law shall be established.
2. Fees for the distribution of universal share certificates shall constitute revenue of the Privatization Fund.
3. The appropriate minister shall have disposition over the assets of the Privatization Fund.
4. The Privatization Fund shall be liquidated six months after the end of distribution of universal share certificates; assets remaining in the account of the Fund on the date of its liquidation shall constitute revenue of the State Treasury.

Art. 40

1. The Council of Ministers may, by ordinance, establish a Privatization Agency, hereinafter referred to as the ''Agency", as a state legal person within the meaning of Art. 33 of the Civil Code. The Agency shall have legal personality from the date of entry into force of the ordinance,
2. The Council of Ministers shall grant the Agency its statutes. The statutes shall determine, in particular, the organization and tasks of the Agency with respect to the exercise by the appropriate minister of the rights and duties provided for, in particular, in Art. 38 Secs. 4 - 6 and Art. 39 Sec. 3 of this law.
3. The appropriate minister shall supervise the activities of the Agency.
4. The budget law shall determine the revenues and expenditures of the Agency.

5. Every year the Agency shall submit to the Sejm a report on its activities.

6. The organ of the Agency is the President, who shall be appointed or recalled by the President of the Council of Ministers, upon the motion of the appropriate minister. The Council of Ministers shall effect the liquidation of the Agency by an ordinance, simultaneously determining the procedure of the liquidation.

CHAPTER 9

CHANGES IN EXISTING REGULATIONS

Art. 41

The Law dated March 22 1991, on Public Trading in Securities and Trust Funds (Journal of Laws Nº 35, Item 155 and Nº 103, Item 447) shall be amended by replacing in Art. 1 Sec. 1, Item 2 the period after the words ''for one purchaser" with a comma and adding new Items 3 and 4, which shall read as follows:

"3) making available shares to employees on the basis of Article 46 of the Law dated April 30, 1993 on National Investment Funds and Their Privatization (Journal of Laws Nº 44, Item 202),

4) proposing to acquire, acquiring or transferring rights pertaining to shares in any company established as a result of the transformation of a state-owned enterprise into a company wholly owned by the State Treasury, based on the Law on Privatization of State-Owned Enterprises, if the parties to the agreement are exclusively either employees of the company or persons referred to in Art. 46 of the Law on National Investment Funds and Their Privatization, or a national investment fund."

Art. 42

In the Law dated July 26, 1991 on Personal Income Tax (Journal of Laws, Nº 80, Item 350, Nº 100, Item 442 and 1992, Nº 21, Item 86, Nº 68, Item 341, Nº 100, Item 498 and 1993 Nº 28, Item 127) in Art. 21:

1) a new Item 41 shall be added, which shall read as follows:

"41) revenue obtained from the sale of share certificates exchanged for shares of national investment funds established pursuant to the Law dated April 30, 1993 on National Investment Funds and Their Privatization (Journal of Laws, Nº 44, Item 202), except for the cases where such sale is the subject of economic activity;"

2) a new Item 42 shall be added, which shall read as follows:

"12) revenue obtained from the sale of shares of national investment funds established pursuant to the Law dated April 30, 1993 on National Investment Funds and Their Privatization (Journal of Laws, Nº 44, Item 202), in one year not to exceed half of one month's average salary in the national economy."

Art. 43

In the Law dated February 15, 1992 on Corporate Income Tax and on Amendments to Laws Regulating the Principles of Taxation (Journal of Laws Nº 21, Item 86, Nº 40, Item 174,

Nº 68, Item 341, Nº 100, Item 498 and 1993 Nº 28, Item 127) in Art. 17 Sec. l, a new Item 21 shall be added, which shall read as follows:

"21) income of the national investment funds established pursuant to the Law dated April 30, 1993 on National Investment Funds (Journal of Laws, Nº 44, Item 202), arising from dividends and other revenues from participation in profits of legal persons having their seat within the territory of the Republic of Poland."

CHAPTER 10

TRANSITIONALAND SPECIAL PROVISIONS

Art. 44

1. At the time of registration of a fund, the fund statutes should contain the following restrictions:

   1) a prohibition to acquire securities issued by entities not having their seats in Poland or by entities not primarily engaged in business in Poland,

   2) a prohibition to hold shares in general partnerships or other entities, investment in which would create unlimited liability for the fund,

   3) a prohibition to acquire shares of any company if as a result of such acquisition the fund would have over 33% of the votes of the company, with the exception of a situation where:

      a) shares exceeding the limit of 33% were obtained by the fund in accordance with Art. 435 of the Commercial Code,

      b) shares exceeding the limit of 33% were obtained by the fund in the exercise of a preemption right due to all shareholders,

      c) shares exceeding the limit of 33% were obtained by the fund in the performance of an obligation to make a cash offer to all remaining shareholders of the company to purchase all remaining shares,

   4) within three years of the registration of the fund, a prohibition on the fund to sell shares of a company in which the fund owns more than 20% of the share capital and is at the same time, with the exception of state legal persons, its largest shareholder, if as a result of such sale the fund's holding in the share capital of such company would fall below 20%; this prohibition need not apply to situations where such sale takes place as a result of a public offer made by the fund or an offer for sale to a single investor or a group of investors, provided however that the buyer shall acquire all the shares of such company offered for sale in this way,

   5) a prohibition on the fund to sell securities that the fund at the time of the making of the sale agreement does not own; unless at the time of making of such agreement the fund is entitled to acquire an appropriate number of securities of the same kind,

   6) a prohibition on the fund to acquire securities issued by another fund or entity which is engaged primarily in trade in securities, if as a result of such acquisition more than 5% of the net asset value of the fund would be invested in the acquired securities,

