

REFLECTIONS ON THE SOCIAL DIALOGUE IN POLAND PREPARING TO THE EU ACCESSION

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1. General Introduction

After the democratic changes in Poland, Social Dialogue, as a term, has been a commonplace in the public language in the country, but since 1997 it became a constitutional concept as well. Although the draft provision institutionalising the Tripartite Commission was not included in the Polish Constitution adopted on 2 April 1997 (the interested circles remember the TV speech by Prof. Leszek Balcerowicz, in which he fought against the very idea), the Preamble to the Constitution indicates Social Dialogue as one of the pillars on which the fundamental law is based. Moreover, Article 20 of the Constitution names dialogue and cooperation between social partners as one of the bases of social market economy and generally of the economic system of the Republic. Thus, the constitutional legitimisation of Social Dialogue is quite robust even though — regrettably - it did not take the form of a special separate constitutional provision.

On the sociological plane. Social Dialogue, just as other forms of cooperation organised through negotiations between social partners (trade unions and employers) is qualified as a symptom of the corporative system, which - as a result of very different historical experiences - is sometimes associated with the authoritarian state. In the second half of the 20th century this negative attitude towards corporativism became groundless in the light of the fact that the fundamental role of negotiations between social partners was commonly acknowledged, also by the International Labour Organisation¹ and the European institutions.² Besides, resentment and apprehension of corporativism in the sociological sense turned out to be insignificant in Polish conditions: “the process of institutionalisation of corporative solutions [in Poland] will gradually progress, but since all partners are immature, an immature

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¹ See R. H y m a n: *Social Dialogue in Western Europe: the State of the Art*, International Labour Office, Geneva 2000; cf. also: G. C a s a l e (ed.): *Social Dialogue in Central and Eastern Europe*, Geneva-Budapest 1999.

² See “European Social Dialogue - Preparing for Enlargement,” September 2000, European Commission, Brussels; cf. also “Industrial Relations in Europe 2000,” European Commission; Employment & Social Affairs DG, 2000, Brussels.

corporative system will emerge.”³ In the most recent social sciences writings the Social Dialogue is perceived as a form of public - economic and social - governance, constantly enlarged: not only labour/employment relations, but all relations covered by social consultation are the area thereof and the list of participants of Social Dialogue includes, besides trade unions and employers, all kind of organizations and associations, a civic society and even State bodies.⁴ As for Polish lawyers, even at the height of real socialism, labour law specialists perceived the negotiation system of collective agreements, the only means possible at that time, however moderate, as a way of escape from legal regulation of labour/employment relations by the omnipotent, authoritarian State.⁵ Nowadays, the negotiatory method, not limited to only bargaining the collective agreements, but covering a broad spectrum of agreements and “pacts” (or just proposals thereof) became the basis - however flawed⁶ - for shaping branches of public life, including the labour process and the legal and social relations connected with it. Besides, social agreements and pacts are a common phenomenon in contemporary Europe.⁷

Whereas Polish theoreticians and practitioners of labour law fully acknowledge the significance of Social Dialogue, implementing it more or less successfully, in the political and parliamentary world, particularly in the right-oriented one, the idea of Social Dialogue is not always understood, and sometimes it is opposed against as unnecessary,⁸ even bringing negative results (due to its pretended lack of productivity),⁹ or at least inconsistent with the principles of parliamentary democracy. Sometimes, we hear the opinions on the “incompatibility” of the institution of Social Dialogue with the principles of parliamentarism from other countries as well (such as Japan). However, in Poland, the President of the Sejm (Polish Parliament) Marek Borowski, still during his precedent term as parliamentary Deputy-President, explained the problem in question in the following way: “In a democratic State, the most important plane of dialogue should be the Parliament and other bodies elected in universal ballot, whereas other

³ Cf. W. Morawski: “Nowe stosunki przemysłowe a demokracja przemysłowa” [New Industrial Relations and Industrial Democracy], *Przegląd Socjologiczny* 1994, p. 57.

⁴ See J. Hausner, M. Marody (eds): *The Polish Talk Show: Social Dialogue and the European Integration*, F. Ebert Foundation and Academy of Economics, Kraków 2001, p. 124.

⁵ Cf. e.g. a fundamental work from that period, W. Szubert: *Układy zbiorowe pracy* [Collective Labour Agreements], Warszawa 1960.

⁶ See: T. Zieliński: “Reforma prawa pracy (szanse i zagrożenia)” [Labour Law Reform (Chances and Threats)], *Państwo i Prawo* 2001, vol. 2, and previously by the same Author: “Nowy ład pracy - rzeczywistość i wizja przyszłości” [New Labour order - Reality and Future Vision] [in:] M. Matey (ed.): *Nowy ład pracy w Polsce i w Europie* [New Labour Order in Poland and in Europe], Warszawa, 1997; see also M. Matey-Tyrowicz: “Współczesne prawo pracy - implikacje dla jakości prawa mechanizmów negocjacyjnych” [Contemporary Labour Law - Implications for the Quality of Law of Negotiation Mechanisms] [in:] *Jakość prawa* [The Quality of Law], collective book, Warszawa 1996.

