

LEGITIMACY AND CONSTITUTIONAL STABILITY AS CHALLENGES FOR POLAND'S ACCESSION TO THE EUROPEAN UNION*

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The aspiration to membership in the Communities and then in the European Union was manifest in Polish politics since the departure from the communist system, not to mention the hopes fostered even before that time by the circles of democratic opposition. Naturally, these aspirations were not and still are not approved by the whole nation, and one of the reasons for that was the particular emotional attachment to the relatively freshly regained independence. Poland's possible adherence to supra-national structures and — in practice - an irrevocable diminishing of the competence of the national authorities in the areas in which European Communities have exclusive competence provokes considerable public resistance.¹ Poles had no objections to meeting the initial, purely political criteria, which are taken into account when considering new candidates to the European Union because these criteria matched the expectations of the Polish society as to the democratisation of the political system and basing it on safeguards of rights and freedoms.² The economic criteria and the level of adjustment of the Polish law remain the decisive factors - apart from ones pertaining to the Union itself - for the date of Poland's admission to the Union.

One legally fundamental and politically significant step towards membership was the regulation, in the Constitution of 2 April 1997, of the possibility and procedure for

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¹ Although according to results of a most recent poll conducted by Centrum Badań Opinii Społecznej in December 2001, there are still twice as many supporters of accession as its opponents (75% of respondents intended to participate in the referendum on the accession to the EU; among those 56% were in favour of accession, 27% were against, with 17% being undecided), in comparison with a poll conducted in June 1994, the percentage of votes "for" fell by 20%, and the percentage of votes "against" rose by 20%. An interesting discussion of the evolving attitudes towards membership of the European Union in an earlier period among Poles is presented in a book entitled: *Polacy wobec integracji Polski z Unią Europejską* [Poles in the Face of Poland's Integration with the European Union], Warszawa 1998.

² What I am referring to here is particularly the condition, envisaged in the Treaty of Rome, that the countries acceding to the Union be democratic states and the so-called first Copenhagen criterion - see further in the article. Cf. E.-W. Böckendorff: *Państwo prawa w jednoczącej się Europie* [The State of Law in the Uniting Europe], Warszawa 2000.

transferring the competence of domestic authorities to an international organisation or institution (such as the EU), as well as including the legal instruments enacted thereby into the domestic legal order. This paper will focus on the legal problems connected with these constitutional provisions and attempt to provide an evaluation of their completeness.

The 1997 Constitution as an Institutional Step Towards the EU Membership

The Republic of Poland, a country whose process of departure from the communist system started further radical changes towards democracy in Central and Eastern Europe, was paradoxically one of the last countries in that region to adopt a complete “post-totalitarian” constitution. Some of the reasons for that were: the fact that the old regulation in force, the so-called Small Constitution of 17 October 1992, was relatively satisfactory from the point of view of an effective functioning of the state system, the existence of considerable ideological differences between political parties participating in the preparation of drafts of the new Constitution and the necessity to reach a compromise, as the draft constitution required a majority in the National Assembly, i.e. the joint chambers of Parliament. The resulting delay - the Constitution of the Republic of Poland was adopted as late as 2 April 1997 — made it possible to include among the constitutional provisions some norms anticipating Poland’s adherence to the European structures. By that time, under the Association Agreement of 1991, the perspective of Poland’s future membership in the European Union had gained legitimisation.

The works on the shape of the future constitution were conducted with an awareness of the importance and delicate nature of European integration problems. The “European clause” as it was finally adopted: its content and place in the system of the constitution were the result of balancing various political, systemic, historical and psychological arguments.

A very important stage of constitutional works was the preparation of the country for accession to the European Union under an accession treaty, which will require ratification upon consent previously granted in a statute (cf. Article 89 para. 1 subpara. 2, 3, 4 and 5). The current wording of Article 90 of the Constitution takes into account the historical importance of this decision and the experiences of those countries, which have already joined the European Communities.

The final conclusion that was drawn from these experiences was that a country had to be prepared in advance for the political, systemic and legal consequences of a decision on accession to the Union. Therefore, such country must sufficiently early foresee the possibility of delegating to this organisation the competence of organs of State authority in relation to certain matters. If Poland is ever to become a member of the Union, then, sooner or later, such transfer of power will inevitably occur. So we should not postpone the approximation of constitutional provisions (and this is a matter of fundamental law) till the moment when it becomes necessary anyway. Later on it may involve

some difficulties (cf. the procedure for amending the Constitution), which could be avoided relatively easily during the process of preparing the Constitution in the years 1993-1997. These forecasts proved only partially true, since the issue of the "European clause" aroused heated discussions and was one of the arguments invoked by the opponents of the new Constitution in the campaign preceding the referendum in which it was adopted, in May 1997. The reason why the "European clause" was and still is being contested - now with lesser intensity, although growing in times of election campaigns - is the fear of losing State sovereignty, or at least reducing it, which is unacceptable in the understanding of sovereignty as presented by anti-European parties (conservative, nationalist and fundamentalist Catholic ones).³

