

P-207

ACADÉMIE POLONAISE DES SCIENCES \* INSTITUT DES SCIENCES JURIDIQUES  
POLISH ACADEMY OF SCIENCES \* INSTITUTE OF LAW STUDIES



DROIT POLONAIS CONTEMPORAIN  
POLISH CONTEMPORARY LAW

1-4(125-128)/2000

1-4(129-132)/2001

The publication of this issue has been possible thanks to the dotations from:

- the Polish Academy of Sciences
- the Chancellery of the Polish Parliament (Sejm)
- the Chancellery of the President of the Republic of Poland
- the Polish Lawyers' Association
- firms sponsoring 45th Anniversary of the Institute of Law Studies of the Polish Academy of Sciences, according to the following list:



**KRAJOWA RADA  
RADCÓW PRAWNYCH**

**OKRĘGOWA IZBA  
RADCÓW PRAWNYCH  
w Warszawie**



**Naczelna Rada  
Adwokacka**

**SALANS**

**SALANS HERTZFELD & HEILBRONN**  
G. GŁĘBOSZUK KANCELARIA PRAWNICZA SP. J.

**"«VARDYiVSKI i WSPÓLNICY**  
W.i.rJt inki, Wicfcubki Skd/m-ki K'v/cpin'ki A Lxhvt S C  
Л D W O K Л C I I R A D C O W I E Ё R Л W X I

**7 Z"**

**GIDE LOYRETTE NOUEL**

DARIUSZ TOKARCZUK I WSPÓLNICY  
KANCELARIA PRAWNA GLN SPÓŁKA KOMANDYTOWA

sixcEuuaT.wtw

**HOGAN & HARTS ON**  
.II J AM KA, A. GALOS I WSIWLMCY SFT.H.KA KOMANDYTOWA

Le present volume est publié grâce aux dotations accordées par:

- l'Académie Polonaise des Sciences
- la Chancellerie du Parlement de la République de Pologne (Sejm)
- la Chancellerie du Président de la République de Pologne
- L'Association des Juristes Polonais
- firmes ayant accordé un support financier aux célébrations du 45-ième anniversaire de l'Institut des Sciences Juridiques de l'Académie Polonaise des Sciences, selon la liste suivante:



**Wydawnictwo Prawnicze  
LexisNexis™**



**Wydawnictwo Naukowe  
SCHOLAR**



**Powszechny Bank  
Kredytowy S.A.  
w Warszawie**

IGuK«l<vi't Prawibi: \*1 I MkkdAi, Z  
I •ASpdIMtv, SpdM kninandvlf.t.i  
ЕТЕМЛТЯГСШ Z

**HUNTON &  
WILLIAMS**



**FUNDACJA PROMOCJI  
PRAWA EUROPEJSKIEGO**



**Usługi komputerowe**



POLSKA AKADEMIA NAUK • INSTYTUT NAUK PRAWNYCH

# DROIT POLONAIS CONTEMPORAIN

Revue trimestrielle

# POLISH CONTEMPORARY LAW

Quarterly Review

№ 1-4 (125-128)/2000

№ 1-4(129-132)/2001



Warszawa 2002

*Maria Matey*

Rédacteur en Chef  
Editor-in-Chief

*Andrzej Calus, Jerzy Ciemniowski, Leszek Kubicki, Maria Kruk-Jarosz,  
Ewa Łętowska, Jerzy Makarczyk, Stanisław Soltyśński, Andrzej Szajkowski*

*Ewa Popławska*

Secrétaire de la Rédaction  
Executive Editor

Wydawnictwo Naukowe SCHOLAR  
00-322 Warszawa, ul. Krakowskie Przedmieście 62  
Tel/Fax (\*48.22) 828.93.91, 826.59.21, 828.95.63  
e-mail: [info@scholar.com.pl](mailto:info@scholar.com.pl)  
Skład i łamanie WN „Scholar”

## TABLE DES MATIÈRES \* CONTENTS

|                                                                                                                                                                      |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Tadeusz Zieliński: National Systems of Law and European Integration.....                                                                                             | 7   |
| Marek S a f j a n: The Constitution and the Membership of the Republic<br>of Poland in the European Union .....                                                      | 17  |
| Wojciech S o k o l e w i c z: Le Sénat en Pologne — du besoin d’une réforme .....                                                                                    | 35  |
| Maria K r u k: Some Remarks about the Conception of Executive Power<br>in the 1997 Polish Constitution .....                                                         | 53  |
| Jerzy J a s k i e r n i a: Polish Sejm’s Procedure for Approximating Polish Law<br>to the Law of the European Union .....                                            | 63  |
| Maria M a t e y - T y r o w i c z: Reflections on the Social Dialogue in Poland<br>preparing to the EU Accession.....                                                | 81  |
| Ewa P o p ł a w s k a: Legitimacy and Constitutional Stability as Challenges<br>for Poland’s Accession to the European Union.....                                    | 95  |
| Barbara B a j o r: Les sociétés unipersonnelles d’Etat en Pologne d’après la loi<br>de 1996 sur la commercialisation et la privatisation des entreprises d’Eta ..... | 111 |

♦ ♦ ♦

|                                                                                                                                                    |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Institute of Law Studies of the Polish Academy of Sciences - 45 Years of Activity<br>(Maria K r u k - J a r o s z, Director of the Institute)..... | 125 |
|----------------------------------------------------------------------------------------------------------------------------------------------------|-----|

## ACTES LÉGISLATIFS \* LEGISLATIVE ACTS

|                                                                                                                                         |     |
|-----------------------------------------------------------------------------------------------------------------------------------------|-----|
| The Law of 6th July 2001 on the Tripartite Commission for Socio-Economic Affairs<br>and on Voivodship Social Dialogue Commissions ..... | 135 |
|-----------------------------------------------------------------------------------------------------------------------------------------|-----|

## NATIONAL SYSTEMS OF LAW AND EUROPEAN INTEGRATION

Tadeusz Zieliński\*

### I.

1. A Roman jurist called Gaius, who lived in the times of Mark Aurelius' rule, in the introduction to his great work entitled *Institutiones*, put a maxim which is still worthwhile to remind now, more than eighteen centuries later. It is strikingly fresh and up-to-date in the times of a uniting Europe.

This great lawyer said that all peoples that are governed by laws and customs use partly their own statutes and partly the law that is common to all people (*pmnes populi qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur*<sup>1</sup>).

The idea contained in this brief sentence holds true in the present time in the case of the European Union. The creators of the Treaty establishing the European Community, referred to as the Treaty of Rome, had in mind the idea of laws that are partly common to the countries of our continent. The treaty owes its name to the Eternal City where it was concluded in 1957.

The signatories of the Treaty of Rome probably did not realise that the idea of laws uniting different nations had such an ancient origin. More likely, they followed an instinctive sense of unity of existential objectives pursued by all people despite the fact that they are separated by state frontiers, speak different languages and have different customs. Though respecting the laws of individual nations, the States Parties to the above-mentioned Treaty made an attempt to be governed also by common laws, which - according to Gaius - resulted from "natural reason" among all the people (*ex naturali ratione inter omnes homines*).

Never in the history of Europe has the idea of an international community enjoyed such strong support as in the second half of the last century. For three hundred years at least the belief that national interests had absolute primacy in the relations between sovereign States had been dominant in the opinions on the system of international rela-

---

\* Member of the Polish Academy of Sciences, President of the Committee for Legal Sciences of the Polish Academy of Sciences, cm. Professor at the Jagellonian University, Cracow, former Ombudsman, former Minister of Labour and Social Policy.

<sup>1</sup> Gaius: *Institutiones. Commentarius primus* with Polish translation by C. Kunderciewicz, Warszawa 1982, pp. 28-29.

tions. In his book entitled *Diplomacy*, Henry Kissinger wrote that this modern, in his view, approach to relations between States was introduced in the 17<sup>th</sup> century by France under the rule of Cardinal Richelieu.<sup>2</sup> A similar standpoint on the issue of European communities still prevailed in the 1960s. Then, General de Gaulle promoted a conception of Europe composed of national States, which he referred to as “Europe de patries.” He rejected the idea of supranational Europe.<sup>3</sup>

The integration of European nations, guided by common values and aspirations to peaceful development of mutual economic relations, proved possible thanks to overcoming the dogma of a “balance of powers” understood as achieving uniformity of interests of the strongest States even to the detriment of the weaker nations.

2. The Treaty of Rome did not envisage unification of European law, as it is sometimes - erroneously - believed to have done. It only indicated general common objectives: laying down the foundations for closer links between European States, ensuring economic and social development by joint actions aimed at liquidating barriers dividing Europe and improvement of the conditions of life and work for its nations. Article 3 of this document envisages “the approximation of laws of Member States to the extent required for the functioning of the common market,” while Article 100 provides that the method of such “approximation” of legal and administrative provisions will be effectuated through directives, issued by the European Council, in matters having direct influence on the establishment or the functioning of the common market. The above Articles are of considerable importance for determining the place of national laws in the legal order of the European Union. We will deal with this question in more detail later on.

A new stage in the process of European integration, which started with the establishment of European Communities, was opened in 1991 in Maastricht with the Treaty on the European Union (Maastricht Treaty). In this document, the heads of twelve European States confirmed “their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.” The Union adopted as its objectives, *inter alia*, preserving the full *acquis communautaire* and conducting a detailed analysis of legal regulations (so-called *screening*) in order to determine to what extent politics and forms of co-operation introduced by this treaty require changes to ensure efficiency of Community mechanisms and institutions.

The Treaty of Amsterdam, concluded in 1997, played a certain role in the development of the idea of legal integration of Europe. It confirmed the respect for basic social rights determined in the European Social Charter of the Council of Europe, signed in 1961 in Turin, and in the 1989 Community Charter of Basic Social Rights of Workers. The latter document, although it is just a “solemn declaration” and not a normative instrument, is of vital importance in the search for common directions in the social

---

<sup>2</sup> Polish edition: Philip Wilson, Warszawa 1996, p. 16.

<sup>3</sup> Cf. S. Sołtysiński: “Dostosowanie prawa polskiego do wymagań Układu Europejskiego” [Approximation of Polish Law to the Requirements of the Europe Agreement], *Państwo i Prawo* 1996, no. 4-5, p. 3; the views of this author were accepted a. o. by M. Matey-Tyrowicz: “Polskie prawo pracy wobec integracji europejskiej” [Polish Labour Law and European Integration], *Państwo i Prawo* 1996, no. 4-5, pp. 120-121.

protection of workers of the European community. And probably it will be the Charter of Fundamental Rights of the European Union adopted in Nice in December 2000 that will play a fundamental role in the process of establishing a close union between the nations of Europe.

## II.

1. The expression “approximation of laws of the Member States” (Article 3 of the Treaty of Rome) became the object of various interpretations. The term “adjustment” of domestic law to the Community law is inaccurately used as a synonym of this expression. This term is close to the notion of unification (standardisation) of law. But the objective of the European Union is not to create uniform legal structures in the Member States. In other words, unification is something different from the “approximation” of domestic legislations of EU Member States.

The most commonly used word is “harmonisation.” The meaning of this term is the closest to the concept of “approximation” of domestic legislations according to Article 3 of the Treaty of Rome.

Harmonisation consists in “approximating” national legislations to EU law in the sense that a Member State should be governed by the directives issued by the Council of the Communities and by the objectives set in such directives. But the choice of forms and means to achieve such objectives is left at the discretion of each State (Article 181 of the Treaty).

Legal harmonisation in a yet broader understanding is “activity consisting in agreeing the contents and rhythm of introducing common legal standards (particularly substantive norms) within the framework of EC institutional structure...”<sup>4</sup> This definition lacks precision and is too narrow, since the above-mentioned “agreements” are not a sufficient condition for approximation of comparable cultures (national ones and the culture of the European Union). It is also important whether the administration and the judiciary of a Member State (or a State applying for such a status) are capable of enforcing and observing EU standards.<sup>5</sup>

It also seems erroneous to call the process in question “reception” of the European Community law by Member States.<sup>6</sup> In the encyclopaedic meaning, reception is absorbing foreign examples (customs, different law). In jurisprudence, reception of law

---

<sup>4</sup> C. M i k: “Problemy dostosowania polskiego systemu prawnego do europejskiego prawa wspólnotowego (w kontekście przyszłego członkostwa Polski w Unii Europejskiej)” [Problems of Adjusting the Polish Legal System to the European Community Law (in the context of Poland's future membership in the European Union)], *Przegląd Legislacyjny* 1998, no. 1—2, p. 70.