⁷ See G. Fajertag, Ph. Pochet: *La nouvelle dynamique des pactes sociaux en Europe*, Brussels 2001.

⁸ E.g. Aleksander Hall and Aleksander Smolar in their addresses at the Conference “Dialog społeczny: miraż czy rzeczywistość?” [Social Dialogue: Mirage or Reality?], organized on 21–22 November 2000 by the Polish Confederation of Private Employers.

⁹ E.g. L. Balcerowicz at the above PCPE conference. During the same conference, a left-wing politician Marek Borowski expressed support for the development of social dialogue in Poland.

fields of dialogue with trade unions, with employers, with self-government or professional organisations should be of an auxiliary nature The dialogue between the Government, employers and trade unionists, agreements reached in its course cannot be more important than decisions of the Sejm, but they can and should be something of 'clearing the way' before a parliamentary debate."¹⁰ After the parliamentary elections in 2001, the importance of Social Dialogue has been appreciated in the new social-democratic Government's exposé and developed in statements of the new minister of labour and social policy."

In Poland it is accepted that the objective of Social Dialogue is communication between social partners (representative trade unions and employers' organisations) in order to shape, with the participation of the Government, the labour relations and conditions in the broad sense. Voicing their interests and modifying them through compromise enables social partners to arrive at agreements and to identify themselves with their contents, and as a consequence, enable social economy to function in the conditions of social peace. The objective of the dialogue is, additionally, to shape the relations between the social partners themselves in a way enabling harmonious economic and social development of a company and the country. Social Dialogue is, therefore, a pillar of the development of rational ("civilised") capitalism, generally accepted in contemporary world, also - or maybe above all - by modern social-democratic parties.

When discussing Social Dialogue, we cannot ignore the question of its bi- or tripartite nature (etymologically, the term "dialogue" means a conversation between several participants). In Poland, two-sided dialogue is traditionally limited to bargaining and concluding collective agreements, but its most socially widespread form is tripartite dialogue on national level, through the Tripartite Commission for Social and Economic Matters. The constitutional legitimisation mentioned above encompasses bipartite dialogue between social partners (i.e. trade unions and employers' organisations - the State is not a partner unless it plays the role of an employer), leaving out the tripartite dialogue - this being against the actual hierarchy of importance of both forms of dialogue. This deficiency has recently been made up (at least partially) by the Law of

¹⁰ vice-president of the Polish Parliament M. Borowski, at the above forum gave the following answer to the question he asked himself - why does the society need other forms of dialogue if it has the Parliament and territorial self-government?: "The dialogue, also outside of the elective authorities, is necessary for three reasons. The universal reason is that parliaments are never fully representative. Some social groups are not represented at all, others are even over-represented. Besides, the Parliament in principle adopts laws, but has no influence over the day-to-day economic decisions and their consequences. These decisions may be of great importance to individual social groups. The second reason, Poland-specific one is the fact that Polish parliamentary democracy, contrary to Western democracies, is much less common. Half of those having the right to vote - representatives of different social groups - does not participate in elections. But even though they do not give their vote of confidence to the Parliament, they are ready to give it to their representatives in trade unions or other associations. The third reason, equally specific one, is that Poland is still undergoing transformation. Although we crossed the Rubicon separating the State-controlled economy from the private one, the process of adjustment of economic entities to market requirements is lengthy and difficult. Consequently, many tensions and problems arise, and if they are resolved unskillfully, they may delay the beneficial transformation" (PCPE Conference materials, see footnote 8).

¹¹ See interview with the new Minister of Labour and Social Policy, Professor J. H a u s n e r: "Dialog to klucz do rządzenia" [Dialogue Is a Key for Governing], *Rzeczpospolita* of 31 October 2001.

6 July 2001 on Tripartite Commission for Social and Economic Matters and voivodship committees for social dialogue,¹² granting the Tripartite Commission a legal basis (so far, the Commission functioned not only without constitutional, but also without statutory basis). In the European Union - due to the original composition of the group of Community founders, which consisted of highly industrialised States based on the principles of liberal market economy - the basic conception is the bipartite dialogue between employers and employees (the so-called independent or autonomous dialogue). However, as the Community grows to include less wealthy countries of the Mediterranean where State interventionism still plays an important role in the economy, and especially in view of the prospects of Union's enlargement to the Central and Eastern Europe where, in spite of the doctrinal postulates of minimising the State's role in the economy, this role will probably be maintained for a long time - the EU is making a concession from the principle of bipartite dialogue to its tripartite version, yet emphasising the transitional nature of this concession. Thus, the Union supports the tripartite system in Poland as justified by its usefulness in the period of economic transformations, but remains watchful if it is not used as camouflage for the State maintaining its domination or for shifting the responsibility for governmental decisions on the social partners. It is also worth observing how the tripartite dialogue functions in CEECs in the conditions of pluralism on both sides - the employees and the employers.