The arguments in favour of adopting the constitutional provisions anticipating Poland's accession to the Union were systemic and political rationality and prudence, which required the fundamental law, on the one hand, to define the procedure for ratifying the accession agreement and thereby define the behaviour of public authorities responsible for the success of negotiations, and, on the other, to "socialize" the citizens into the perspective of making a decision on Poland's membership in the European Union, be it in the form of a referendum or through an appropriate choice of representatives in both chambers of Parliament.⁴

Here, we should also remind ourselves that, while working on the consolidated draft of the Constitution, the Constitutional Commission of the National Assembly was constantly considering the conformity of its systemic provisions with the laws of the Member States of the European Union. In accordance with Article 6 of the Treaty on the European Union, the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, common to all Member States, are also the basis on which the Union is built. The assumption was that if the fundamental laws of such countries as France, Italy, the Federal Republic of Germany, Portugal or Spain "fit into" the Union laws, then, once the basic principles underlying the Polish constitutional solutions are in line with the norms adopted in these countries, they will also "fit into" the requirements of the Union. This is particularly true of the fundamental principles of the state political and economic system, the catalogue of human and civil freedoms, rights and duties, the institutional mechanism of protection of such freedoms and rights, including, above all, judicial protection.

The Constitutional Commission regularly compared the norms that were included in the draft on which it was working with the regulations presented in the constitutions of Member States of the Union. The argument that the suggested solutions differ from the

³ A. Szczerbiak: *Decline and stabilisation. Changing patterns of support of European Union membership in Poland* (report), Instytut Spraw Publicznych, Warszawa 2000; Polish version: "Spadek i stabilizacja. Zmieniające się wzorce poparcia dla członkostwa Polski w Unii Europejskiej" [in:] E. Popławska (ed.): *Konstytucja dla rozszerzającej się Europy* [Constitution for the Expanding Europe], Warszawa 2000.

⁴ M. Wyrzykowski: "Klauzula europejska RP - zagrożenie dla suwerenności? Suwerenność a klauzula ratyfikacyjna członkostwa Polski w Unii Europejskiej" [The European Clause - Menace to Sovereignty? Sovereignty and the procedure of ratification of Polish membership in the European Union] [in:] W. Czapliński, I. Lipowicz, M. Wyrzykowski, T. Skoczny (eds.): *Suwerenność i integracja europejska. Materiały pokonferencyjne* [Sovereignty and European Integration. Conference materials], Warszawa 1999.

systemic standards common in these countries was one of those arguments that usually led to elimination of the suggestions. And conversely, if a given solution was known in these countries and satisfactorily functioned in them, this argument was treated as a particularly important one, which meant it had considerable impact on the content of the draft on which the Commission was working. Similar weight was given to references to international law regulations adopted on our continent, especially upon the initiative of the Council of Europe. The thinking behind it was that if Member States of the Union ratified these instruments and included their provisions in their domestic laws, then basing the Polish constitutional regulations on similar or even identical standards will bring our country closer to the Member States of the Union and will minimise the risk of discrepancies between the Polish domestic law and the law accepted in this organisation.⁵

Furthermore, the norms known in the primary Community legislation, including the Maastricht Treaty, have had the role of setting standards. Following the European principle of subsidiarity, the same principle was included in the preamble to the Constitution of 1997.⁶ Article 216 Para 5 of the Constitution was also directly influenced by these regulations ("It shall neither be permissible to contract loans nor to provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product...").

Although one can have different opinions about the usefulness of this method, consultations were also held with experts in constitutional law from the EU Member States in the course of works on the constitution (e.g. France). The aim was to be certain of the quality of Polish norms and their conformity to the standards accepted in this organisation. It is safe to say that the authors of the Polish Constitution of 1997 were aware of the fact that the instrument they were working on would, in the future, function in the European normative environment and if it was not to be in conflict with this environment, it must share the same basic principles. To a considerable extent, this kind of compliance was achieved.

Legitimacy of the Accession

The constitutional norm that I have called the "European clause" is contained in the provision of Article 90. Paragraph 1 thereof states "The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters." It is a specific provision in comparison to the general principle, contained in Article 89 para. 1 subpara. 3, on the Republic of Poland's membership in international

⁵ P. W i n c z o r e k: "Kilka uwag w kwestii dostosowania Konstytucji Rzeczypospolitej Polskiej z dn. 2.04.1997 r. do wymogów prawa europejskiego" [Some Remarks on Adapting the Constitution of the Republic of Poland of 2 April 1997 to the Requirements of European Law] [in:] E. P o p ł a w s k a (cd.), *Konstytucja... op. cit.*

⁶ E. P o p ł a w s k a: "Zasada pomocniczości jako zasada konstytucyjna Rzeczypospolitej Polskiej oraz Unii Europejskiej" [The Principle of Subsidiarity as a Constitutional Principle of the Republic of Poland and the European Union] [in:] C. M i k (cd.): *Europeizacja prawa krajowego* [Europeanization of the Domestic Law], Toruń 2000.