<sup>5</sup> Cf. M. K ę p i ń s k i: “Obowiązek zbliżania ustawodawstwa Polski do przepisów obowiązujących w Unii Europejskiej w świetle Układu Europejskiego” [The Duty of Approximating Poland's Legislation to the Provisions in Force in the European Union in the Light of the Europe Agreement], *Przegląd Legislacyjny* 1998, no. 1-2, p. 13; C. M i k, *op. cit.*, p. 69.

<sup>6</sup> M. J a ś k o w s k a: “Europeizacja prawa administracyjnego” [Europeanisation of Administrative Law], *Państwo i Prawo (PiP)* 1997, no. 11, p. 18.

is considered to be using the achievements of other nations in making the laws of a given country, using the examples of more developed legislations, even ones from very remote times.<sup>7</sup> The greatest reception of law in the history was the reception of Roman law initiated in the 12<sup>th</sup> and the 13<sup>th</sup> centuries by the University of Bologna. In the processes of establishing national legal orders, EU directives are not “received” on the ground of domestic legislations in the way institutions of Roman law were used to create modern systems of civil law. The directives set European standards, but do not provide ready examples of legal solutions which could be simply “received.” In accordance with these directives, Member States create their own laws instead of absorbing external laws, laws of the Union. It does not mean that Community law as separate supranational law does not exist, but that it is a collection of domestic legislations of the Member States of the Community.<sup>8</sup> The sources of this law include EU regulations, which have the force of law *ipso vigore* and do not require any transposition in order to be binding in the countries of the Community.<sup>9</sup>

The notion of harmonisation of domestic laws with EU directives does not include the so-called “implementation of Community law,” which is understood as a process of introducing EU standards into the legal order of a given country. It is not only a task for lawyers, but also for specialists in other disciplines.<sup>10</sup> By no means can this “implementation” be understood as some kind of transplantation, simple incorporation of Community norms into a Member State’s domestic legislation. We should separately tackle the problem of direct effectiveness, in the relations between subjects of a Member State and other partners, of such provisions contained in the directives with which the domestic law has not been harmonised. The case law of the Court of Justice does not exclude such a possibility.

Against the background of the above arguments, some misunderstandings may result from using a very general term with many meanings, namely “Europeanisation of law.”<sup>11</sup> None of the national laws are transformed into European law as a result of approximating to common standards set by the Council of the Union. “Europeanisation” of law, in the most general and metaphorical meaning of the word, might mean subordination of national laws to the European system of values.<sup>12</sup>

Anyway, none of the terms discussed here justifies the thesis that national systems of law of the Member States become an integral part of some supranational European law. Each Member State has its own law consistent with the basic assumption of the Union, which is its economic and social coherence (Article 130a of the Treaty of Rome).

---

<sup>7</sup> Cf. J. B a r d a c h: “Recepcja w historii państwa i prawa” [Reception in the History of the State and the Law], *Czasopismo Prawno-Historyczne* 1997, no. 1, vol. XXIX.

<sup>8</sup> Cf. L. B a r: “Kształtowanie ordynacji rynkowych (Rozważania w drodze do Wspólnoty Europejskiej)” [Formation of Market Ordinances (Reflections on the way to the European Community)], *PiP* 1992, no. 11, p. 36.

<sup>9</sup> Cf. D. L a s o k: “Porządek prawny Wspólnoty i Unii Europejskiej” [Legal order of the European Community and the European Union], *PiP* 1997, no. 3, p. 25.

<sup>10</sup> Cf. S. B i e r n a t: “Kilka uwag o harmonizacji polskiego prawa z prawem Wspólnoty Europejskiej” [Some Comments about the Harmonisation of Polish Law with EC Law], *Przegląd Legislacyjny* 1998, no. 1-2, pp. 23-24.

<sup>11</sup> Cf. M. J a ś k o w s k a, op. cit., p. 18 and the literature quoted by the author.

<sup>12</sup> *Ibid.*

It follows from the above remarks that progressive States of our continent by no means aim at “incapacitating” Member States in the adoption of their own laws. The founders of the European Community were guided, in their search for the idea of uniting laws, by the admonition that Ch. de Montesquieu gave the future generations 250 years ago in “The Spirit of Laws”: “Laws should be so specific to each nation that it is a rare occurrence that the laws of one nation might be suitable for another. The political and civil rights of each nation should only be special cases through which human reason manifests itself” (*Des lois devraient être appropriées à chaque nation à point qu’il soit rare qu’elles puissent servir à une autre nation. Les droits politiques et civiles de chaque nation ne devraient être que cas particuliers à travers lesquels se manifeste l’esprit humaine*).<sup>13</sup>

The architects of common Europe were, however, more optimistic than the great Montesquieu in their assessment of the possibility of nations of the contemporary world using similar laws.

2. The victory of the idea of law based on common foundations means, in today’s world, liberation of juridical minds of contemporary Europe from the influence of the historical school in jurisprudence. F. K. Savigny, the main representative of this doctrine in German jurisprudence of the early 19<sup>th</sup> century, would probably consider the conception of laws common to the nations of united Europe as deeply incoherent with the assumptions of the theory according to which law, just as language, is an unconscious product of the history of a given nation, of its “spirit.”<sup>14</sup> Savigny claimed that laws could not be invented for any nation, even in the form of codes that should be binding in a single State. Lawyers only express the laws which are formed in the national conscience and fulfil this task limiting themselves to formulating legal norms in the same way grammarians determine the rules of a living language.<sup>15</sup> Imposing laws taken from foreign legal orders on a nation is, in the light of the assumptions of historicism, a serious assault on the development of the nation which has its own legal consciousness and culture rooted, above all, in the national customs.

In the times of globalism, historicism is extremely anachronistic. The irrationalism and nationalism accompanying this doctrine cannot be reconciled with today’s view on the future of European nations, and in a further perspective even the nations of the whole world. Now Europe reverts to the ideas of rationalism, which started in the Renaissance. This great intellectual trend stressed the active attitude of a human being in shaping his life. The creation of partly common international cultures is nothing but a futuristic vision of united nations.

Of course, each period in the history is causally conditioned by earlier events. The achievements of the past must then be taken into account in the making of national laws. However, there are no dialectical rules in the history that would determine upfront the social course of historical events, as Marxist historicism saw it, propagating the

<sup>13</sup> Ch. de Montesquieu: *L’Esprit des lois* [The Spirit of Laws], Paris 1748.

<sup>14</sup> F. K. Savigny: *Vom Beruf unserer Zeit zur Gesetzgebung und Rechtswissenschaft* [On the Vocation of our Age for Legislation and Jurisprudence], 1814.

<sup>15</sup> Quoted after J. L and e: *Studia z filozofii prawa* [Studies in the Philosophy of Law], Warszawa 1959, p. 349.

philosophy of determinism in social development under the name of historical materialism. "The poverty of historicism" was presented by K. R. Popper in a book under the same title.<sup>16</sup> Referring to the arguments of the author of "The Open Society," we must say that history itself does not create the legal culture of any nation. It is us that have to create it using the experiences of other nations, not waiting until such culture is created by the force of tradition based on beliefs, customs, laws of nature, etc.

### III.

1. Community patrimony was included, under the name of *acquis communautaire* in the so-called White Book adopted by the European Commission in 1995 in Cannes. Apart from normative regulations, this document contains also more general legal principles and case law of the European Court of Justice. Adjusting the internal legal system to these requirements is a precondition for Community capacity, that is, for enjoying the status of a Member of the European Union.

Additionally, what is of some importance for the countries of Central and Eastern Europe applying for membership of the European Union is the conclusions of the European Council adopted in Copenhagen in 1993 (so-called "Copenhagen criteria"), which lay down the conditions for extension of the Union eastwards. One of these criteria is the capacity of a given State to adopt *acquis communautaire*.

The conclusions of the European Council from Luxembourg, adopted in 1997, and the 1998 document entitled "Partnership for Membership" are also vital for fulfilling the conditions for adjustment of the countries of Central and Eastern Europe (including Poland) for future membership.

In any case, according to the above documents, the purpose of the integration process is not a simple incorporation of Community norms into a Member State's domestic legal order. "Adjustment" of national law to EU law consists in such transformations of the legal order of the given State which, while preserving its national autonomy, will ensure its compliance with the law of the European Communities from the point of view of aims and directions of development. The guiding principle of the process of harmonisation is "unity in diversity." It means mutual recognition of procedures and freedom of making decisions that are necessary to preserve developmental continuity and internal coherence of national laws.<sup>17</sup>

2. Integration of national structures with the order of the EU is not as easy a process as it may seem. European integration is based on the assumption of compatibility of cultural systems of the States of our continent. However, this assumption must be used with great caution. National cultures even within the same civilisation circle are not comparable in all respects.<sup>18</sup> In comparative studies, false conclusions may be drawn

---

<sup>16</sup> K. R. Popper: *The Poverty of Historicism*, London 1956.

<sup>17</sup> Cf. P. Daranowski [in:] *Komentarz do Układu Europejskiego* [Commentary to the Europe Agreement], Warszawa 1994, p. 198.

from discovering synchronic similarities and differences, that is, ones that coexist at the same time. The studies of “diachronic” diversity, showing differences in the development of individual nations in various time profiles are also quite important. On the basis of such studies one may determine that a given country is ready for entry into the European Communities or, quite the contrary, that it is backward, which is an obstacle in its aspirations to European membership. Thanks to such studies one may also understand the resistance of Eurosceptics against integration, driven by fear of breaking the tradition, losing the continuity and the coherence of national culture and State autonomy.

Spatial criteria are the most deceptive in comparative studies of civilisations. Membership of the same, seemingly uniform, geographical systems, such as Europe, does not equal unity of cultures of the States of the same region, even neighbouring ones. The apt comments by Ch. de Montesquieu on the links between laws and “the nature of climate and nature of soil”<sup>19</sup> are helpful in explaining the difficulties on the way to integration of Polish agriculture with the highly-developed agriculture of leading West-em-European States.

Harmonisation of internal laws with EU directives seems relatively straightforward. It is mainly a task for lawyers. Polish lawyers, so far, have not succeeded in completing this task.<sup>20</sup>

There is a more complex task of implementing Community norms, directives and case law on a broader scale, namely achieving a satisfactory level of observance and practical application of Community *acquis*.

However, the most difficult problem is preparing the general public for integration with Europe. It is not just about showing the citizens the benefits of membership of their State in the Union. A big change must be brought about in the thinking and behaviour of the whole society, many national habits must be overcome, xenophobia and intolerance must be eradicated from people’s minds. To achieve this objective, we need many years of work on the formation of a new intellectual culture, more universal than the traditional one, wide open to the world. In this sense, the task of adjusting the mentality of citizens to the European dimensions is an enormous one and requires many measures, including studies of the economy and culture of States of the European Union, teaching European law in schools of higher education, training for public administration workers, linguistic preparation for moving freely within the European structures, etc.

#### IV.

The problem of determining the individual shape of Polish law after Poland’s accession to European Union has not been, so far, dealt with in more detail in our litera-

<sup>18</sup> Cf. P. B a g b y: *Culture and History. Prolegomena to the Comparative Study of Civilizations*, London 1958.

<sup>19</sup> Ch. d e M o n t e s q u i e u: *L'Esprit des lois*, op. cit., vol. 1, chapters XIV and XVIII.