Social Dialogue, promoted by the European Union, is part of the community achievements, the "acquis communautaire," to which Poland, as a candidate country, must adjust its legal system and practice both from the legal point of view and from the institutional one.

The basic contemporary varieties of social dialogue are:

- a) dialogue as a form of communication and agreements between social partners with auxiliary participation of the State;
- b) negotiating and concluding collective agreements;
- c) the principle of information and consultation of employees.

2. Social Dialogue in the European Union

In an integrating Europe, the importance of Social Dialogue increased as the economic dimension of the integration process developed to include more social aspects. In the original tenor, Article 118 of the Treaty of Rome encouraged collective bargaining between employers and employees. Then a tripartite form of "concertation" developed at Community level (with the participation of Community bodies as the third party). The decisive phase of development in this domain were the Eighties, during the presidency in the Commission of Jacques Delors, by whose initiative in 1985 a meeting of European Social Partners was organised in Val Duchesse near Brussels. This meeting is considered to be a turning point in the development of Social Dialogue in Europe.

¹² *Journal of Laws*, no. 100, item 1080.

The European Social Partners in Val Duchesse were UNICE (Union of Industrial and Employers' Confederations of Europe) and CEEP (Centre Européen des Entreprises à Participation Publique) on the part of employers, and ETUC (European Trade Unions' Confederation) on the part of the employees. Since that historic meeting, the term "Social Dialogue" has been widely used in Europe. In 1986, the so-called Single European Act introduced the notion of "dialogue between social partners" in the new wording of Article 118B of the EEC Treaty. In 1989, Social Dialogue was among the basic rights proclaimed by the Community Charter of Fundamental Social Rights of Workers (a non-binding declaration). Then the conception and functioning of the European Social Dialogue were included more extensively in the Agreement on Social Policy adopted in 1991 in Maastricht, which was incorporated into the Treaty of Amsterdam in 1997, being definitively granted the rank of Community treaty law (primary law). Finally, two articles of the Charter of Fundamental Rights of the European Union, adopted on 7 December 2000 at the Nice conference, relate to the issues of Social Dialogue (Article 27 "Workers' right to information and consultation within the enterprises" and Article 28 "Right to collective bargaining and collective action"¹³).

- Social Dialogue in the European Union assumes several basic forms. They include:¹⁴
- a) day-to-day communication between European Social Partners (UNICE/UEAPME,¹⁵ CEEP on the part of employers, ETUC on the part of employees) in matters relating to their interests and needs. This dialogue can take the form of sectoral dialogue or cross-industry dialogue. Recently, more and more frequently, social partners from the candidate countries are being invited to participate in such dialogue (from Poland, as observers, the Confederation of Polish Employers and the Polish Confederation of Private Employers on the part of employers and the Trade Union "Solidarity" on the part of employees - so far the Polish major union with social-democratic links - Polish Alliance of Trade Unions [OPZZ] - has encountered difficulties in gaining official recognition from ETUC).
 - b) consultations of the European Social Partners undertaken by the initiative of Community institutions in order to agree upon a common policy and contents of EC

¹³ It is worth mentioning that if the Nice Charter of Fundamental Rights of the EU were, as the Union institutions planned, adopted as a binding instrument, the two articles would mean additional adjustment problems for Poland. First, Polish labour law does not provide for a mechanism of "informing and consulting employees in an enterprise" which would require creating a representation of employees not necessarily linked to the trade unions (the right to information and consultation is, pursuant to the Charter, enjoyed by all employees, regardless of whether they belong to the trade unions or not and whether there is a union in the enterprise or not). To such solution both major Polish trade unions are reluctant, which resulted, *inter alia*, in suspending the work on the so-called Collective Labour Law Code in 1998 and in the fact that Poland did not ratify the 1988 Protocol to the European Social Charter of the Council of Europe. Besides, Article 28 of the 2000 EU Charter of Fundamental Rights proclaims the right to collective action, i.e. to strike on the part of employees and to lock-out on the part of employers. Introduction of the latter to the Polish labour law was opposed by both major trade unions.

¹⁴ Cf. *European Social Dialogue*, European Commission, Brussels, May 2000; *Der Soziale Dialog in Europa - Entwicklungen und Perspektiven*, Bonn 1996; O. Quentin, B. Favarel-Dap: *L'Europe sociale-enjeux et réalités*, Paris 1999; cf. also: M. Matey-Tyrowicz: "Koncepcja wspólnotowa Dialogu Społecznego" [Community Conception of Social Dialogue], *Przegląd Prawa Europejskiego* 1999, vol. 2.