organisations. The element, which differentiates both these situations, is the effect of the accession agreement, which is to move the competence of organs of State authority outside of the state constitutional apparatus. So if the membership of an international organisation does not entail delegating such competence, it is sufficient to use the ordinary procedure, that is, to grant consent to ratification of the accession agreement by means of a statute. It was according to this procedure that the Act of 17 February 1999 granted consent to the ratification of the North Atlantic Treaty by the Polish President. Whether or not adherence to an organisation involves delegation of state authority competence is decided in the contents of the treaty constituting this organisation. It must be an “integrative” organisation.⁷ It must be remembered that although the founding treaties of the Communities do not make a clear distinction of competence between the Communities and the Member States, it was as early as in 1964 that the European Court of Justice interpreting the Treaty establishing the European Economic Community concluded that “by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.”⁸ Article 90 of the Constitution does not touch upon the second aspect, but the possibility of delegating competence is coherent with the above characteristics of the Union as an organisation.⁹

The Communities are no longer treated as another kind of international organisation. Currently, more emphasis is placed on their integrative dimension as opposed to classical international organisations, whose sole purpose is to ensure optimal conditions of co-operation between the states. Alternatively, the notion of “supra-nationality” is used to distinguish them from the international organisations of inter-governmental character. There are intensive doctrinal discussions taking place concerning replacing the “internationalisation” of Community legal order with its “constitutionalisation.” This change in the evaluation of the legal character of the organisation is accompanied by changes in the constitutional regulations adopted in the Member States. Some constitutions were amended to mention, for example, the names of the Communities and the European Union, which puts stress on their particular character in comparison to the typical international law order.¹⁰ Article 90 para. 1 of the Polish Constitu-

⁷ K. Działocho: “Artykuł 90” [Article 90] and “Artykuł 91” [Article 91] [in:] L. Garlicki (cd.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary], vol. I, Warszawa 1999.

⁸ Judgement in case 6/64 *Costa v. ENEL*.

⁹ W. Czapliński, “L’intégration européenne dans la Constitution polonaise de 1997,” *Revue du Marché commun et de l’Union européenne* 2000, no. 436; K. Wójtowicz: “Konstytucja Rzeczypospolitej Polskiej a członkostwo w Unii Europejskiej” [Constitution of the Republic of Poland and Membership in the European Union] [in:] E. Popławska (ed.): *Konstytucja... op. cit.*

¹⁰ E.g. the French constitution was supplemented with Title XIV „On the Communities and the European Union,” the German fundamental law was amended by adding Article 23 making clear reference to the European Union

tion mentions the possibility of delegating a competence “in relation to certain matters.” Although one can draw the conclusion that it is not permissible to delegate all competence, we do not find any clues as to in what matters it cannot be delegated. If such a clause were included in the Constitution, it would help identify a specific “nucleus of sovereignty,” inviolable both at the time of concluding the accession treaty and later, save in case if appropriate amendments had already been made to the Constitution. The lack of specification as to what types of competence were subject to delegation was one of the reasons why this norm was heavily criticised before the constitutional referendum: this was perceived as opening a possibility of losing sovereignty by the Polish State. This norm does not narrow down the scope of competence to be delegated, except for the reservation that it cannot be all matters. Similarly, it does not set any qualitative or axiological limitations to indicate to whom, for the protection of what values and for the attainment of what objectives the competence may be delegated. Consequently, this constitutionally articulated possibility theoretically opens up the possibility of actions, which do not get public support (for example, delegating the competence to the Community of Independent States).¹¹ It must be noted, however, that the Constitution sets higher requirements of democratic legitimacy for such a decision to be taken (Article 90 paras. 2 to 4), therefore there is no risk that it might be taken against the will of society. An important role in setting the boundaries of delegation of the competence and establishing the criteria for resolving possible disputes about competence between Member States and the European Union or Communities is played by the national constitutional courts or other organs responsible for the protection of the constitutionality of laws.¹² In the Constitutions there is no exclusion of certain matters from the scope of affairs transferred outside. Therefore it is possible to verify each time the constitutionality of the accession treaty or amending treaties. It is a more flexible formula, which fosters the integration process, without setting the limits of the delegation of competence, and in essence nothing stops a state from giving away all possible attributes of its sovereignty.¹³ The open formula of competence transfer, adopted in Article 90 para. 1 of the Polish

and the content of Article 5 of Chapter X of the Swedish constitution was amended to include a passage referring to the European Communities. R. Arnold: “Koncepcje suwerenności w konstytucjach państw członkowskich Unii Europejskiej a integracja europejska” [Conceptions of Sovereignty and European Integration in Constitutions of EU Member States] [in:] W. Czapliński, I. Lipowicz, M. Wyrzykowski, T. Skoczny (eds.): *Suwerenność...*, *op. cit.*; J. Barcz: “Akt integracyjny Polski z Unią Europejską w świetle Konstytucji RP” [Act of Poland’s Integration with the European Union in the Light of the Constitution of the Republic of Poland], *Państwo i Prawo* 1998, no. 4. J.-L. Quermone: “L’adaptation de l’Etat à l’intégration européenne.” *Revue du droit public et de la science politique en France et à l’étranger* 1998, no. 5-6.