<sup>20</sup> Cf. P. C z e c h o w s k i: “Stan i trudności w realizacji dostosowania prawa polskiego do prawa Wspólnot Europejskich” [The Status and Difficulties in Adjusting Polish Law to the Law of the European Communities], *Przegląd Legislacyjny* 1998, no. 1-2, p. 44 and following.

ture. Until now the main focus has been on finding the ways to achieving the objective we long for, while little attention has been devoted to the issue of autonomy that our law should preserve after adjusting the legal order to EU requirements. The aspiration to quick integration under the proud banner "Poland in Europe" does not really encourage critical reflection on the issue whether it is feasible for our country to adopt certain patterns within a short timeframe.

In such a brief paper devoted to such a broad range of problems it is naturally impossible to elaborate on this subject. It is worthwhile to think at least about the scope of necessary transformations of Polish law against the background of international sources already binding upon Poland.

The basic instrument that imposes the duty of approximating Polish law to Community law upon Poland is the Europe (Association) Agreement concluded in Brussels in 1991 (which entered into force on 1 February 1994).

The aims of the Agreement were specified in Article 1 thereof (to provide appropriate framework for political dialogue, to promote the expansion of trade and the harmonious economic relations between the parties, to provide a basis for the Community's financial and technical assistance to Poland, to provide an appropriate framework for Poland's gradual integration into the Community, to promote co-operation in cultural matters).

The association was established for a transitional period of a maximum duration of ten years, divided into two successive stages, each in principle lasting five years (Article 6). It seems a sufficiently long period, but it is not sufficient taking into account the possibilities of our society (see part III and end of this paper).

The source of Poland's obligation to "approximate" (harmonise) the provisions of law are the provisions of Articles 68 to 70 in Chapter III of the Agreement. The approximation includes, *inter alia*, intellectual property, protection of life and health, protection of workers at the workplace, consumer protection and the environment.

Article 68 envisages that Poland will use its "best endeavours" to ensure that its future legislation is compatible with Community legislation. This provision guarantees the Polish legislator freedom in setting the priorities and speed of approximating Polish legislation to that of the Communities. The way this process is organised and the time it will take to bring our legislation to EU standards are internal Polish matters.

The harmonisation in question should ensure, first of all, rationalisation of our regulations in compliance with European patterns. Culturally, Poland seems well adjusted to take up this challenge, because our country belongs to the circle of Mediterranean civilisation and the elements of collectivism are basically alien to our way of thinking. Individualism and rationalism are the features of the Western-European civilisation that we should assimilate in the process of integration with the European communities.

Poland must, above all, include in its legislation the concrete aims set by numerous EU directives, which are the basic instrument of integration in its broad sense. The European Commission has the power to bring an action to the Court of Justice against a Member State that did not incorporate the provisions of a directive into its legislation. Not being a member of the Union yet, Poland is not under a formal duty to adopt any

directives, but as part of its efforts to become a member of the European Community it should complete the approximation of its legislation to the provisions contained in all EU directives.

To facilitate the tasks set in Article 68 of the Association Agreement, Poland is granted assistance in accordance with Article 70 thereof. It is the so-called “technical assistance,” which includes exchange of experts, provision of information, organisation of seminars, training activities and aid for the translation of Community documents.

As regards the obligation determined in Article 70 of the Association Agreement, Poland received financial assistance within the framework of PHARE programme, which was implemented and whose fruits included over 160 drafts of legal instruments and over a dozen thousand pages of expert opinions in the field of law. The above programme was supported by SIERRA programme, which was used, *inter alia*, to translate, publish and disseminate Community legal instruments.<sup>21</sup>

Our very weak command of foreign languages is a stumbling block on Poland’s road to the European Union. Article 76, subparagraph 5 of the Association Agreement recognises as necessary “to promote the use of Community standards and terminology.” If our translators are too eager to accept this encouragement, it may prove unfortunate for the purity of our language. The Polish language is already full of various linguistic horrors imitating EU terminology, especially the English words (such as *aprosymacja*, *kontroling*, *skrining*, *transparencja*, etc.).

## V.

Poland’s integration with the European Communities is, as it follows from our reflections, a difficult process, which requires deep systemic changes that must occur within the framework of the transformation of the State system, which has been going on for ten years already and has not been completed yet. Without continuing the transformation Poland has no chance for a real integration. There can be no integration without transformation. This statement reflects the magnitude of the task that all of us are facing, not only those who “govern the Republic and hold justice in their hands.”

Membership in its nominal sense means the fulfilment of formal requirements by including *acquis communautaire* in our laws. But integration should be real in the sense of us being competitive in relation to other countries of the Community, not only on single European markets, but also in the field of science, education and culture.

The European Union must already be a structure of reference, the point of gravity in the current development of Poland.<sup>22</sup> The most difficult thing is to understand not

---

<sup>21</sup> Detailed information about the utilisation of this programme can be found in the article by P. Czechowski quoted in the previous footnote.

<sup>22</sup> M. B e l k a, J. H a u s n e r, L. J. J a s i ń s k i, M. M a r o d y, M. Z i r k - S a d o w s k i: *Polska transformacja w perspektywie integracji europejskiej (streszczenie)* [Polish Transformation in the Perspective of European Integration (an outline)], Friedrich Ebert Stiftung, Warszawa 1994.

only the benefits of Poland's accession to the Union, but also getting to know the conditions that must be fulfilled in order to achieve this aim. Can the consciousness of our nation handle the problem within a period that is proudly considered to be sufficient for Poland's integration with Europe? Is transforming the traditional mentality not a task for many generations?

## THE CONSTITUTION AND THE MEMBERSHIP OF THE REPUBLIC OF POLAND IN THE EUROPEAN UNION

**Marek Safjan\***

### **I. Introductory Remarks**

To begin with it should be noted that the norms of the new Constitution of the Republic of Poland of 2 April 1997 provide very favourable legal conditions for the implementation of the process of integration. It is a constitution which was drafted at a time when the Republic of Poland was bound by the association treaty with the European Union, when serious preparations for the negotiations concerning integration were under way and what, which is worth stressing, all the significant parliamentary groups expressed their support for the very idea of integration (which, of course, did not necessarily imply unanimity with regard to the negotiating positions and the very conditions of integration).

Over the past 10 years, beginning with the fall of the communist system and the regaining of sovereignty, the Polish society has experienced a significant evolution. During the initial years, the integration of Poland with the European Union was perceived more in the categories of a symbolic return of the country to the European family, of the recovery of its own identity in opposition to the reality which had dominated it for 45 years, forcing alien political models upon the nation, a different system of values and very little room for decisions concerning its own fate. The European Union embodied the society's yearning for not only a better life, but above all for the return to its own roots, historically embedded in the values of western culture. In that sense the European option coincided with a particular choice of civilisation.

That early or "childhood" Euro-enthusiasm of the Polish society is now over. Although the pro-European option continues to be strongly present among the political and juristic elites, and still enjoys strong support of the population, the spontaneous enthusiasm for the prospects of European integration has been replaced by a more balanced and more serious reflection on the consequences of the processes of integration, including their considerable costs, which need to be measured by the enormous effort undertaken by the society in order to make up, in a short period of time, for the economic and civilisational collapse in which the Republic of Poland had found itself in

---

\* Professor of Civil Law at the University of Warsaw, President of the Constitutional Tribunal.

the aftermath of the communist rule. The reasons diminishing the Euro-enthusiasm are probably more complex. They include, I believe, the entrenchment of normal democratic mechanisms, which by their very nature allow to gain a more multifaceted, diversified and thereby more objective and independent insight into the essence of the integration processes and the evaluation of Poland's position in the uniting Europe. Undeniably, one of the factors weakening the pro-European attitudes is also the steady flow of information about the reluctance towards such integration manifested by the statistical majority of inhabitants (citizens) of the European Union, especially in such countries as France, Austria or Germany. Today, the prospects for integration still do not seem to be threatened, and it is expected that in our society the pro-European option would receive a substantial majority of about 60% in favour. But the prolongation of the period of negotiations, the postponement of integration to an unspecified future date will not have a positive influence on the continuation of pro-European attitudes in our society.

We should keep in mind the social and political context of the on-going debate on the future of Poland's integration with the European Union. Indeed, in the end - that social and political reality will tip the balance for the outcome of that debate, and not the purely formal and legal disputes concerning the otherwise important issues related to the adaptation of the legal system of the Republic of Poland to that of the European Union.

## II. Constitutional Juridical Instruments of Integration

The law of the European Community has been recognized in the constitutional regulations as being separate from the norms of the international public law (norms contained in treaties, conventions, etc.) system of regulations which, given the objectively present differences, will have a favourable influence on the processes of implementing the entire *acquis communautaire* in the framework of legal order of the Republic of Poland.<sup>1</sup> One should not overlook, however, the fact that the legal system of the European Community is composed of norms of diverse legal character, classified as belonging to the so called primary law on one hand, and to the secondary law on the other hand. We shall attempt to describe the legal position of the Community law with regard to the above indicated categories, emphasizing issues related to the evaluation of the Community law from the point of view of the hierarchical review of norms under the Polish law.<sup>2</sup>

<sup>1</sup> Concerning the notion of the *acquis communautaire*, see i.a.: Z. Brodecki: "Acquis communautaire. Pojęcie nieznane Konstytucji RP" [Acquis communautaire. A Notion Unknown to the Constitution of the Republic of Poland] [in:] C. M i k (ed.): *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej* [The Constitution of the Republic of Poland of 1997 and Poland's Membership of the European Union], Toruń 1999, from p. 75 and following.

<sup>2</sup> Polish literature on that subject is presently rather voluminous; See, i.a. the recently published cycle of papers: M. K r u k (ed.): *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in the Internal Legal Order], Warszawa 1997; C. M i k (ed.): *Konstytucja..., op. cit.*;

### *The Act of Accession and its Consequences*

The founding treaties, the accession treaties, and, above all, the regulations concerning the structure and internal functioning of the European Union, which form the unique constitution of the Communities,<sup>3</sup> have to be classified as belonging to the body of the so called primary law. Initially, it can be assumed here that their evaluation will be subject to the criteria proper to the norms of international public law. Two significant constitutional principles concerning treaty norms, specified in Article 91, should be noted here: first, that a ratified international agreement, having been published in the Official Journal of Laws, becomes a part of the domestic legal order and is directly applicable, unless its application requires the enactment of a respective statute (section 1); second, that an international agreement which has been ratified upon the consent granted by statute has precedence over the statute, should such statute be irreconcilable with the respective international agreement (section 2). *Prima facie* this construction seems very clear and sufficiently precise, as it expresses the concept of incorporation of the treaty norms into the internal legal order (the monistic theory) and, additionally, *expressis verbis*, the principle of the validity of such norms *ex proprio vigore* as prevailing over the internal law.

As a side-note, we can only observe that in the context of the current constitutional regulations there are no serious doubts as to the status and the binding force of the Association Treaty of the Republic of Poland with the European Communities (the European Agreement).<sup>4</sup> As an act subject to the regulation of Article 91 section 1 and 2 of the Constitution, it constitutes a part of the internal legal order, is assured direct application (unless the application of its provisions requires the enactment of respective statutes), as well as precedence in the event of a conflict with statutory norms. Therefore, from the point of view of the hierarchy of the sources of universally binding laws, the European Agreement occupies a higher position than statutory regulations. Owing to the clear formulation of Article 91 section 2 of the Constitution, a court may refuse to apply a provision of internal law which contravenes a norm of the Agreement, and in the event when - due to the nature of such norm (lack of direct application) - its direct application is not imminent, a contravention of that kind may lead to repealing of a provision of internal law by the Constitutional Tribunal (see: Article 188 sub-section 2 of the Constitution).<sup>5</sup>

---

C. Banasiński, J. Oniszczyk (eds.): *Konstytucja. Trybunał Konstytucyjny. Zbiór studiów* [The Constitution. The Constitutional Tribunal. Collected papers.], Warszawa 1998; A. Jeneralczyk-Sobierajska (ed.): *Wzajemne relacje prawa międzynarodowego, wspólnotowego oraz prawa krajowego* [Mutual Relationships Between International Law, European Union Law and Internal Law], Łódź 1998.