¹⁵ UEAPME - European Association of Craft, Small and Medium-Sized Enterprises.

regulations in the social field. The first category includes the so-called Macro-economic Dialogue with the participation of the Council, Commission, European Central Bank and European Social Partners. Also the participation of European Social Partners in developing the European Employment Strategy and other EU actions aimed at increasing employment and reducing unemployment has a macro-economic dimension. In the second category should be included the consultations completed on the so-called EU Anti-discrimination Package and especially on amendment to Directive 76/207/EEC on equal treatment of men and women in employment, or the currently conducted consultations (2000/2001) on future directives on workers employed by temporary work agencies, on tele-work, lifelong education, protection of personal data in employment, IT technologies in employment, professional mobility and European mediation in employment matters.

- c) negotiations between the European Social Partners aiming at concluding standard-making Agreements, to which the Council then confers - upon Partners' request - the form of Community Directives. This procedure, introduced in Maastricht, was applied in recent years for: Directive 96/34/EC on parental leaves, Directive 97/81/EC on part-time work, Directive 99/70/EC on fixed-term employment contracts. Application of the negotiative standard-making procedure from Maastricht does not mean that the Community generally shifted to a new procedure for adopting directives in the social field; the European Social Partners decide in each case if they are interested in negotiations and concluding a standard-making Agreement or just in consultation of the drafts prepared by the Commission according to the ordinary procedure.

Social Dialogue at Community level affects the scope and forms of functioning of the dialogue at national level and directly in enterprises in EU. This can be done in the following manner:

- 1) by entrusting the national social partners with national implementation of Community Directives. Article 137(4) of the Treaty of Amsterdam authorises Member States to entrust the national social partners - upon their joint request — with implementing Community directives. This possibility is an application of the principle of "horizontal subsidiarity," which assumes that the national social partners, if they so wish, are equally competent or even better able than the State authorities to implement directives in the social field. However, the Treaty, just in case, makes a reservation that the State "leaving" such a task to the social partners is still responsible for the appropriate transposition of the directive and still safeguards the achievement of the results required by the given directive.
- 2) many EC directives in the labour and social field require the participation of national social partners in their application or lay down special required consultation procedures in an enterprise, the failure to observe which constitutes a significant violation of the provisions of the directive, in which case an action can be brought before the ECJ (e.g. the consolidated Directive 98/59/EC on collective redundancies or the consolidated Directive 2001/23/EC on safeguarding of employees' rights in the event of transfers of undertakings). As a rule, numerous directives regarding

safety and health at work contain a requirement of consultation between social partners.

- 3) the principle of informing and consulting employees, promoted by EC law, is a special form of social dialogue, which can be described as a creation of the Community social thinking. Being based on treaty law (Article 137(1) of the Treaty of Amsterdam), it is additionally used in many directives, it is proclaimed in the Community Charter of Fundamental Social Rights for Workers (1989), and it is the subject matter of Article 27 of the Charter of Fundamental Rights of the European Union (2000).

The most important manifestation of the principle of information and consultation of employees is Directive 94/45/EC on European Works Councils and alternative procedures for informing and consulting employees in Community-scale undertakings (employing at least 1000 employees in EU Member States, including at least 150 employees in at least two Member States each). Representatives of Polish employees in branches of Community-scale undertakings operating in Poland are now invited to participate in some of the European Works Councils created pursuant to this directive.

It should be mentioned that the preparatory works on a directive requiring the introduction of the procedure of informing and consulting employees in national undertakings of EU Member States, including the creation therein of employees' councils¹⁶ - as non trade unions related bodies, are fairly advanced (the attitude of the Polish trade unions in this matter is mentioned in footnote 13). The principle of informing and consulting employees will also be manifested in the already agreed by Community institutions Directive on the Status of a European Company.¹⁷

3. Social Dialogue in Poland

3.7. Social Partners, Communication within the Tripartite Commission

Whereas in Poland collective agreements are a well rooted form of Social Dialogue (which will be discussed further), the communication between social partners on the forum of the Tripartite Commission for Social and Economic Matters is a new phenomenon, accompanying the social market economy taking shape in the Nineties. The beginning of such practice was the negotiations on the Pact on State Enterprises during the transformation initiated in 1992/1993 by Jacek Kuroń (who was then the Polish Minister of Labour and Social Policy). Some authors trace the beginning of social dialogue as early as in the Agreements from Gdańsk, Szczecin and Jastrzębie (1980), which is not likely to be right. Negotiations on the Pact conducted in 1992/1993

¹⁶ First Commission's draft has been published in 1998 as COM(1998)612 the second, amended, in 2001 as COM/2001/296 final. At the time of publishing this issue the Directive has already been adopted on 11 March 2002 and is numbered as Directive 2002/14/EC on informing and consulting the employees in the European Community.