¹¹ J. Jaskiernia: “Konstytucyjnoprawne aspekty i społeczno-polityczny kontekst przyszłego traktatu akcesyjnego Rzeczypospolitej Polskiej do Unii Europejskiej” [Constitutional Law Aspects and Socio-political Context of the Future Accession Treaty of the Republic of Poland to the European Union] [in:] E. Popławska (ed.): *Konstytucja ...*, *op. cit.*

¹² Such as the Italian Constitutional Tribunal, the Spanish Constitutional Tribunal and the German Federal Constitutional Tribunal.

¹³ Cf. the practices of the French Constitutional Council, which worked out a constitutionality test of international obligations of the State in the shape of a question whether such obligations „do not infringe the fundamental conditions for the exercise of national sovereignty”: J.-L. Quermone: “L’adaptation de l’Etat...,” *op. cit.*, J. Barcz: “Akt integracyjny ...,” *op. cit.*

Constitution, does not rule out the possibility of the Constitutional Tribunal setting limits for this type of instrument when checking the compliance with the Constitution of the statute granting consent to the ratification of an accession treaty. The Tribunal could do so on the grounds of Article 4 para. 1 of the Constitution - "Supreme power in the Republic of Poland shall be vested in the Nation" or Article 5 - "The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of citizens, safeguard the national heritage...." Accession to the European Union in its current shape would not infringe upon these provisions, but the Union will evolve and it is difficult to predict the direction in which the founding treaties will be developed.¹⁴

In line with the last sentence of Article 49 of the Treaty on European Union, an accession treaty "is submitted for ratification by all the contracting States in accordance with their respective constitutional requirements." The Polish Constitution of 1997 established the grounds not only for making the decision on Poland joining the Union, but also for delegating to it "the competence of organs of State authority in relation to certain matters" (Article 90 para. 1). On the other hand it set the particular requirements of democratic legitimacy for making such decision (Article 90 paras. 2 to 4). While, in accordance with Article 89 para. 1 subpara. 3 of the Constitution, the ratification of an international agreement on "the Republic of Poland's membership in an international organisation" requires "prior consent granted by statute," once such agreement involves Poland delegating "to an international organisation or international institution the competence of organs of State authority in relation to certain matters" (Article 90 para. 1), the Constitution defines a special procedure for granting consent to the ratification of this kind of international agreement. This very procedure will apply to the accession treaty.

In such a case - according to Article 90 para. 2 of the Constitution - the Sejm and the Senate will pass a statute granting consent for ratification by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies and Senators respectively. May we just not that the requirements envisaged here are stricter than the ones that apply to amending the constitution: for this an absolute majority of votes in the Senate will suffice (Article 235 para. 4 of the Constitution). Exposing this argument seems to be particularly purposeful for stressing the democratic legitimacy of the whole procedure, in view of the criticism that is likely to accompany the last stages of the accession process, and the criticism of the conditions of granting consent for the delegation to an international organisation of the competence of organs of State authority. Because if the chosen mechanism of granting consent was by statute and not in a referendum, then particular attention would have to be devoted to the characteristics of the strict requirements envisaged in Article 90 para. 2 of the Constitution. We can assume that if a referendum were not chosen for this purpose, this fact would open numerous possibilities for controversies or disputes in which the meaning of democratic legitimacy would be subjected to various interpretations.¹⁵

¹⁴ K. Wójtowicz, *op. cit.*

¹⁵ J. Jaskiernia: "Konstytucyjnoprawne aspekty..*op. cit.*

Alternatively, consent for ratification of the accession treaty may be granted in a nationwide referendum “in accordance with the provisions of Article 125” (Article 90 para. 3 of the Constitution), should the Sejm so decide by a resolution taken “by an absolute majority of votes in the presence of at least half of the statutory number of Deputies.” Reference to Article 125 of the Constitution indicates that a referendum will be deemed to have granted consent for ratification of the accession treaty if its results are binding, that is if more than half of those having the right to vote participate in it (Article 125 para. 2) and also if the referendum is decisive, that is, if the majority of participants have voted in favour of the ratification of the accession treaty (Article 9 para. 1 of the Referendum Act of 29 June 1995).

However, if this method is used in Poland, interpretation problems may arise in a situation when the result of the referendum is not binding due to the fact that the turnout was less than half of those having the right to vote (Article 125 para. 3 of the Constitution). If we think how low the turnout at universal voting has been since 1989, this scenario is quite likely to occur. The next question is whether ordering the referendum means closing the parliamentary road for good. It may well be the choice of procedure for ratification of the accession treaty that will arouse the basic controversies, which in turn may affect the success of the whole procedure.