<sup>3</sup> The notion of the "European Constitution" is used, above all, with regards to the acts on the Establishment of the European Community (TWE) and the Treaty on the European Union, the Amsterdam Treaty in the Jurisprudence of the Court of Justice in Luxembourg; see also: R. Arnold: "Perspektywy prawne powstania konstytucji europejskiej" [The Legal Prospects for the Establishment of a European Constitution], *Państwo i Prawo* (PiP) 2000, no. 7, p. 35 and following.

<sup>4</sup> *Dziennik Ustaw* (Dz.U.) [Official Journal] 1994, no. 11, item 38 with subsequent amendments.

<sup>5</sup> Concerning the association agreements concluded by the European Community, see: E. Latoszek: *Podmiotowość prawna Wspólnoty Europejskiej i jej kompetencje w zakresie zewnętrznych stosunków umownych* [The Juridical Personality of the European Community and Its Competencies Concerning External Contractual

With regard to the primary law of the Community, however, we are dealing with distinct specificity as compared to the classical regulations of international public law.

First, in the Polish constitution, the ratification procedure for the accession treaty is subject to special regulation, which differs from a typical ratification of an international agreement.

Second, the consequences of the accession treaty are of particular nature from the point of view of the implications of accession for the domestic legal order, and namely: that they automatically embrace all of the acts of the Community law (the constitutive acts of the Community and the acts of law derived from them) which, from that moment on constitute the *acquis communautaire*, and thereby become a part of the legal order in force in the Republic of Poland, what does not indicate, at least in terms of secondary law, that it is at the same time a part of internal law, as it is a particular, autonomous legal order.<sup>6</sup> They imply the relinquishment of certain legislative competencies by the respective state organs in the areas reserved for the agencies of the Communities; they introduce the exclusivity of the Communities' organ of jurisdiction with regard to the norms of the Community law, especially with regard to their interpretation, and the disputes over their validity and scope.<sup>7</sup>

The new Polish constitution provides the ratification of the accession treaty with a special status:

First, the constitutional regulation stipulates *expressis verbis* that in certain areas the competencies of the state organs be delegated to an international organisation (Article 90 section 1).

Second, the procedure for granting consent to the ratification of such an international agreement is extraordinary, namely it is required of both the lower chamber (Sejm) and the upper chamber (Senate) of Parliament to pass the respective statute by a qualified 2/3 majority of votes in the presence of at least half of the statutory number of deputies and the corresponding statutory number of senators (Article 90 section 2). As a side-note it can be pointed out that the requirement of majority in this case is more rigorous than in the case of a bill to amend the constitution, since in that latter case it is sufficient to have an absolute majority in the Senate in the presence of at least half of the statutory number of senators (Article 235 section 4 of the Constitution).

Third, the granting of consent for the ratification of the accession treaty may be passed by a nationwide referendum (Article 90 section 3). According to the Constitution, a referendum may be held on matters of particular significance to the state (Article

---

Relations], Warszawa 1999, p. 28 and following. With regard to general issues related to the position of an international agreement in the internal legal order, see also: M. M a s t e r n a k - K u b i a k: *Umowa międzynarodowa w prawie konstytucyjnym* [International Agreement in Constitutional Law], Warszawa 1997.

<sup>6</sup> See i.a. the famous ruling of the ECJ defining univocally the independent and autonomous nature of the Community law in the case *Costa Falmino v. Enel*. ECR 1964, p. 585 (in that judgment also the principle of unconditional precedence over the internal national law was pointed out),

<sup>7</sup> In particular see: Article 230 TWE concerning the competencies of the European Court of Justice, and also the well known ruling on the case *Handelsgesellschaft 11/70*, ECR 1972, p. 1125. See also: E. P o d g ó r s k a: "Podstawowe koncepcje prawa Wspólnot Europejskich a perspektywa członkostwa Polski w Unii Europejskiej" [Fundamental Concepts of the Law of the European Communities and the Prospects of Poland's Membership in the European Union], *KPP* 1995, vol. 1, p. 73 and following.

125). In this case, of course, there is no vote in the Sejm or the Senate on the bill of consent for the respective ratification.

The constitutional norms provide thus two alternative legal procedures for the granting of consent for ratification: an act of parliament or a referendum, whereby the enactment of a statute should be regarded as an ordinary or basic procedure, while the decision to hold a referendum requires a separate resolution by the parliament passed by an absolute majority of the vote in the presence of at least half of the statutory number of deputies.

On this occasion it should be noted that the competence of the Sejm concerning the choice of procedure for granting consent to ratification is of exclusive nature and, as a result, the general principles of ordering a referendum stipulated in Article 125 of the Constitution do not apply in such a case (in my opinion, Article 90 section 4 constitutes a *lex specialis* in relation to the more general norm of Article 125 section 2).<sup>8</sup> The question of substantive justification for the selection of one of the two procedures provided for by the constitution is, of course, an entirely separate issue. The accession to the European Union, considering its importance and far-reaching consequences for the entire nation, should by its very nature be based on the broadest possible consensus, which might be expressed by a for-ratification outcome of the referendum. And so, will the political elites of the country be faced with the dilemma resulting from the gradually but systematically declining approval of the society for membership in the Union? Will there be a threat that the referendum may bring an outcome contrary to the expectations of the elites, and that the Norwegian scenario will be repeated?<sup>9</sup> On the other hand, should such forecast of the attitudes of the society, mostly negative towards the accession appear, then the parliamentary vote in favour of the consent for the ratification of the agreement, against the will of the society's majority, would be dramatically tensed.

This gives rise to the question (which is explicitly voiced in constitutional literature),<sup>10</sup> whether a statute passed pursuant to the procedure of Article 90 section 2 of the Constitution, granting consent to the agreement on the accession of Poland to the Communities, and especially the accession treaty itself, may be the subject of review by the

<sup>8</sup> A different position on this issue is presented by K. Działocho [in:] L. Garlicki (ed.): *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [The Constitution of the Republic of Poland. A Commentary], Warszawa 1999, p. 7, in whose opinion, in such case Article 125 section 2 will also apply.

<sup>9</sup> One should agree with the thesis that the dark scenario, i.e. the negative outcome of the referendum, a return of parliamentary consent to ratification would be impossible. It might take place only under the assumption that the result of such a referendum would not be binding, due to nonfulfillment of provisions of Article 125 section 3 of the Constitution, see: K. Działocho, *op. cit.*, p. 9.

<sup>10</sup> See, i.a.: J. Barcz: "Akt integracyjny Polski z Unią Europejską w świetle Konstytucji RP" [The Act of Integration of Poland with the European Union in Light of the Constitution of the Republic of Poland], *PiP* 1998, vol. 4, p. 121; also: W. Sokolewicz: "Ustawa ratyfikacyjna" [Ratification Law] [in:] M. Kruck (ed.): *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Domestic Legal Order], Warszawa 1997, p. 93 and following; also: R. Mojaż: "Konstytucyjne podstawy integracji Polski z Unią Europejską (zarys problematyki)" [The Constitutional Foundation of Poland's Integration with the European Union (An Outline of Issues)] [in:] *Konstytucyjny ustrój państwa. Księga ku czci Prof. Wiesława Skrzydło* [The Constitutional System of the State. A Book of Tribute to Prof. Wiesław Skrzydło], Lublin 2000.

Constitutional Tribunal. What is the status of that agreement and, subsequently, of other acts of the Community's primary law in the constitutional legal order?

Apparently the matter should not generate any doubts. The competencies of the Constitutional Tribunal include adjudication of conformity to the constitution of any statute, and therefore - one may justifiably claim - also of an act adopted under the special procedure specified in Article 90 of the Constitution. According to that point of view, the accession agreement would be subject to review by the Constitutional Tribunal even when the decision would have been made through a referendum, since according to Article 188 section 1 of the Constitution, any international agreement may undergo direct review of its conformity to the Constitution.<sup>11</sup> Moreover, it would be possible to apply the preventive review procedure (the President refers the act of consent for ratification to the Constitutional Tribunal pursuant to the procedure of Article 133 section 2 of the Constitution), as well as the subsequent review procedure. It should be noted that this approach, if adopted consistently, would also imply subjecting all treaty-like Community regulations of primary law to constitutional review (as they are introduced via the act of accession into the binding legal order).

In theory, however, one could also consider a different position. The accession agreement, being subject to the special ratification procedure (comparable with the amendment of the Constitution) should not be the subject of control by the constitutional court.

First, it can be claimed that the special course of action established under the Constitution exhausts all other premises and requirements concerning the legality of such an act.

Second, although the accession agreement is an international treaty from the point of view of public law, its status and its consequences are different in comparison with a typical or classical international agreement. It becomes, as already mentioned above, an element of the legal order in force in the Republic of Poland, but at the same time it belongs to the Community order (*acquis communautaire*) forming autonomous legal regulations, characterized also by the separateness of regulations concerning the institutional mechanisms of creating the legal rules belonging to the system (derived law), as well as its interpretation and application.

Third, the interference of the constitutional court could lead to consequences difficult to reconcile with the general principles in force in the European law (the interpretation of the constitutive treaties of the Communities and of the accession treaty performed by the Constitutional Tribunal could infringe on the exclusive competencies of the European Court of Justice in Luxembourg). The recognition of one of the elements (rules) of those treaties as non-conformant with the Constitution of the Republic of Poland would also contravene the principle of full acceptance of the entire legal order of the Communities upon accession.

---

<sup>11</sup> In such case, of course, the Constitutional Tribunal would not rule on conformity to the Constitution of the approval of accession to the Union, which is rightly pointed out in the respective literature; See e.g.: K. Wójtowicz: "Skutki przystąpienia Polski do Unii Europejskiej dla sądów i Trybunału Konstytucyjnego" [The Consequences of Poland's Accession to the European Union for the Courts and the Constitutional Tribunal] [in:] Z. Witkowski (ed.): *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* [Entry into Force of the New Constitution of the Republic of Poland], Toruń 1998, p. 89. That is irrelevant, however, from the point of view of the competencies of the Constitutional Tribunal to rule on the constitutional compliance of the very agreement.

And thus, fourth, the subsequent review of the accession agreement (or any other acts of primary law) performed by the Tribunal (which theoretically could not be ruled out, given the assumption adopted here), could lead to insurmountable complications with regard to the existing relations between the Republic of Poland and the Community, as well as the other member states (e.g., what would have given grounds to the ruling about non-conformance with the Constitution of some of the clauses of the founding treaty? How could this be reconciled with the principle of uniform application and interpretation of the entire legal heritage of the Community?).

Fifth, it could imply that the rank of the norms of primary law is to some extent lower than that of derived law - as only those former ones would be subject to the review of their constitutionality according to general principles, the latter ones, however, would be either exempt from such review altogether, or would be subject to review only to a limited extent (see the comments below).

The above presented argumentation is certainly of considerable substantive significance, and refers to the essential reasons of purpose related to the key principles of the integration process, but finding sufficient support for it in a formal semantic interpretation of the constitutional regulations currently in force might prove difficult. The scope of review of conformity to the Constitution of international agreements has been unequivocally defined (Article 188 section 1 of the Constitution). There is no doubt, however, that a possible evaluation of the constitutionality of the agreement of accession to the European Union should include all of the consequences resulting from the acceptance of the principles on which the Community order is resting. *De lege lata fundamental*i the principles of direct application of the Community law, of precedence over statutory regulations, of uniformity of interpretation and application of the derived Community norms (see below), may find, given the appropriate interpretation, their constitutional justification. And this is exactly what causes the thesis of the “constitutional environment” favouring the integration process to be more than a mere cliché.<sup>12</sup>

Against the background of the currently binding constitutional regulations, however, there can be no doubt as to the competence of the Constitutional Tribunal to review the accession agreement (and other norms of primary law belonging to international public law), from the point of view of its conformity to the provisions of the Constitution of the Republic of Poland. *De lege ferenda* the intervention of the constitutional legislator in order to contain the scope of such review seems, however, very desirable, to say the least. Approving the very admissibility of the Tribunal’s review of the accession treaty, it would seem necessary to consider limiting it only to the procedure of preventive review, thus conducted prior to the final ratification of the agreement.<sup>13</sup> Although at present such

---

<sup>12</sup> See the polemic with that view in: J. G a l s t e r: “Tzw. opcja integracyjna konstytucji państw członkowskich a przychylność polskiego ustawodawstwa konstytucyjnego wobec przystąpienia do Unii Europejskiej” [The So-Called Integration Option for the Constitutions of Member Countries and the Favoring by Polish Constitutional Jurisprudence of the Accession to the European Union] [in:] C. M i k (ed.): *Konstytucja..., op. cit.*, p. 135 and following.