¹⁷ Cf. reports from such debates in *European Industrial Relations Review*, January 2001.

brought to light the specific Polish difficulties in dialogue, connected with a “confrontational” feature of pluralism on the part of trade unions (as both major unions - “Solidarity” and OPZZ - refused to sit at the same negotiation table, negotiations were conducted parallelly but separately, in different rooms, and two separate, slightly different Pacts were signed); later “confrontational” pluralism or rather a keen rivalry appeared also in some period of time on the part of employers (rivalry between the well established Confederation of Polish Employers and the later emerging Polish Confederation of Private Employers).

The final success of negotiations on the Pact encouraged the parties to preserve the already formed negotiation practice and to institutionalise it. Resolution 7/94 of the Council of Ministers of 15 February 1994 appointed the Tripartite Commission for Social and Economic Matters determining - and preserving - the composition of the Commission reflecting the composition of signatories of the Pact on Enterprises (9 trade unions existing at that time, including major unions “Solidarity” and OPZZ, the Confederation of Polish Employers and the Government representatives, i.e. representatives of the Ministers of Finance, of Labour and Social Policy, of Industry and Trade, and the Head of the Central Planification Office). In accordance with the above governmental regulation, the Commission was “a platform of agreement and dialogue between the Government and organisations of employees and employers” and a “forum of cooperation between central agencies of State administration, trade unions and employers’ organisations.” The competencies of the Commission included, in particular, matters in the field of remuneration policy and instruments for implementation thereof, employment policy and social welfare policy. The scope of competencies of the Commission was additionally developed in two laws enacted in 1994: the law on the remuneration funds in the State budget sphere and the law on the negotiatory system of determining the increase of average pay in enterprises.

As for the rules of functioning of the Tripartite Commission - let us define it as Commission (I) - headed by the Minister of Labour and Social Policy, the Commission determined its standpoint by compromise between the three parties: Government, employers and trade unions. Its standpoint was not legally binding for its participants (including the Government). The 1994 Resolution of the Council of Ministers defined its function as follows: “The Commission’s standpoint is the main guideline for the parties’ activities in the area being the subject-matter of the consensus achieved.” However, no sanctions were imposed if any party departed from such a guideline. For example, the Commission often agreed by negotiation on drafts of laws or other provisions, then the drafts were submitted to the Parliament as governmental drafts and at any stage of the procedure the Government had the right to make corrections, or self-corrections, in them.

The activity of the Tripartite Commission (I) may be evaluated differently in various periods, but even in the “good” periods its efficiency was limited. We can detect the weaknesses connected with the already mentioned immature corporative system in Poland, with politicisation of its participants (overt and even structural links with political parties), as well as with “confrontational” behaviour within both unions’ and employ-

ers' sides.¹⁸ On the trade unions' side there was political animosity between "Solidarity" and OPZZ, manifested by lack of a common standpoint of the trade unions, accusations that the Government treats the two unions differently (depending on the political option represented by the given government, one of the unions became the privileged one, or the persecuted one, and in the latter case sometimes this union withdrew from the Commission's works, which paralysed such works: in 1997 "Solidarity" withdrew from the Commission, and in 2000 OPZZ did, or made complaints, e.g. OPZZ complained against the Polish Government to the International Labour Organisation, which complaint was considered justified). On the employers' side, rivalry and conflicts started at the end of the Nineties, as a result of emerging of the new Polish Confederation of Private Employers, which was not a formal member of the Tripartite Commission (I), since it did not exist in 1994 and was successfully prevented by the Confederation of Polish Employers from participating, even informally, in works of the Commission.

The complications indicated above, combined with little willingness to compromise presented by the participants, constituted a serious obstacle not only to the efficiency of the Tripartite Commission (I), but simply to its functioning, particularly in the periods when one of the trade unions withdrew from participation in sessions. In spite of all that, after the first period of difficulties in identifying the social partners in Poland, the institutionalisation of social dialogue in the Tripartite Commission (I) has been recognised,¹⁹ the Commission's usefulness and the functioning of tripartite social dialogue in Poland were evaluated positively,²⁰ especially by authors connected with the governmental side of that time,²¹ and, as a further consequence, by external observers, including European ones,²² who sometimes set the Polish practice as example to be followed by other candidate countries. The Polish Tripartite Commission (I) was admitted as a member of the International Association of Economic and Social Councils and Similar Institutions. At the same time, there was much criticism against the form and

¹⁸ Rivalry and conflicts of interests within the Polish representations of employees and employers have been transferred from the national scene onto the European forum (ETUC and UNICE).

¹⁹ *Inter alia*, in the Constitutional Tribunal judgment of 6 May 1996, case U.2/96.