The choice of a ratification path gives rise to serious political dilemmas. The decision on applying one of the procedures laid down in the Constitution is an independent decision of the Republic of Poland. Having regard to the historical dimension of Poland's accession to the EU, and even the circumstances — expressed also in the fears of Euro-sceptics — connected with that key step in the process of European integration, there is very little room from the political, social or psychological point of view for applying any other solution than the referendum. The point is not just to meet the formal requirements of democratic legitimacy, as this can be achieved equally well by applying the statutory procedure of granting consent for ratification, but also to produce an appropriate psychological effect: the society should identify itself with the decision on accession. If the institution of referendum is not chosen, there will always be room for speculation whether the Parliament's decision reflected the will of the sovereign. It is particularly important in a situation when sociological research shows that support for the European integration process is greater among the political elite than in the society as a whole.¹⁶

Even though the major political parties are in favour of European integration, the level of support among the general public hardly exceeds 50%, and sometimes has fallen below that figure. In the period following the entry into force of the Constitution, numerous influential politicians announced that the referendum would be ordered in due time, apparently paying no attention to the fact that, according to the provisions in

¹⁶ Cf. L. Kołarska-Bobińska (cd.): *Polska Eurodebata* [The Polish Eurodebate], Warszawa 1999, other quoted by J. Jaskiernia: “‘Być sobą’ w dobie integracji europejskiej (Społeczno-polityczne uwarunkowania procesu samorealizacji w okresie radykalnych zmian otoczenia społecznego)” [‘To be Oneself’ in the Era of European Integration (Social and political conditions of the process of self-fulfilment in the period of radical changes of the social environment)], *The Peculiarity of Man* 1999, vol. 4 and A. Szczepiak, *op. cit.*

force, it is just facultative. As a result of such declarations, the public became accustomed to the idea that it is the nation, and not the Sejm, the Senate and the President of the Republic that will decide on Poland's accession to the Union. In the future, it will be difficult to disregard such announcements and promises.

The Constitution defines the methods of granting consent for ratification of the accession treaty in such a way that the application of either method is sufficient for the procedure to be valid, and they need not be applied jointly. It does not appear that for the validity of the ratification decision it is necessary to have the ratification statute approved by a referendum or that consent to ratification granted in a referendum requires an additional confirmation from Parliament. In the light of the Polish constitution model, effective expression of consent in one of the above procedures, indicated by the Sejm, excludes the need for using the other procedure. There are no unequivocal arguments in the Constitution to question a procedure in which - once no decision was made in the referendum - there would be no possibility of returning to the Sejm. In this case we are faced with a certain lacuna, which, however, does give us the right to interpret the status of the constitutional regulation on the basis of all the provisions of the fundamental law as a whole.

If the result of the referendum were not binding, the Sejm would have to decide upon a further course of action. Return to the statutory method may be conditioned by an analysis of the results of the referendum. In the case of lack of quorum in the referendum with the majority of votes in favour of the ratification of the accession treaty, the Parliament has stronger moral and political grounds to express consent for ratification. One may argue that the Parliament is acting in accordance with the views of the society, the majority of which was in favour of the accession. It would be much more difficult to go back to the statutory procedure in a situation when — also lacking quorum — the majority of those casting votes were against the ratification. The Parliament, deciding to grant consent for ratification in a statute in spite of the negative opinion resulting from the referendum, would risk a serious constitutional conflict and put itself in an area of dubious democratic legitimacy. So, even if return to the statutory procedure theoretically cannot be excluded, even in this situation, acting in this way would involve the risk of mismatch between the Sovereign's will and the Parliament's will, with all the consequences for the perception of the results of such a decision.

One must take into account the fact that a "return" to the statutory method in the ratification procedure, which we have found to be perfectly acceptable, will continue to be objected to and, if it is applied, may be protested against as creating the rules of the game *post factum*, with the participants of the referendum not being aware of such possibility, which might potentially have influenced the way they behaved in the referendum.¹⁷ A proposal to apply a preventive measure emerged in the doctrine.¹⁸ It was

¹⁷ R. M o j a k: "Konstytucyjne podstawy integracji Polski z Unią Europejską (zarys problematyki)" [Constitutional Foundations of Poland's Integration with the European Union (an outline)] [in:] *Konstytucyjny ustrój państwa. Księga pamiątkowa Profesora Wiesława Skrzydły* [Political System in the Constitution. Book dedicated to Professor Wiesław Skrzydło], Lublin 2000.