<sup>13</sup> A similar stipulation is proposed by S. B i e r n a t: “Miejsce prawa pochodnego Wspólnoty Europejskiej w systemie konstytucyjnym RP” [The Place of Derived Law of the European Union in the Constitutional System of the Republic of Poland] [in:] C. M i k (ed.): *Konstytucja..., op. cit.*, p. 182.

a possibility exists, as has been mentioned above, within Article 133 section 2 of the Constitution, it is neither mandatory nor exclusive. It should be added here that in such a case the application of the so called interpretative jurisprudence of the Constitutional Tribunal should be ruled out (a regulation is considered constitutional on condition of being interpreted as defined in the respective decision of the Tribunal), in order to prevent a collision in this matter with the exclusive competencies of the ECJ in Luxembourg.

### *The Community Law and the Constitution*

Based on the currently binding Constitution there is no ground for the thesis on the precedence of the Community law (both primary and derived) over the entire body of the domestic legal order, including constitutional norms. Therefore one cannot accept, as some representatives of the doctrine do, that the specificity of the act of integration expressed, among others, in the special procedure of accession,<sup>14</sup> secures the precedence of Community law not only over the statutes, but also over the constitution itself.

It is possible to indicate a number of formal arguments supporting the claim, that the Community law must yield in the event of collision with a constitutional norm. According to the reading of the Constitution, it itself is the highest law of the Republic of Poland (Article 8 section 1). The above discussed regulation included in section 2 of Article 91 stipulates *expressis verbis* the precedence of a Community provision in the event of collision with a statutory regulation, but not with a constitutional norm. Finally, one should not overlook the fact that the binding force of the Community regulations in the Republic of Poland does find its direct legitimacy in the constitutional norms (as discussed above), which determine the scope and the procedure for the delegation of certain competencies of the organs of state authority (especially in the legislative field) to an international organisation. As for the primary law, the conclusion is unequivocal: international agreements are in every case inferior to the constitutional norms, and the principle of precedence with respect to the statutes is applicable only to the norms of treaties ratified upon consent granted by statute (see Article 188 section 2, Article 91 section 2; the not precise enough regulation of Article 87 of the Constitution, which determines the sources of the universally binding law, in which all international agreements, regardless of their rank, are mentioned only after statutes - does not contradict this conclusion).

It can be noted further that an inherent characteristic of the Community law, that is its autonomy and independence from the system of internal law, would become involved in a certain contradiction. The Community law derives its position, its status of the legal order in force on a given territory of a member state from a sovereign act of a state authority, adopted on the basis of and within the framework of the Constitution,

---

<sup>14</sup> See e.g.: J. Barcz: „Akt integracyjny ...”, *op. cit.*, p. 12. That author writes, i.a.: “From the theoretical point of view, however, the primary law of the European Union should have the assured precedence of its application over the entire national law, including also constitutional law .... The primary (constitutional) law of the organization should not have guaranteed precedence of application in the national legal order to a lesser extent than its derived law.” A similar conclusion is derived also by K. Wójtowicz, *op. cit.*, p. 87, when he concludes that Community law has precedence over all other norms of domestic law, including the Constitution.

and therefore of the internal law. The autonomy and independence of the Community law cannot be therefore interpreted in absolute terms, and this is exactly why it is not possible to determine the supremacy of the Community law over the Constitution.

How can this approach be reconciled with the fundamental idea of the Community law, derived after all from the fundamental premises of European integration, and therefore from the universality of the rules adopted by the organs of the Communities, from their binding force in all the member states, the uniformity of their application with the respect for the principle of priority, the recognition — in certain areas - of the exclusive jurisdictional competencies of the European Court of Justice, excluding thereby the corresponding competence of the internal organs of jurisdiction?

It has to be recognised, above all, that the supremacy of the Constitution over the Community law should not be expressed in the admissibility of the review of the constitutionality of individual acts of the Community law on the same principles that govern the exercise of such review with regard to all the provisions of internal law. It should be realized in the sovereign act of accession to the Communities, and in the future - the acts of consent granted by the sovereign authorities to any modifications and amendments of the founding acts of the Communities. Those acts, as has already been mentioned above, are subject to review by the constitutional court as acts of international public law. By virtue of a sovereign act of accession to the European Union, the derived law, constituting an autonomous binding legal order, is as of that moment subject to the exclusion from internal review (see the remarks below). This appears to be the proper interpretation of the effects of the transfer of competencies of the state authorities to the organs of the Community. The supremacy of the Constitution with respect to the Community law is realized at the level of decisions concerning the primary law, but not the derived law. Indirectly, however, the control over the derived law is maintained. Adopting, theoretically, incompatibility between the Community regulations and the Constitution, it should also be assumed that they can be neither waived nor amended, nor even subjected to a certain interpretative intervention within the internal law. Such a state of affairs, however, might give grounds for renunciation of the act of accession.<sup>15</sup> Thus, this approach comes close to the position expressed in the jurisprudence of the German Constitutional Court.<sup>16</sup>

<sup>15</sup> The possibility of renunciation of the accession act is being aptly pointed out, see: J. Barcz: "Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich" [The Constitutional and Legal Problems Regarding the Application of the European Union Law in Poland in Light of Experience Obtained so far by Member States] [in:] *Prawo międzynarodowe i wspólnotowe* [International and Community Law], p. 207; also: K. Działocha, *op. cit.*, p. 6.

<sup>16</sup> See i.a.: M. A. Daus: "Prawo Wspólnot Europejskich a prawo niemieckie w świetle niemieckiego porządku konstytucyjnego" [The European Communities and German Law in Light of the German Constitutional Order], *Przegląd Prawa Europejskiego* 1998, no. 1, p. 23 and following. See especially the famous sentence "Solange II" of 22 October 1986, BVerfGE vol. 52, p. 187. It is also interesting that the Hungarian constitutional doctrine is heading in the same direction, putting a strong emphasis on the constitutional legitimization of the Community legal norms. The jurisprudence of the Hungarian Constitutional Court 30/1998 holds, among others, that the parliament is not authorized to alter the Constitution through the procedure of granting consent to the ratification of an international agreement. On this issue, see also: M. Barna Berke: *European Integration and Constitutional Law: The Situation in Hungary*, publication of the Venice Committee 2000, p. 5.

Our conclusions with regard to the control over the constitutionality of the derived law are confirmed by the regulations concerning the scope of competencies of the Constitutional Tribunal. Article 188 of the Constitution does not provide for such control, as the derived Community law is neither a treaty norm (international agreement) subject to cognition pursuant to sub-section 1 of Article 188, nor can it be in any respect qualified as a set of regulations issued by the central organs of the State (section 3 of Article 188). Some doubt arises only with regard to the possibility of appeal against a Community regulation in accordance with the procedure for constitutional complaints. Article 79 of the Constitution provides for an appeal against a statute or any other normative act violating the constitutionally guaranteed rights and freedoms. Theoretically, therefore, a collision between a constitutional norm and a derived provision of the Community law is conceivable. It seems, however, that such a possibility should be ruled out. The concept of a normative act, defined in Article 79 of the Constitution, does not embrace the Community's derived law, which forms, as has already been mentioned, an autonomous legal order alongside the internal law.<sup>17</sup> The Community law is not included in the sources of universally binding law in Article 87 of the Constitution. A similar position should be adopted with regard to the possibility of control over a regulation of the derived Community law through a legal inquiry, directed to the Constitutional Tribunal by a court adjudicating a specific case. For, as a matter of consistency, neither in such a case can a provision of the Community law be regarded as a normative act in the sense of Article 193 of the Constitution. One cannot exclude, however, the possibility of a legal inquiry for the purpose of adjudication of conformity of a provision of the internal law with the Community law. But this matter requires further analysis and discussion.

### *The Legal System of the Republic of Poland and the Derived Law*

The evaluation of provisions constituting the so called secondary law of the Community, with regard to the relationship of those provisions with the internal statutory regulations, presents the next substantial problem. As previously indicated, the Constitution grants a distinct character to the secondary law - recognising its specificity in comparison to the classical treaty norms. The provision of section 3 Article 91 of the

---

<sup>17</sup> The issue, however, gives rise to doubts. Theoretically, the possibility to base a constitutional complaint on the contradiction of a provision of primary Community law with the Constitution is found admissible by, e.g., K. Wójtowicz, *op. cit.*, p. 89; also by J. Barcz: "Akt integracyjny z Unią Europejską..." *op. cit.*, p. 16. Similarly, S. Biernat: "Miejsce prawa pochodnego ..." *op. cit.*, p. 186. A different view of that issue seems to be held by: C. Mik: "Zasady ustrojowe europejskiego prawa wspólnotowego a polski system konstytucyjny" [The Principles of Political System in the European Community Law and Polish Constitutional System], *PiP* 1998, no. 1, p. 38. S. Biernat's comment (*op. cit.*, p. 186) is to the point that, at least indirectly, the notion of a normative act subject to control by the Constitutional Tribunal stems, i.e., from Article 191 section 1, Article 190 sections 2,3,4 of the Constitution. A similar argumentation is put forward by K. Działocha (*op. cit.*, p. 9), in whose opinion the Constitution applies the notion of a normative act (Article 88 section 2, Art. 79, Art. 190 sec. 3, Art. 191 sec. 2, Art. 193) to the law established by the organs of the Republic of Poland. Yet, as an aside, it should also be noted that inapt seems the view of S. Biernat (*op. cit.*, *supra*) on the limiting of the substantive scope of acts subject to control via the complaint to the regulations named in Article 188 of the Constitution. Such an interpretation would eliminate other normative acts being part of the internal domestic order, e.g. acts of local law.

Constitution reads: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws."

Although this formula constitutes a clear opening of the Polish law towards the Community order, it is not the most fortunate one and - as noted in the literature (see: Mik, Biemat, Glaser) - leaves a number of doubts. They concern, among others, the position of the norms of the Community law within the system of the sources of the law in force in the Republic of Poland (as already indicated, Article 87 of the Constitution concerning the sources of universally binding law does not mention the Community law at all), the concept and the scope of direct application, the concept and the effects of precedence of the Community law, and finally, they concern the possible conflict between the provisions of the Community law and the statutes, and the possible competencies of the Constitutional Tribunal with regard to these issues.

On the basis of the general formula of Article 91 section 3, however, certain conclusions have been derived and a consensus with regard to at least some of the issues is gradually emerging.