²⁰ Cf. M. S e w e r y ń s k i: "Dialog społeczny - współzależność między gospodarką i prawem pracy" [Social Dialogue - Interdependency Between the Economy and the Labour Law], General Co-Report at VI European Congress of Labour and Social Protection Law, Warszawa, September 1999; similarly G. G o ń d z i e w i c z: "Podstawowe zasady zbiorowego prawa pracy" [Basic Rules of Collective Labour Law] [in:] G. G o ń d z i e w i c z (ed.): *Zbiorowe prawo pracy w społecznej gospodarce rynkowej* [Collective Labour Law in Social Market Economy], Toruń 2000.

²¹ Cf. E. S o b ó t k a: "Dialog Społeczny" - założenia, realizacja, perspektywy [Social Dialogue" - Assumptions, Implementation, Perspectives], [in:] *Trójstronność i zbiorowe stosunki pracy w krajach Europy Środkowo-Wschodniej* [Tripartism and Collective Labour Relations in Countries of the Central and Eastern Europe], Ministry of Labour and Social Policy, Warszawa 1994; by the same author: "Rola porozumień zbiorowych w regulowaniu stosunków pracy i kształtowaniu polityki społeczno-gospodarczej w Polsce na tle porównawczym" [The Role of Collective Arrangements in Regulating Labour Relations and Development of Social and Economic Policy in Poland against a Comparative Background] [in:] W. K o z e k (ed.): *Zbiorowe stosunki pracy w Polsce w perspektywie integracji europejskiej* [Collective Labour Relationships in Poland in the Perspective of European Integration], Warszawa 1997; and her statement in the materials from PCPE Conference in 2000 (see footnote 8).

²² Cf. G. C a s a l e (ed.): *Social Dialogue in Central and Eastern Europe*, op. cit.; cf also *European Social Dialogue — Preparing for Enlargement*, op. cit.

practice of Social Dialogue developed in Poland. When the political rightist coalition was in power, particularly in 2000 till September 2001, OPZZ union members, embittered by the politicisation in the Commission, often called it a facade or even a dummy institution, and some authoritative observers claimed that in this period the dialogue in the Commission ceased altogether.²³ Academics were also pointing to the choice of tripartite dialogue model as inapt, as an impediment to the market mechanisms in economy. Besides, according to some academic opinions, “participation of the Government as one of the parties makes the Commission not a place for dialogue between social partners but for bargaining with the Government”²⁴ and the present formula of the Commission results in additional politicisation of collective labour relations, because the individual trade unions tend to emphasise political differences in front of the Government representatives. “There are doubts as to the purposefulness of further functioning of the Commission in its present formula.”²⁵

Regardless of the controversies over the choice of the tripartite dialogue formula, there has been anxiety as to the fragile legal ground of the Tripartite Commission (I) in Poland, the Commission’s activities being since 1994 based on an administrative instrument (the 1994 Resolution of the Council of Ministers). Therefore, since mid Nineties, attempts have been made to provide an appropriate legal regulation in this area, which was the more purposeful that the 1997 Constitution did not emphasise social dialogue as strongly as it was expected. Additionally, its tripartite character was not clearly confirmed in the Constitution.

The first attempt was made in the years 1996-1997 by the Labour Law Reform Commission²⁶ and aimed at “legalising” the Tripartite Commission in a draft of the Collective Labour Law Code, which, however, was never submitted to the legislative procedure. The second attempt was made in 2000, when a governmental draft of the law on the Commission for Social and Economic Matters was submitted to Parliament, which, by the way, obtained the evaluation of the Labour Law Reform Commission as an immature draft. The submission of the governmental draft provoked the OPZZ parliamentarians to propose a counter-draft. Both drafts have been the subject of stormy controversies in Parliament. Finally, in May 2001 a “Common Declaration on Counter-acting Unemployment, Creating Jobs and on the Rules and Role of the Tripartite Commission” was adopted (the signatories of the Declaration were: OPZZ-Union, “Solidarity” Union, Polish Confederation of Private Employers, Polish Association of Handicraft — the Confederation of Polish Employers refused to sign the Declaration). The Declaration opened the way to an agreement on the draft law on The Tripartite Commission for Social and Economic Matters; moreover a possibility has been opened to create social

²³ For example, Prof. Tadeusz Zieliński in an interview “Bez widoków na pokój społeczny” [No Chance for Social Peace], *Trybuna* of 17-18 June 2000. Cf. also critical opinion on the Commission (I) in the interview of the new Minister of Labour, Prof. J. Hausner, *Rzeczpospolita* of 31 October 2001 (“There were plenty of talks, dialogue was continued perpetually but with no results whatever”).

²⁴ For example, Z. Hajn, materials from PCPE Conference in 2000 (footnote 8).