¹⁸ J. J a s k i e r n i a: "Konstytucyjnoprawne aspekty ..op. cit.

proposed that the resolution on ordering the referendum, provided for in Article 125 para. 2, should state expressly that in case the referendum does not give a binding result in accordance with the provisions of Article 125 para. 3 of the Constitution, then the decision would be made following the procedure envisaged in Article 90 para. 2 of the Constitution. Such an interpretation of the ratification procedure would be made as part of the process of application of law by the Sejm, which — when faced with a constitutional lacuna - has the right to determine such rules of behaviour as will not contradict the Constitution. They would also create an opportunity for preventing a constitutional deadlock in a situation of there being no binding result of the referendum. The main advantage of this proposal seems to be that participants of the referendum know *a priori* in what circumstances its result will be binding, and when the decision will be taken in a different procedure. Once they are aware from the start what effect various types of behaviour in the referendum will bring, they can choose to act in a way they think appropriate.

Constitutional Stability

The process of legal preparation of the candidate countries, including Poland, for EU membership resembles the well-known logical paradox of a turtle chasing a hare.¹⁹ The process of adjustment of law in candidate countries — however fast it might be, and its speed still leaves much to be desired - is accompanied by a parallel regular increase in *acquis communautaire*.

A turning point in the development of the “unequalled” Union will be its institutional reform. Although it is designed to enable effective functioning of the extended Union, it may change the “rules of play” considerably, which will create a new situation also for the candidate countries.

Resolution of the dilemma whether and to what extent the Polish Constitution needs adjusting to the requirements of European law depends largely on the institutional and legal structure of the European Union as of the day of admission of our country to its members. One can hardly expect changes in the fundamental principles of the Union, such as direct application of Community law in Member States or common agricultural or commercial policy.²⁰ However, it is hard to predict the development of the institution of European citizenship or the participation of national parliaments in the decision-making process of the Union, and these are matters regulated in the constitution. An-

¹⁹ According to this paradox, the hare (or Achilles, in another version) can never catch up with the turtle because any time the hare covers half of the distance, the turtle also moves forward by a certain bit. This way, the difference between the fragments of the path covered by both of them is never absolute and the turtle always “catches up” with the hare.

²⁰ See, for instance, the recent proposal of special, different to the “old” EU Member States, conditions of subsidy to the agriculture sector, formulated by the Commission in negotiations with Poland and other candidate countries.

other unknown is the possible consequences of some Member States applying the Treaty provisions concerning closer co-operation.²¹

We cannot blame the authors of the Constitution for limiting themselves to include therein an “integration clause” and a provision on the direct applicability of the laws enacted by an international organisation to the Polish legal order, and for not taking into account the need to adjust other provisions to European law. As the negotiations with the Union are progressing and Polish legislation is being adjusted to *acquis communautaire*, these discrepancies are becoming more and more problematic. We may of course agree with the point of view of Community institutions and declare amending the Constitution superfluous once Community law has supremacy over national laws, including constitutions. It seems, however, that the emotional attachment to the constitutional principle stating that the Constitution is the supreme law of the Republic of Poland (Article 8) will make the Polish authorities amend the Constitution rather than tolerate the application of Community law substantially different from its provisions.

Election law displays the most apparent discrepancies between the Constitution and the future European obligations. Article 62 para. 1 of the Constitution provides that Polish citizens have the right to vote, inter alia, for representatives to the organs of local self-government. Since the Maastricht Treaty, active, and sometimes even passive, electoral rights in local elections in the Member States are granted not only to citizens of the State in which such organs operate, but also to nationals of other Member States, provided that they reside on the territory where the election is taking place (Article 19 of the Treaty establishing the European Community). It seems that the provision of Article 62 para. 1 in its present tenor would make it impossible for citizens of EU Member States to vote in local elections in Poland, because it defines the group of subjects having exclusive rights to participate in elections. Other persons are excluded from this group. Though this provision establishes a subjective right of the citizen, at the same time it limits the rights of other persons. This interpretation prevails among Polish constitutionalists.²² The Legislative Council for the Chairman of the Council of Ministers has interpreted this provision differently, assuming that it will not be necessary to amend Article 62 para. 1 of the Constitution, because it “is a constitutional guarantee of the minimum scope of political rights, that is the electoral franchise, enjoyed by Polish citizens...” (opinion prepared by Mirosław Wyrzykowski). If we were to accept that constitutional provisions granting some rights to Polish citizens, grant them *eo ipso* to citizens of other States as well (or foreign national in general), the constitutional divi-

²¹ According to the provisions of the Nice Treaty, the risk of use of the “closer co-operation” procedure for establishing a “Europe of various speeds” seemed to be weakened, but the Treaty didn’t enter into force yet.

²² J. Barcz: “Struktura przyszłego traktatu akcesyjnego RP do UE wraz z wybranymi odniesieniami konstytucyjnoprawnymi” [Structure of the Future Accession Treaty of the Republic of Poland to EU. Selected constitutional law references]; J. Jaskiernia: “Konstytucyjnoprawne aspekty...,” op. cit.; M. Kruk: “Konstytucja Rzeczypospolitej Polskiej a członkostwo w Unii Europejskiej - kilka uwag” [Constitution of the Republic of Poland and Membership in the European Union - Some remarks]; R. Wieruszewski: “Obywatele RP - przyszli obywatele Unii Europejskiej” [Citizens of the Republic of Poland as Future Citizens of the European Union]; P. Winczorek: “Kilka uwag w kwestii...,” op. cit. — all [in:] E. Popławska (ed.), Konstytucja ..., op. cit.

sion between human and civil rights would be meaningless.²³ But we probably should expect an amendment of Article 62 para. 1 in the part pertaining to local elections.