It is assumed that the Community law, which constitutes an autonomous legal order, does not thereby belong to the system of sources of internal law.<sup>18</sup> The Community regulations are based on the constitutive acts of the European Communities, and their legality, their binding force and direct effectiveness are defined according to these acts.<sup>19</sup> They function in the area where the state authority has divested itself of its legislative competencies on behalf of the organs of the Community. There is also a view being expressed that the notion of direct effectiveness should be interpreted in the way that has been determined by the jurisprudence of the European Court of Justice in Luxembourg, and therefore more broadly than what the provisions of the founding treaty directly imply.<sup>20</sup> As

---

<sup>18</sup> For example: K. Wójtowicz, *op. cit.*, p. 86. But also the view is being expressed that the institutional (derived) law belongs by the force of a ratified international agreement to the national legal order. It would thereby become a source of Polish law, despite lack of a clear mention of that in Article 87 of the Constitution. (See also: C. Mik: *Przekazanie kompetencji przez Rzeczypospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne (uwagi na tle Art. 90 ust. 1 Konstytucji)* [Transfer of Competencies by the Republic of Poland in favour of the European Union (reference made to Art. 90 passage 1 of the Constitution)], in: C. Mik (ed.): *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej* [Constitution of the Republic of Poland of 1997 and Membership of Poland in the European Union], Toruń, p. 159). That thesis is doubtful for at least two reasons. First, it is contradictory to the concept of autonomy and relative independence of the Community order; second, it must lead to the eradication of the principle of the exclusive jurisdiction of the ECJ. Similarly, it seems, K. Działocha (*op. cit.*, pp. 7-8), in whose opinion the Community law constitutes an element of the domestic legal order, but does not belong to the internal law. On the other hand, it is advisable to avoid confusion over the concepts in this matter: the Community law is an element of the legal order applied on the territory of a given state, however, it does not acquire the characteristics of internal law. Therefore, including the Community law into the internal legal order does not seem justified.

<sup>19</sup> The notions of direct application and direct effectiveness have been giving rise to essential discrepancies in the European doctrine for a long time. See the pertinent comments on that issue by E. Podgórska (*op. cit.*, p. 89 and following) and the jurisprudence and literature sources quoted there.

<sup>20</sup> See: C. Mik: *Przekazanie kompetencji...* [Transfer of Competencies...], p. 161; by the same author: "Zasady ustrojowe..." *op. cit.*, p. 27; see also: W. Czapliński: "Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości" [Legal Acts of the European Communities in the Jurisprudence of the Court of Justice] [in:] M. Kruck (ed.), *Prawo międzynarodowe...*, *op. cit.*, p. 188.

a consequence, the notion of direct effectiveness can be applied not only to regulations (which the founding act refers to directly, see Article 249 EC Treaty), but to other community regulatory acts, and in particular to the directives, which at least in a vertical order, and therefore in conflicts between the state and the citizen, may have specific legal implications and constitute a direct source of the citizen's rights and the correlated duties of the state.<sup>21</sup> The possibility of indemnification liability of the state for the failure to implement Community norms confirms that belief. Finally, it is recognized that the precedence of Community norms over the statute, established by the constitutional norm, implies, in particular, the demand addressed to the courts to apply the Community provision in the event of such a collision (this is not treated as tantamount to the effect of derogation with respect to the provision of internal law which cannot be reconciled with the Community norm). Also, the postulate of such interpretation of the norms of internal law, as to allow for its reconciliation with the Community regulation to a maximum extent is deemed to be universally accepted. It is therefore a requirement to interpret and apply the law in the manner which is as favourable to the Community law as possible, and which expresses a particular presumption in favour of the adoption of such a meaning of the norm of internal law, from among many conceivable meanings of that norm according to the rules of inference, which corresponds with the Community norm.<sup>22</sup>

However, there exists a number of doubts, which still require resolution, and which are the subject of serious discrepancies in the available literature.

The general formula of precedence of application of the provisions of the Community law as expressed in section 3 Article 91 does not remove all of the doubts. A fairly clear situation will exist if a conflict (inconsistency) arises between a norm of the Community law and a provision of a statutory regulation in a situation, while the direct nature of the effects of the Community regulation will present itself unequivocally. The imperative of precedence expressed in the quoted constitutional norm must be interpreted as a demand to apply the Community provision, and therefore, at the same time, a refusal to apply a provision of internal law contradicting it. This position is not obstructed by any other basic constitutional formula (Article 178 section 1), expressing the principle of subjection of the judges to the Constitution and the statutes, from which

---

<sup>21</sup> See also: A Wyrozumsk a: "Formy zapewnienia skuteczności prawa międzynarodowemu w porządku krajowym" [Forms of Assurance of Effectiveness of International Law in the National Order] [in:] M. Kruk (ed.): *Prawo międzynarodowe . . .*, op. cit., p. 193 and following.

<sup>22</sup> See i.a.: S. Biernat: "Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich" [Interpretation of National Law in Compliance with the Law of the European Communities] [in:] C. Mik (ed.): *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [Implementation of the Law of European Integration Law in Domestic Legal Orders], Toruń 1998, p. 123. This position is also expressed, e.g., in the jurisprudence of the Constitutional Tribunal dated 28th March, 2000, K 27/99, which states that in consequence of the obligation to ensure the conformability of legislation, a directive of interpretation has been adopted, by which the regulations currently in effect should be given understanding that they will be used to ensure the broadest possible conformability. Similar theories are emerging in other candidate states, e.g. the Czech Republic is considering the introduction of a distinct constitutional norm which would require the application of internal legal regulations (along with the constitutional ones) to be interpreted and applied in a way that allows their reconciliation with the Community law, see: V. Balas: "Legal and Quasi Legal Threshold of the Czech Republic to the E.C.," a report presented at an international conference in the Hague, August 2000.

one could draw the conclusion that it is unacceptable to refuse to apply a statute which is formally in force and has not been waived, even if it remains in conflict with a Community norm. The existence of a clear constitutional regulation regarding the precedence of application of the Community norm allows to accept that Article 178 of the Constitution must be interpreted in conjunction with the entire body of constitutional regulations concerning the application of the law, therefore including in particular Article 91 section 3 of the Constitution. Of course, it would probably have been better if that issue were resolved *expressis verbis* by an appropriately edited formula of Article 178 of the Constitution (although here I could not agree with the view that Article 178 of the Constitution should limit the subjection of the ordinary judges only to the Constitution; such formula would become a source of anarchic phenomena in law, and, in essence, it would question the purpose of existence of the constitutional court).<sup>23</sup> In any case, with the above indicated reservations, *de lege lata fundamentals* the problem of precedence of application of a Community norm, having a univocally direct effect, over a statute, can be resolved correctly.<sup>24</sup> By that univocal character I understand both the direct binding force in the legal system (and therefore without the need for implementation), and the possibility to define the rights of the addressee of the norm, resulting from the sufficiently precise contents of the regulation.

A much more serious problem arises in the situation when the collision concerns a Community regulation (eg. a directive), which requires its implementation in the internal order. With respect to the precise enough content of the Community regulation (subject to easy and univocal reconstruction by way of interpretation), which allows to assign it a direct effect (in the broader sense of that term - see above) in the sphere of the rights of the subject as a legal or physical person, can the court refuse to apply a statute or another type of provision of internal law, referring to the principle of precedence expressed in Article 91 section 3? The problem is controversial, the more so, as even applying the broad interpretation of the direct effect, in the case of a directive, it does not apply in the area of horizontal relations (in the relationships between private individuals; in the relationships between the citizen and the state, the directive can neither be a source of obligations arising in violation of the *lex retro non agit* principle).<sup>25</sup> We should neither lose out of sight the fact that the implementation of the Community rule may occur by way of various legislative methods - the determination of the procedure for the implementation of a directive belongs to the internal competencies of each state. It is also probably easier when the scope of regulation covered by the directive comprises an area previously not included in the legal reglamentation of the internal order; the case of an obvious collision between a binding statutory norm of a country and that of a Community is more complicated.

The direct application of a directive (or another type of Community regulation yet requiring to be implemented) by the organ applying the law, and the simultaneous refusal

<sup>23</sup> See: C. M i k: "Zasady ustrojowe ...," *op. cil.*, p. 36.

<sup>24</sup> Formally speaking, that requirement of the precedence of the application by national courts of the Community regulations is referred by the ETS only to the regulations which exert a direct outcome; see c.g. the case Simmenthal, ECJ 1979, p. 629.

<sup>25</sup> See: C. M i k: "Zasady ustrojowe ...," *op. cil.*, p. 29.

to apply the conflicting norm of the internal law, seems to generate many doubts and difficulties, at least on the grounds of *legis latae*. The approach purporting the direct effect of the Community regulations (interpreted at the same time as the possibility of their direct application), presented by the ECJ jurisprudence also with respect to that category of provisions, which require implementation, is *prima facie* encumbered by inconsistency, even if the direct effects do not emerge on every facet, but only in the vertical relationship (the state — vs. - the individual citizen). Thus the direct effect (applicability) of the legal regulation, approached in the above manner, is in consequence at least deficient. Undeniably, by its very nature, the directive is addressed to the member state, and creates on its part the obligation to abstain from introducing regulations inconsistent with the Community rule, to remove any regulations in conflict with such rule, or to establish laws which implement the norms of the Community law.<sup>26</sup>

If one pursues the already developed jurisprudence of the ECJ on that matter,<sup>27</sup> it should be assumed that at least within such deficient scope of direct applicability (the controversy the state - the individual), there would appear a possibility for the direct application of the directive with precedence over the internal law, according to the solution adopted in Article 91 section 3 of the Constitution. As a result, it would also imply that those acts which require implementation generate a direct effect (in the sense of direct applicability), within the scope resulting from the jurisprudence of the ECJ. Given such an assumption, the differentiation between the direct effect and direct application loses its practical significance.<sup>28</sup>

But there is yet another possibility of looking at the problem of collision between a regulation of the Community law and a statutory regulation.

In the Polish legal system there is an institution of legal inquiries (questions of law), which makes that kind of collision possible to resolve. In accordance with Article 193 of the Constitution, “any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements

---

<sup>26</sup> In accordance with the contents of Article 249 of the Treaty on the European Community, the directive “with regards to the intended effect, in relation to each member country to which it is addressed” is binding. The national authorities are provided with the choice of the forms and methods of its implementation. It should be added that no internal legislative objections resulting from the constitutionally defined procedures shall provide justification of a state's reluctance to apply the Community regulations. See also the comments on that issue by E. Podgórska, *op. cit.*, pp. 84-85.

<sup>27</sup> At least since the time of the well-known ruling on the case *Van Duyn v. Home Office*, ECJ 1974, p. 1337; see also the case *Becker v. Finanzamt Münster Innenstadt*, ECJ 1982, p. 53. See also with regards to the significance of the position of the ECJ on that issue for the interpretation of Article 91 section 3: J. Skrzydło: “Konieczne zmiany w prawie polskim w perspektywie współpracy sądów polskich z Trybunałem Wspólnot (na podstawie Art. 177 Traktatu WE)” [The Necessary Changes in the Polish Law in the Perspective of Cooperation of Polish Courts with the Court of Justice of the Communities (on the basis of Article 177 of the Treaty on the European Community)], *PiP* 1998, no. 8, p. 91.

<sup>28</sup> It should be stressed, of course, that the principle of precedence of a Community norm of direct effect is not tantamount with the automatic elimination of a contradictory norm from the internal legal order. Such approach has been adopted also in the constitutional doctrine and jurisprudence of member states, see e.g. the characteristic decision of the Italian Constitutional Tribunal of 5th June, 1984, No. 170 in the *Gramini* case, which holds that beyond the meritorious scope and the time frame in which the Community law prevails, an internal norm sustains its validity and applicability.

or statute, if the answer to such a question of law will determine an issue currently examined before such court.” I express the view that the model of review of a regulation of internal law can also be - albeit only indirectly - the rule of the Community law. Although Article 193 of the Constitution does not *expressis verbis* mention the Community rules, it is entirely legitimate to adopt the position that in a situation of collision between a norm of internal law and a Community norm, *eo ipso* a treaty norm of the primary law (of the founding treaty or the accession agreement) is being infringed upon, what fully justifies the application of the instrument of legal inquiry. The finding by the Constitutional Tribunal of the collision between a statute (or another provision of internal law) and a Community rule will be tantamount with the loss of binding force by such a normative act.<sup>29</sup> It is worth noting here, that the Constitutional Tribunal does not enter in that manner into the field reserved exclusively to the competence of the ECJ, as the object of the judgement is a provision of internal law, and the model is a treaty norm (indirectly — a derived rule of the Community). The establishment of the actual content of the model, of course, will at times also present a complicated exercise of interpretation.