²⁵ *Ibid.*

²⁶ This Commission existed since 1990 and was headed by Prof Tadeusz Zielinski, former Ombudsman and former Minister of Labour and Social Policy.

dialogue commissions at voivodship (regional) level. The law has been adopted on 6 July 2001. According to the law, the new Commission constitutes a forum for social dialogue carried on with a view to reconciling the interests of employees, employers and public interest; each party of the Commission is entitled to submit to the Commission for consideration any issue of major social or economic importance, if in the party's opinion its solution is essential for maintaining social peace. The objective of the Commission is achieving and maintaining social peace. Special detailed regulation concerns the Commission's competencies in the course of the annual State budget preparative process.

The new Tripartite Commission - let us define it as Tripartite Commission (II) - is composed of the governmental side, employees' side and employers' side. Meetings of the Commission shall be attended on advisory basis by representatives of local self-government in matters concerning public tasks performed by local self-government. Representatives of the President of the National Bank of Poland, as well as of the President of the Central Statistical Office take part in works of the Commission on advisory basis.

The law of July 2001²⁷ links the Tripartite Commission (II) with the Prime Minister. The Chairman and all members of the Commission are appointed by the Prime Minister, on proposals, respectively, of representative of employees' and employers' organisations, local self-government and Presidents of the National Bank of Poland and of the Central Statistical Office. The Chairman of the Tripartite Commission is appointed by the Prime Minister from among members of the Council of Ministers representing the Council of Ministers in the Commission (their number is defined by the Prime Minister who also appoints and recalls them). Unlike in case of the Commission (I), according to the law of 2001 the appointed Chairman of the Tripartite Commission (II) may not necessarily be the Minister of Labour - however, in the Fall 2001 it is just this minister who has been appointed the Chairman of the Commission.

On the **employees' side**, members of the Tripartite Commission (II) are representative unions which, by force of the law of 2001, are the "Solidarity" and the OPZZ unions. Also national federations and national inter-union organisations associating more than 300,000 members, may be recognised as representative by the District Court in Warsaw, on interested union's request, and, as a result, may be admitted to the Commission as its regular members.

On the **employers' side**, members of the Tripartite Commission (II) are representative employers' organisations which, by force of the law of 2001, are the Confederation of Polish Employers, the Polish Confederation of Private Employers and the Alliance of Polish Handicraft. Also employers' organisations employing more than 300,000 employees and having national scale, may be recognised as representative by the District Court in Warsaw, on interested organisation's request and, as a result, may be admitted to the Commission as its regular members.

Representative unions and employers' organisations have equal number of representatives in the Tripartite Commission (II); this number is fixed by the Commission's

²⁷ *Journal of Laws* 2001, no. 100, item 1080.

resolution. Representative unions and employers' organisations elect Deputy-Chairmen of the Commission. Sitzings of the Tripartite Commission (II) have to be held according to needs, but at least every 2 months.

The Commission takes a standpoint by adopting a resolution as result of achieved consent of all members taking part in the voting. The Commission may legitimately adopt resolutions if a representative of the Council of Ministers and representatives of at least one representative union and at least one representative employers' organisations take part in the voting (this rule has to prevent the paralysing of the Commission's activity by way of withdrawals or suspending attendance by individual unions or employers' organisations - as it used to happen in the previous years).

It is expected that the law of 6 July 2001 will prove to be a turning point in the development of Social Dialogue in Poland. By establishing a solid legal framework for this dialogue it will enable the proper and efficient functioning of the new Tripartite Commission at national level (the Commission has held its first session in November 2001) and will promote Social Dialogue at regional (voivodship) level as well.

3.2. *Collective Agreements in Poland*

Collective bargaining and concluding collective agreements have had a long tradition in Poland. It started in the period between the World Wars (a very good Polish 1937 Law on Collective Agreements has to be mentioned here) and the institution of collective agreement survived, although in a degenerated form, the period of real socialism. The basic regulation concerning collective agreements is contained in Chapter XI of the Labour Code, radically amended in 1994 and further amended in 2000. Collective agreements are one of the fundamental matters of labour law in Poland, in general regulated appropriately, in a manner corresponding to European practice (this area, as one from the field of trade unions' freedoms and liberties, is not regulated in detail in the Community law, and as such is not covered by the adjustment requirement). There is considerable amount of Polish labour law writings on this issue.²⁸

Here, in connection with the 1997 Polish Constitution, we have to raise the controversial, in the academic circles, dilemma of collective agreements preserving or losing their nature of a source of labour law. The problem is that Article 87 of the Polish Constitution (even though the issue was raised before the Commission had prepared the draft of the Constitution) does not list collective agreements among the sources of universally binding law, which include: the Constitution, laws, ratified international agreements and regulations, and also enactments of local law, in the territory of the organ issuing them. Meanwhile Article 9(1) of the Labour Code states that: "whenever in this Code there is a mention of labour law, it shall be understood... also as covering the provisions of collective agreements and other collective arrangements based on the statutory law," thus attributing to them the legal character referred to in labour law