The Polish Constitution does not provide grounds for covering the citizens of the Union staying within the territory of a third country, where the Member State of which he is a citizen does not have its mission, with consular or diplomatic protection, granted under Article 20 of the Treaty establishing the European Community. It only states that "a Polish citizen, during a stay abroad, has the right to protection by the Polish State." It seems that because of the marginal practical importance of this provision of Community law and the emphasis on the beneficiaries of (lie protection and not on the exclusive character of this right this provision of the Constitution will remain unchanged.

We should also be aware of the potential conflict between the Community law on migration and foreign nationals and the constitutional provision stating that "anyone whose Polish origin has been confirmed in accordance with statute, may settle permanently in Poland" (Article 52 para. 5). In practice, this right is exercised by citizens of the Community of Independent States, deported from Poland during World War II. Under the Treaty of Amsterdam, the competence in the field of migration policy, which traditionally belonged to the national authorities, has been transferred to the Community. As it seems, candidate countries will have to implement the *acquis communautaire* as a whole, without the possibility of derogations, at most with some transitional periods. They may not expect that their national particularities, following from the duty of national solidarity, will be taken into account.

Another example, also from the field of constitutional regulations: the possibility of Poland joining the Economic and Monetary Union would require a change in Article 227 para. 1 of the Constitution, which grants to the National Bank of Poland an exclusive right to issue money, and formulate and implement monetary policy. But as countries enter the monetary and currency union, they renounce their independence in money matters. From then on, it is no longer central banks that decide upon the amount of money on the market, but the European Central Bank (on the other hand, it functions in the European System of Central Banks).

Although the next issue does not concern any conflict between Community and constitutional provisions, it imposes a difficult obligation on the State authorities. In accordance with Article 2 of the Constitution, the Republic of Poland is a democratic state of law. This should mean that upon joining the Union, all its legal provisions in force that Poland accepted in the accession agreement should be available in official translations into Polish. Otherwise, it is hard to imagine that a country can be considered a democratic state of law if the citizens are unable to familiarise themselves with the contents of law that binds them. In spite of the efforts undertaken so far by the Office of the Committee for European Integration, this task seems unimaginable. Another postulate is to involve - upon accession to the Union - the Sejm and the Senate to a greater extent in the internal decision-making process concerning integration matters. It is consistent with the tradition of development of the European integration, expressed,

²³ P. Winczorek, *op. cit.*

inter alia, in Protocol No. 9 on the role of national parliaments in the European Union²⁴ added by the Treaty of Amsterdam to the Treaty on European Union and the Treaties establishing the European Communities. This postulate follows from the tendency to limit the deficit of democratic legitimacy in the Union - because the law-making functions in the Communities are still exercised mainly by the Council, an institution composed of representatives of the executive power of the Member States — and from the need to compensate the national parliaments for the loss of competence that will occur upon Poland's accession to the EU.²⁵ Similarly, we should consider creating conditions for including the organs of local self-government in the decision-making process regarding integration matters. The issue here is particularly the participation of representatives of regional and local organs in the Committee of the Regions and the guarantee of participation of self-governing bodies in shaping Poland's standpoint in integration matters involving local and regional interests. According to the principle of subsidiarity, applicable both in the European Union and the Polish constitutional order, there must be a mechanism for exerting comprehensive social influence on the decision-making processes in EU institutions to ensure adequate articulation of national interests, as perceived in various fields and on various planes of social life.²⁶

The conflict of constitutional values: stability of the Constitution or precision and completeness of regulations may seem just an appearance. The application of European provisions in the Polish legal order is ensured by their supremacy, established by the Union institutions, over national laws, thus Community may exercise its power *praeter legem fundamentalem*. It does not infringe the Constitution directly, but diminishes the authority of the constitutional legislator and the prestige of the Constitution itself. The competing supra-national power might also diminish the political, doctrinal, ideological and philosophical weight of the basic constitutional principles (especially that of Article 8 stating that the Constitution is the supreme law of the Republic).²⁷ The possible amendments of the Constitution would aim at preserving the authority of the State and its fundamental law.

There are several arguments against amending the Constitution. Firstly, by definition it is an inflexible act, with a more difficult procedure of amendments. In order to amend the Constitution of 1997 a bill must be submitted by at least one-fifth of the statutory number of Deputies, the Senate or the President and adopted by the Sejm by a majority of two-thirds of votes in the presence of at least half of the statutory number of Deputies and by the Senate by an absolute majority with the same quorum. Moreover, the bill to amend

²⁴ M. Kruk, E. Popławska (eds.): *Parlamenti a integracja europejska* [Parliaments and the European Integration], Warszawa (forthcoming).