In the future the need to establish a procedure for submitting a case to the ECJ must be considered, should there be any doubts concerning the interpretation of a Community provision itself, also by the Constitutional Tribunal.<sup>30</sup>

### *The Issue of Indemnity for Damage Resulting from Infringement of the Community Law — a Comment*

An interesting question arises, whether it is possible for the state to be held liable for damages on the grounds of *legis latae* for infringement of the rights of an individual which result directly from a Community regulation. This issue has been reflected in the jurisprudence of the ECJ, which has defined relatively precise criteria, according to which the liability of the state in this respect should be determined.<sup>31</sup> It is after all significant, that the determination of the grounds and the procedure for claiming damages belong to the domain of internal law. Domestic regulations, as indicated in the

<sup>29</sup> See also: S. Biernat's opinion (*op. cit.*, p. 186) on the possibility of review by the Constitutional Tribunal, following Article 188 section 1 of the Constitution, of acts of internal law issued in order to implement the Community law. However, the issue is not limited to the implementation acts alone.

<sup>30</sup> On the grounds of the existing state of the law it would be doubtful whether Article 234 of the Treaty on the European Community could be applied to proceedings before the Constitutional Tribunal (that any court institution of a member state may ask for a ruling on a preliminary issue connected with the interpretation of a Community provision). See also: M. Kornilowicz: "Wyroki prejudycjalne Trybunału Sprawiedliwości Wspólnot Europejskich" [Prejudicial Decisions of the European Communities Justice Tribunal], *Radca Prawny* 1999, no. 4, p. 50 and following.

<sup>31</sup> See more on this topic: N. Półtorak: "Konstytucyjne prawo do wynagrodzenia szkody wyrządzonej przez organ władzy publicznej a odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich" [The Constitutional Right to the Reparation of Damage Inflicted by an Organ of Public Authority and the Liability of the State for Damages in the Law of the European Communities] [in:] *Konstytucja Rzeczypospolitej Polskiej...*, *op. cit.*, p. 201 and following; M. Górka: "Zasada odpowiedzialności odszkodowawczej państwa za naruszenie prawa wspólnotowego" [The Principle of Liability of the State for Damages on Account of Infringement of Community Law], *Przegląd Prawa Europejskiego* 1997, no. 1, p. 32 and following. See also particularly characteristic judgement by the ECJ on the case Francovich, ECJ 1991, p. 5114, paragraph 35.

jurisprudence of the ECJ, must not make the indemnification of damage impossible or especially difficult. The problem cannot be reviewed further. I believe, however, that the Constitution of the Republic of Poland (considering above all Article 77 section 1) provides a basis for the triggering of liability for damages in case of damage suffered by a private individual resulting from his/her being subject to the application of the internal law regulations which contradicted a Community rule.<sup>32</sup> The premise for the liability of the state would need to involve not so much the lack of implementation of a Community provision or the rule of a statutory norm contradicting such a provision, but the shape of the legal status of the subject concerned - through an individual judgement (and therefore an individual act of application of the law) - on the basis of a norm not conformant with a provision of the Community law. The premise of the causal link between the damage and the specific, sufficiently individualised, causative action (a specific act of application of the law) will be met only then. The binding of a regulation contradictory with a provision of the Community law or a hierarchically higher act alone, would not, in my belief, fulfil such a requirement, which in some situations may be regarded as the infringement of the requirements imposed upon a member country in accordance with Article 10 of the Treaty on the European Community.<sup>33</sup>

*Prospects for the Establishment of the European Constitution*

There is no doubt that the fundamental issues related to the relationship of the internal law with the Community law, including those deciding on the position of the constitutional norms of each member state, may be consistently and comprehensively resolved only at the level of an act, which is more frequently referred to as the European Constitution. Preparations for the adoption of such a document by the European Union have begun, although not all significant issues related to the structure of such an act and the procedure for its implementation have been resolved so far. The preliminary assumptions include the positioning of the future European Constitution in the hierarchy of the binding laws of the member states above their national constitutions. It becomes particularly important for the future to grant univocal guarantees to the basic rights of the individual, and thus a specific incorporation of the provisions of the European Convention on Human Rights within the framework of that future constitutional regulation.<sup>34</sup> There is no doubt

---

<sup>32</sup> See i.a. my own article: "Odpowiedzialność państwa na podstawie art. 77 Konstytucji RP" [Liability of the State on the Grounds of Article 77 of the Constitution of the Republic of Poland], *PiP* 1999, vol. 4 pp. 3-18. I agree with the general conclusion of N. Półtorak on the possibility of constructing the liability of the state in the discussed situation, although the relation between Article 77 of the Constitution and Article 417 and what follows of the Civil Code, require much more careful evaluation.

<sup>33</sup> In accordance with that provision, the member states shall undertake every possible measure of a general or special nature in order to assure the fulfillment of the obligations resulting from that Treaty.

<sup>34</sup> It should be noted, however, that the particular incorporation of the provision of the European Human Rights Convention into the Community law has already taken place, first, through the jurisprudence of the ECJ indicating the obligation to observe in the Community law the basic rights guaranteed by the constitutions of the member states, and subsequently, in Article 6 of the Treaty on the European Union. A step in this direction was the adoption of the European Charter of Fundamental Rights at the Conference in Nice in December 2000; the Charter is not, however, a legal act formally binding the member states.

that both the procedure for the adoption of the European constitution, and the consequences which it will generate in the constitutional sphere of each member state, will require the introduction of appropriate significant changes to the national constitutions. The prospects related to the creation of the Constitution of the European Union are so essential for the future of European integration that the candidate countries aspiring to the Union, and bound by the association agreements, should be ensured the real opportunity to present their points of view. The work on the formulation of such positions should begin as early as possible, given that its subject consists of an array of problems of particular complexity, both in legal and in political terms. The opening towards the expansion of the European Union must be expressed not only in the efforts of the preparatory stage and on the candidate states' determination, but it should be reciprocated by the commensurate determination of the European Union itself. The participation of the candidate countries in the debate on the future of the European Union, strongly dominated by the prospects of the European Constitution, not only provide a great opportunity for dialogue, but also reinforce the belief in the real will of the Union to open itself towards a new formula of integration resulting from its expansion in the not very distant future.

### Conclusions

The above presented considerations seem to confirm the thesis formulated already in the introduction, that the Polish constitutional regulations provide legal solutions which are in principle favourable for the process of European integration. The constitutional European clause contained in Article 90, which opens the system to the accession of Poland to the European Union and anticipates the transfer of part of the competencies of the sovereign organs of state authority to the organs of the Community determines, at the same time, the legal framework within which the process of Poland's accession to the Community will be implemented.

With of the prospect of Poland's membership in the European Union, the special constitutional status of the Community law (differing from international law interpreted as the law of treaties), assuming an explicit clause of precedence of its application over the internal legislation, is of enormous importance.

At the same time, Poland does not renounce its own constitutional identity, conceived in this case as maintaining the hierarchical superiority of the constitutional regulations over any other legal norms in force in the Republic of Poland. Poland, therefore, has not followed the example of some of the states in the Community, which have guaranteed the precedence of the Community law also over their constitutional regulations. But it should be firmly stressed at this point that such a position is not tantamount to the introduction of the Constitutional Tribunal's control of the derived Community law with regard to its conformance with the Constitution. Therefore, it is possible, within the scope related to the interpretation and evaluation of the validity of the Community regulations, to respect the principle of the exclusive competence of the Community's organ of jurisdiction. The Polish constitutional court, however, maintains its compe-

tence to adjudicate on the constitutionality of the accession agreement and, in consequence, of the other norms of the primary law of the European Union. The proposals on how to resolve the dilemmas arising in this context have been presented above.

And finally, it must be emphasized, that the favourable to the Community law and, above all, to the principle of direct consequence, interpretation of the solution contained in Article 91 section 3 of the Constitution, will enable the adoption of that direction in the jurisprudence of the ECJ, which extends the principles of direct effectiveness and precedence to include also those legal acts which require implementation (above all the directives).

With regard to the question as to the stage of the future of integration processes of the Republic of Poland with the European Union, the progress in establishing the legal construction constituting the foundations of Poland's accession to the Community can be assessed as satisfactory. The Polish legal community appears to be well prepared, what is manifested by the on-going extensive and profound discussions on the consequences of our country's integration with the Union. However, a balance is needed in every area. Is the Community also so determined and politically willing to expand in such a hurry?

## LE SÉNAT EN POLOGNE - DU BESOIN D'UNE RÉFORME

Wojciech Sokolewicz\*

La discussion au sujet de programmes dans laquelle s'étaient engagés les politiciens polonais avant les élections législatives du 23 septembre 2001, a attisé le débat qui couvait en Pologne, et pas seulement en Pologne, sur le sens de l'existence de la deuxième chambre du Parlement<sup>1</sup>.

En effet, il n'est pas absolument nécessaire d'instituer la chambre dite haute. Son existence ne s'impose ni en vertu du principe constitutionnel de l'Etat démocratique de droit<sup>2</sup>, ni, ce qui est encore plus évident, en vertu du principe du pouvoir suprême (souverain) de la nation, ni même en vertu de celui de la division de ce pouvoir en des « pouvoirs » distincts<sup>3</sup>. La nécessité d'instituer la chambre haute ne découle pas non plus de la souveraineté des droits naturels, indépendamment de la définition adoptée de leur contenu. « Bien entendu, dit le philosophe, on ne saurait déduire du droit naturel aucune constitution définie en détail »<sup>4</sup>.

---

\* Professeur de droit constitutionnel à l'Institut des sciences juridiques de l'Académie Polonaise des Sciences à Varsovie, ancien juge au Tribunal Constitutionnel.

<sup>1</sup>En ce qui concerne la doctrine, le premier à s'être déclaré pour le maintien du Sénat fut L. Garlicki dans sa réponse à l'enquête de la Commission constitutionnelle du Sénat: « Prace Komisji Konstytucyjnej Senatu RP » [Travaux de la Commission constitutionnelle du Sénat de la République de Pologne], *Ankieta konstytucyjna* [Enquête constitutionnelle], cahier 2, Warszawa 1990, pp. 56-57; de riches matériaux comparatifs à ce sujet se trouvent dans l'ouvrage collectif sous la direction de E. Z w i e r z c h o w s k i: *Izby drugie parlamentu* [Les deuxièmes chambres du Parlement], Białystok 1996. Dans les milieux politiques c'est Leszek Miller, président de l'Alliance de la gauche démocratique qui se prononçait de la façon la plus radicale contre l'existence du Sénat; il fut secondé dans la presse notamment par B. Ł a g o w s k i: *O bezużyteczności Senatu* [De l'inutilité du Sénat], *Przegląd*, 6 août 2001, p. 67. Une polémique à ce sujet fut engagée par Z. R o m a s z e w s k i: *Gdy zabraknie gwaranta* [En l'absence du garant], *Rzeczpospolita*, 6 septembre 2001, p. A8.

<sup>2</sup>A moins que l'on confère à ce principe un sens matériel, le rattachant organiquement à ce que l'on appelle les principes de la justice sociale, comme à l'article 2 de la Constitution de la République de Pologne de 1997. Voir J. J a s k i e r n i a: *Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym* (Les principes de l'Etat démocratique de droit dans la procédure législative de la Diète), Warszawa 1999, p. 393 et suiv. Voir également la suite de notre texte.

<sup>3</sup>Si toutefois l'on interprète le principe de la séparation des pouvoirs comme une obligation de disperser le pouvoir, ce qui est l'une des interprétations légitimes de ce principe (et à proprement parler, son interprétation unique sur le continent américain), suggérée d'ailleurs par l'article 10 de la Constitution de la République de Pologne qui tient compte de la division « intérieure » au sein de chacun des trois « pouvoirs » séparés (le pouvoir législatif: la Diète et le Sénat, le pouvoir exécutif: le Président de la République et le gouvernement, le pouvoir judiciaire: les cours et les tribunaux), on remarquera une corrélation positive entre le principe de la séparation des pouvoirs et le bicaméralisme.

<sup>4</sup>L. K o ł a k o w s k i: « O prawie naturalnym » [Du droit naturel]. *Gazeta Wyborcza*, 8-9 septembre 2001, p. 9.