²⁸ I mention the following as examples: L. F l o r e k: "Rokowania i układy zbiorowe pracy" [Bargaining and Collective Agreements], *PiP* 1994, no. 12; J. W r a t n y (ed.): *Nowe układy zbiorowe - przełom czy kontynuacja?* [New Collective Agreements - Turning Point or Continuation?], Warszawa 1998.

theory as “a specific source of labour law.” The consequence of this traditional qualification of collective agreements are the hierarchical interdependencies and relations, established in the Labour Code, between the provisions of labour law based on the principle of “greater expediency” (*Guenstigkeitprinzip*): the provisions of collective agreements cannot be less favourable for employees than the provisions of the Labour Code and other laws, but, with certain restrictions, they can be more favourable. Similarly, the provisions of employment contracts cannot be less favourable for employees than the provisions of labour law (including collective agreements), but they can be more favourable.

After the 1997 Polish Constitution entered into force, labour law scholars faced the question whether the situation resulting from its Art. 87 generates an inconsistency of the Labour Code with the Constitution, which should be removed, or there is no inconsistency, because the Constitution does not prevent collective agreements from preserving their character of a specific source of labour law. After long deliberations, the Labour Law Reform Commission took the view that the contents of Article 9 of the Labour Code should be retained (with possible editorial changes), thereby confirming the character of collective agreements as a specific source of labour law. This view was accepted in the broad circle of labour law scholars at a conference in September 2000 in Toruń, when Prof. Lech Kaczyński formulated the following conclusion: “Linguistic interpretation of the constitutional provisions regarding the sources of law must give way to a functional interpretation.... Reasoning based on the contents of Article 2 [of the Constitution] finds additional justification in the provisions of Articles 12, 20 and 59, which put particular emphasis on the principles of solidarity and social dialogue and the right to negotiating and concluding agreements between employers and employees. None of these principles confirms expressly the normative character of collective agreements, but they all strengthen the axiological arguments, in certain sense also instrumental ones, supporting the thesis that negotiatory form of law-making applied above all in labour relations is not contrary to the fundamental law, but finds strong justification therein.”²⁹

3.3. *The Principle of Information and Consultation of Employees*

The principle of informing and consulting employees, a fundamental principle of EC law and a widespread form of Social Dialogue in EU, has not been properly implemented in Poland yet. Although Article 18(2) of the Labour Code stipulates that: “Employees shall participate in management of the employing establishment to the extent and according to the principles laid down in separate provisions,” this provision is just a memento of the socialist ideas of employees’ co-management, completely abandoned in the market economy, even in the vanishing sector of State enterprises where, for-

²⁹ L. Kaczyński: “Układ zbiorowy pracy - problem konstytucyjny” [Collective Agreement - a Constitutional Problem] [in:] G. Goździewicz (ed.): *Zbiorowe prawo pracy w społecznej gospodarce rynkowej* [Collective Labour Law in Social Market Economy], Toruń 2000, p. 193.

mally, the remains of the 1981 Act on Self-management of Employees of State Enterprises should still be applied.

In the Community understanding, the beneficiaries of the principle of informing and consulting employees are workers' representations not necessarily linked to trade unions (in EU Member States, just like now in Poland, especially in enterprises of foreign investors and in Polish private small and medium-sized enterprises it is more and more common not to admit the existence of trade unions — while the principle in question grants the right of information and consultation to all workers). This principle requires that in all enterprises in EU territory (the Directive 2002/14/EC of 11 March 2002) there should be representations of employees. This EC requirement may "clash" with aspirations of Polish trade unions, seeing their interest in maintaining and increasing the importance of their respective unions - and, that is, their political influences - in the enterprises and reluctant to the new employees' representations. Also employers, especially those dealing with two antagonistic trade union organisations in their enterprises, do not want a third representation body (even if this one could possibly be the easiest to cooperate with). Moreover, in the present Poland there is little interest in the fact that there is a growing tendency not to have any employees' representation in the majority of private firms (the non-union situation is often forced by employers). The liberal economic circles—just as in the countries of traditional capitalism — even seem to consider the dis-unionisation a success.

The new Community directive on information and consultation procedures in national enterprises in the territory of the EU³⁰ means for Poland - maybe soon a EU Member State - definite legislative duties in assuring the implementation of the principle of information and consultation of employees' representation,³¹ preceded by the need to gain the support of the reluctant Polish social partners.

³⁰ The Directive 2002/14/EC of 11 March 2002.

³¹ I am discussing this issue in a publication *Social Policy and Employment - to understand the Negotiations*, published by the Chief Negotiator for Poland's EU Membership Office, Warszawa 2001.