7) a prohibition on the fund to acquire precious metals and enter into commodities contracts, options or futures contracts, except for:

   a) transactions having the aim of reducing the risk within limits allowed by Polish law,

   b) the acquisition of shares of companies that produce and process precious metals or commodities,

8) a prohibition on the fund to acquire real estate (except for use as office space for the fund or any management firm with which the fund has contracted), or shares in companies engaged primarily in real estate investment, if as a result of such investment more than 5% of the net asset value of the fund would be invested in shares of such company,

9) a prohibition on the fund to borrow money or issue debt securities, if as a result the total value of the Fund's debt obligations would exceed 50% of the net asset value of the fund,

10) a prohibition on the fund to acquire securities, if as a result of such acquisition more than 25% of the net asset value of the fund would then be invested in securities of one issuer.

2. The fund statutes should also provide that any amendment of the statutes resulting in the elimination of any of the restrictions referred to in Sec. 1 above, which takes place within three years of the date of registration of the fund, shall require a unanimous vote of the general meeting of the fund. In such a case, the State Treasury will not be obliged by the provisions of the statutes to a particular manner of voting at the general meeting of the fund.

Art. 45

Within three years from the registration of a fund, the statutes of such fund, the entry of such fund in the commercial register, and all agreements concluded by the fund, shall carry the following legend:

> ''This company, pursuant to the Law dated April 30, 1993 on National Investment Funds and Their Privatization is exempted from compliance with Articles 159 Para. 2, 312, 313, 315, 340 Para. 1, 347, 367 Para. 1, 381 Para. 1, 390 Para. 1, 420 Para. 1, 425 and 440 - 442 of the Commercial Code."

Art. 46

1. The provisions of Arts. 23 and 24 of the Law referred to in Art. 4 Sec. 2 Item 1 above shall not apply to companies referred to in Art. 10 Sec. 1 above. Contributions by the State Treasury of shares of such companies to such funds will not require compliance with the requirements of Art. 20 of the Law referred to in Art. 4 Sec. 2 Item 1. In such a case, however, shares of companies owned by the State Treasury may not be made available for payment to individual persons during the first three years after the establishment of the company.
2. At the date of the contribution of the shares of a company to funds, up to 15% of the shares of the company shall be made available, without payment, to the employees of the state-owned enterprise transformed into such company at the date of its deletion from the register of state-owned enterprises.
3. The total nominal value of the shares referred to in Sec. 2 above shall not exceed 24 average monthly wages paid in the six major sectors of the national economy to one employee

during the period of 12 months preceding the contribution of the shares of the company to the funds multiplied by the number of entitled employees. When determining the value of the shares referred to in this Section, the value of all previous preferences relating to the acquisition of shares of the company granted to its employees shall be taken into account.

4. If, within three months from the date of the contribution of shares of a company to a fund, such company does not determine the rules of distribution of shares to the employees, such shares shall be made available to the employees in equal numbers.
5. The shares referred to in Sec. 2 above should be made available to the employees not later than six months from the date of contribution of shares of a company to a fund.
6. The rights referred to in Secs. 2-5 above shall be also granted, subject to the limit referred to in Sec. 3 above, to individual farmers and fishermen providing raw products on a contractual basis to the state-owned enterprise which has been transformed into a company. A condition of this grant is that such farmers or fishermen have remained bound by contract with such state enterprise for a continuous period not shorter than two years immediately preceding the entry of the company into the commercial register.

Art. 47

1. Subject to the provisions of Arts. 10 and 46 above, from the total number of shares of a company belonging to the State Treasury, shares shall be reserved in order to:
   1) reinforce the social security system,
   2) carry out, if necessary, a supplementary compensation for persons referred to in Art. 30 Sec. 1 above.
2. The principles of achieving the objectives referred to in Sec. 1 shall be set forth in a separate law.

Art. 48

The notarial fee imposed for the preparing of a notarial deed establishing a fund shall not exceed 10 million Zlotys.

CHAPTER 11

FINAL PROVISIONS

Art. 49

The provisions of the Law dated July 19, 1991 on Interest on Capital of Companies Wholly Owned by the State Treasury (Journal of Laws, N° 75, Item 330 and 1992 N° 45, Item 200) shall not apply to:

1) companies wholly owned by the State Treasury existing at the date of entry into force of this law, designated by the Council of Ministers in accordance with Art. 7 Sec. 1, from the date of entry into force of this law;
2) companies wholly owned by the State Treasury which will be established as a result of transformation of state enterprises designated by the Council of Ministers in accordance with Art. 7 Sec. 1.

Art. 50

The Law dated December 22, 1990 on the Employee Wage Increase Tax (Journal of Laws 1991 Nº 1, Item 1 and 1992 Nº 21, Item 85 and Nº 73, Item 361, Nº 100, Item 498 and 1993 Nº 28, Item 127) shall not apply to funds or to companies the shares of which shall be contributed to the funds in accordance with the principles defined in Art. 10 above.

Art. 51

The provisions of this law do not restrict the capacity of persons other than the State Treasury to set up joint stock companies or limited liability companies for the purpose of investing, in accordance with prevailing law, in the shares of companies within the meaning of this law.

Art. 52

Subject to the provisions of this law, the State Treasury may repeat the issuance of universal share certificates, establishing at the same time additional funds for the purpose of exchanging share certificates for shares of these funds. Art. 39 shall apply accordingly.

Art. 53

This law shall take effect fourteen days from the date of its publication, except for Art. 42 Sec. 2, whic+h shall take effect on January 1, 1996.