²⁵ It is estimated that with the current state of *acquis communautaire* the parliament of a state accessing to the Union loses approx. 60% of the legislative „substance.” Cf. J. Barcz: „Struktura przyszłego traktatu akcesyjnego.” *op. cit.*

²⁶ J. Jaskiernia: „Konstytucyjnoprawne aspekty ...,” *op. cit.*

²⁷ J. Gałster: „Konstytucyjnoprawne bariery przystąpienia Polski do Unii Europejskiej” [Constitutional Law Barriers to Poland's Accession to the European Union] [in:] C. Mik (cd.): *Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia* [Poland in the European Union. Prospects, preconditions, chances and threats], Toruń 1997.

the provisions regarding the State system, rights and freedoms, or to amend the Constitution may be submitted for a confirmatory referendum upon application of its promoters. But, as we have already mentioned, the statute authorising the President to ratify the accession treaty is subject to even stricter requirements (adoption by a majority of two-thirds of votes in the Senate). Thus we may expect that the constitutional amendments resulting from accession to the Union would not meet obstacles in Parliament. This remark is only true of the parliamentary procedure for granting authorisation, but it is highly probable that this procedure will be applied, at least in the second instance because of lack of quorum. Taking into account the fact that so far there has been more support for Poland's membership in the Union among the political and parliamentary elite than among the general public, also if the ratification is the result of a referendum, we can expect positive results of voting on amending the Constitution from both chambers.

The main problem is not in the legal sphere, but in the political and psychological ones. The Polish Constitution of 1997 required long and intense conception work, and then painstaking and delicate parliamentary negotiations to be adopted. The relatively good effect, achieved with such great difficulty, should be — in the opinion of some political forces — protected against destruction. Any bill to amend the Constitution would probably result in a flood of other amendments to be made “by the way.” A similar situation occurred during the works of the National Assembly, when at the last reading of the draft of the Constitution, a huge number of amendments were proposed. They were of marginal or anecdotal importance, they were incorrect from the legislative point of view, but unfortunately some of them were accepted to gain additional support from “black-mailers” who proposed the amendments. They caused the fundamental law to be overloaded and sometimes inconsistent.

The above threat to the Constitution is smaller than another, even more probable one. During the campaign preceding the constitutional referendum in 1997, one of the main arguments of the right-wing parties used against the Constitution was the threat to State sovereignty posed by the “European clause.” Even today, objections to “selling our sovereignty” are still raised in relation to some parties responsible for the negotiations with the Union and other pro-European parties. It is conceivable that there will be opposition against the constitutional amendments resulting from the accession and also against some pro-European provisions that are already in force.²⁸ Taking into account the fact that the Constitution was accepted in the referendum by a slim majority of votes, and that its opponents were opting for diametrically different systemic solutions (such as a strong presidency, a classical *invocatio Dei*, absolute prohibition of abortion), we can imagine there would be a strong possibility of attempts to amend the Constitution radically. Their success would of course depend on the distribution of forces in Parliament.²⁹ After the experiences preceding the adoption of the Constitution in 1997, we can expect angry and

²⁸ J. M e n k e s: “Konstytucja, suwerenność, integracja - spóźniona (?) polemika” [Constitution, Sovereignty, Integration - Belated Polemic] [in:] C. M i k (ed.): *Konstytucja Rzeczypospolitej Polskiej z 1997 roku...*, *op. cit.*

²⁹ The accession to the EU is supposed to occur during the present legislature (2001-2005), where Sejm's slight and instable majority belongs to pro-European parties, but, contrary to the precedent legislature, openly and radically anti-European parties are present.

heated arguments between the opponents and the supporters of the European option, be it either in connection with the decision to ratify the accession treaty or on the occasion of making appropriate amendments to the Constitution. Therefore, the purposefulness of making constitutional amendments to include the Community norms will require careful attention. As we have already mentioned, the scope of necessary amendments will only be known at the time of accession, due to the continuous development of *acquis communautaire*. And no earlier will we be able to choose between the risk of possible shaking of the authority of the Constitution and the risk of radically infringing upon the body of its provisions.

* * *

Within the legal framework set by the Constitution of 1997, Poland will be able to join the European Union and participate in the process of European integration. The fact that Poland adopted its fundamental law so late did not prevent a social conflict from surrounding the Constitution, to which its basically pro-integration character has contributed. However, it has had no negative impact on the process of democratic transformation and the Polish society has obtained legal instruments facilitating the implementation of strategic goals of State policy.

The high formal requirements for obtaining consent for ratification of the accession treaty mean that Poland's membership in the Union is dependent on very strong social or political — it seems that in this case they can be considered separately - support. It is a paradox of the Constitution of 1997 that it provides better protection against delegation of competence of State authorities to an international organisation than for the constitutional rights and freedoms of an individual. This is a result of certain old and recent national experiences, which are referred to in the Constitution, and particularly in its Preamble.