Cependant le même auteur constate aussitôt que le droit naturel, qui trouve sa justification dans la Raison, doit être pour le législateur le motif d'actions visant à surmonter la dichotomie entre « ius » et « lex », c'est-à-dire, en d'autres termes, il doit l'inciter à créer un droit juste et équitable.

La structure du Parlement en tant que pouvoir législatif peut favoriser ou entraver ce processus, elle peut aussi être neutre. Nous admettons l'hypothèse suivante: la structure bicamérale du Parlement, également en Pologne qui est un Etat unitaire (en ce qui concerne un Etat fédéral ou une confédération, des circonstances et des arguments supplémentaires sont à prendre en considération), peut, dans certaines conditions, faciliter la création d'un droit équitable (laissons de côté l'explication de cette notion, nous contentant de nos intuitions; cela suffit pour mener à bonne fin notre raisonnement), répondant aussi bien aux postulats historiquement variables de la loi naturelle qu'aux règles déduites du principe de l'Etat de droit réalisant les principes de la justice sociale.

Il est par contre difficile de se ranger à l'opinion de ceux qui prétendent que la création éventuelle de la chambre haute n'est conditionnée que par des raisons pratiques (pragmatiques) au sens étroit du terme<sup>5</sup>.

## I.

L'expérience polonaise de l'instauration de la chambre haute et de l'abandon de cette institution, de l'extension et de la limitation de ses compétences, de l'attribution au Sénat de la fonction de représenter des couches ou des milieux sociaux plus ou moins nombreux, est longue de plusieurs siècles. Déjà en 1493 le conseil royal fut transformé en Sénat et la Diète devint une assemblée à deux chambres, constituée précisément du Sénat et de la chambre des députés qui était une représentation des diétines (assemblées provinciales).

La première constitution polonaise moderne, la Loi gouvernementale du 3 mai 1791<sup>6</sup> prévoyait elle aussi que le Sénat qui devait tenir ses débats sous la présidence du roi, serait composé de hauts fonctionnaires d'Etat et de dignitaires de l'Eglise (virilistes) qui y entreraient *ex officio*, à la différence de la Chambre des Députés que devaient composer les délégués élus par la « nation nobiliaire » délibérant en diétines; autrement dit, des personnes élues au suffrage indirect et par un électorat en quelque sorte limité, mais de toute façon désignées par élection et de ce fait dotées d'une espèce de légitimation démocratique.

Le Sénat prenait part à la législation en examinant les lois adoptées par la Chambre des Députés; il pouvait aussi, en s'y opposant, ajourner leur entrée en vigueur jusqu'à ce qu'elles fussent adoptées à nouveau par la Chambre de la législature suivante. En matière de contrôle parlementaire et de responsabilité, aussi bien constitu-

<sup>5</sup> Une telle opinion a été exprimée par la Cour constitutionnelle ukrainienne dans sa décision du 11 juillet 2000 portant sur le cas n° 2-V/2000; d'après le résumé dans *Bulletin on Constitutional Case-Law* 2000, n° 3, pp. 603-604.

tionnelle que politique comme on aurait dit aujourd'hui, des membres de la Garde des Lois (le pouvoir exécutif de l'époque), le Sénat exprimait son avis, au même titre que la Chambre des Députés, au cours d'une séance conjointe des deux chambres. Tous les 25 ans, les deux chambres devaient également délibérer en commun la révision de la Constitution.

Ainsi donc le Sénat était une chambre à légitimation défectueuse et dont les compétences législatives étaient inégales à celles de la Chambre des Députés; par contre, les deux chambres avaient des compétences égales en matière de contrôle.

L'existence et la forme du Sénat étaient les questions constitutionnelles le plus vivement discutées après la Première Guerre mondiale et la restauration de l'Etat polonais. Alors que la droite optait pour une chambre élitare et autoritaire, la gauche ouvrière et paysanne se prononçait pour un Parlement en principe unicaméral, collaborant avec la chambre de travail projetée qui devait représenter les intérêts des différents groupes de salariés. Ce débat faisait penser au mot célèbre de Sieyès selon lequel les chambres hautes qui font la même chose que les chambres basses sont inutiles, et celles qui font autre chose sont nuisibles<sup>7</sup>. Le compromis auquel on en arriva consistait en ce que la Diète constituante introduisit le Sénat, à une majorité insignifiante des voix, dans la Constitution adoptée le 17 mars 1921, mais la chambre haute qui devait être élue au suffrage démocratique ne différait que légèrement des élections à la Diète, fut dotée de compétences législatives - sauf l'initiative législative dont elle était complètement dépourvue — secondaires par rapport à celles de la Diète, à l'exception des compétences en principe égales en ce qui concerne certaines procédures de révision de la Constitution. L'importance de ces premières compétences se manifesta de façon spectaculaire lors de la correction du texte de la nouvelle Constitution « d'avril » adoptée en hâte par la Diète en 1934.

Les propositions de correction partielle d'une loi déposées par le Sénat pouvaient être repoussées par la Diète en tant qu'instance législative suprême à la majorité des 11/20, soit à peine supérieure à la majorité absolue. Quand même la pratique ultérieure admettait le caractère définitif de la proposition du Sénat rejetant en entier un projet de loi adopté préalablement par la chambre basse (la Diète). Cette pratique fut à juste titre qualifiée par la majorité de la doctrine juridique de non conforme à la Constitution. Selon la Constitution il a fallu de considérer plutôt ce genre de rejet de loi comme le « maximum d'amendements » et en conséquence de le soumettre à une vérification ultérieure obligatoire par la Diète<sup>8</sup>.

D'après la Constitution de 1921, le Sénat n'avait aucune compétence en matière de contrôle parlementaire, à l'exception des interpellations adressées par les sénateurs aux membres du gouvernement ainsi que des résolutions du Sénat considérées

<sup>6</sup> Texte dans P. Sarniecki (réd.): *Najstarsze konstytucje z końca XVIII i I połowy XIX wieku* [Les plus anciennes constitutions de la fin du XVIII<sup>e</sup> et de la première moitié du XIX<sup>e</sup> siècle], Warszawa 1997, p. 21 et suiv.

<sup>7</sup> D'après A. Burda (réd.): *Konstytucja marcowa* [La Constitution de mars (1921)], Lublin 1983, p. 46.

<sup>8</sup> Voir A. Gwiżdż: *Burżuazyjno-obszarnicza Konstytucja z 1921 r. w praktyce* [La Constitution de 1921 représentant les intérêts de la bourgeoisie et de la grande propriété foncière dans la pratique], Warszawa 1956, pp. 208-209.

comme admissibles dans la pratique parlementaire et engageant le Conseil des Ministres à entreprendre des actions déterminées. Par contre, le Sénat prenait part à l'élection du Président de la République au cours d'une séance tenue conjointement avec la Diète.

Ainsi donc les termes de l'article 2 de la Constitution de 1921 qui pouvaient suggérer l'égalité des deux chambres, du moins « dans le domaine législatif », n'étaient pas pleinement confirmés par les dispositions constitutionnelles particulières, même si celles-ci se trouvaient parfois corrigées dans la pratique politique à l'avantage de la position de fait du Sénat.

Dans la Constitution d'avril 1935 on réalisa l'idée du Sénat répondant à l'orientation autoritaire du nouveau régime politique comme une chambre élitiste, composée en partie de personnes nommées par le Président de la République (un tiers des sénateurs) et pour le reste, de personnes élues au suffrage indirect par un électorat limité à des élites spécifiques. En même temps les compétences du Sénat furent étendues et sa position par rapport à la Diète renforcée.

On y parvint en rendant un peu plus difficile le rejet par la Diète d'un amendement proposé par le Sénat (dorénavant, la majorité requise en l'occurrence était de 3/5 et non de 11/20), en engageant le Sénat comme une instance de vérification dans la procédure d'adoption de la motion de censure à l'égard du gouvernement et en le faisant participer à la séance tenue conjointement par les deux chambres en vue de voter l'introduction de l'engagement de la responsabilité du Président du Conseil des Ministres ou d'un ministre devant le Tribunal d'Etat. Le Sénat devait également prendre part, par l'élection de 25 électeurs, à la constitution de l'Assemblée convoquée en vue de l'élection du Président de la République, et c'est le Président (le Maréchal) du Sénat (et non le Président de la Diète, comme le voulait la Constitution de 1921) qui devait suppléer le Président de la République en cas d'indisposition, ce qui d'ailleurs avait une signification symbolique plutôt que réelle.

Dans le domaine législatif furent en outre maintenues les compétences étendues du Sénat en matière de procédure, en général devenue désormais bien plus facile, de révision de la Constitution; dans le domaine du contrôle, les sénateurs conservèrent leur droit constitutionnel d'interpellation.

Toutefois, selon la nouvelle classification constitutionnelle, le Sénat n'était plus l'un des deux organes du pouvoir législatif, mais devint un des organes de l'Etat en général, comme le Gouvernement, la Diète et autres, soumis à l'autorité du Président de la République.

## II.

Au cours de l'histoire ultérieure de l'Etat polonais durant et après la Deuxième Guerre mondiale, la structure des corps parlementaires (ou quasi-parlementaires) n'était désormais déterminée que par différentes circonstances de nature purement politique, en général défavorables au système bicaméral.

Aussi bien le Conseil national<sup>9</sup> basé sur le légitimisme de la Constitution de 1935 et agissant en tant que corps opinant auprès du gouvernement de la République de Pologne en exil, que le Conseil national du Peuple (KRN) créé par l'extrême gauche du mouvement de résistance à l'occupant allemand et se réclamant du légitimisme révolutionnaire (« la volonté du peuple ») étaient des organismes à structure unicamérale simple. Leur organisation simplifiée était imposée par les circonstances de leur constitution et de leur fonctionnement. Quant à la question de la structure du futur Parlement, on en remettait la solution à l'après-guerre.

Les communistes et leurs alliés qui, avec l'aide de l'armée soviétique, prirent *manu militari* le pouvoir de fait en Pologne à la fin de la guerre, adoptèrent, conformément à la tradition de la gauche, une attitude défavorable à l'égard de la chambre haute du Parlement. Dans le régime dit de la dictature du prolétariat, c'est-à-dire du pouvoir exercé en réalité par le parti communiste omnipotent, le Sénat eût d'ailleurs été (même sans tenir compte de l'antipathie invétérée des nouveaux dirigeants pour la chambre haute qui jadis représentait les intérêts des mieux nés et des plus riches) une complication inutile du mécanisme du pouvoir dans lequel le Parlement en tant que tel se vit attribuer le rôle d'une façade cachant les procédures et les rapports de dépendance réels.

Indépendamment de tout raisonnement s'appuyant sur des arguments rationnels et pratiques, l'institution du Sénat avait à l'époque une dimension symbolique en ce qu'elle s'associait dans la conscience collective au régime démocratique parlementaire ayant le plus souvent pour principe la séparation des pouvoirs (la division en trois pouvoirs distincts). Le rejet (escompté par les promoteurs de la « dictature du prolétariat ») de l'institution du Sénat dans le référendum de 1946<sup>10</sup> devait ainsi, de ce point de vue, légitimer la transformation de l'ensemble du régime politique dans l'esprit du socialisme marxiste et conformément à ses principes. Ne pouvant contester ni la réforme agraire, ni la confirmation de la frontière ouest de la Pologne, sujets sur lesquels portaient deux des trois questions soumises au vote, et malgré la traditionnelle aversion du mouvement paysan pour le Sénat, l'opposition d'alors, regroupée autour du Parti paysan polonais dirigé par Stanisław Mikołajczyk, appela les électeurs à voter contre la « suppression » du Sénat; cette dernière était l'objet de la troisième question (la première sur le bulletin de vote) encore que la chambre haute n'eût pas repris ses fonctions et restât en sommeil dans le texte non réalisé de la Constitution de 1921. Les résultats du référendum, faussés par les autorités, servirent de justification supplémentaire des décisions législatives, puis des décisions constitutionnelles ignorant le Sénat<sup>11</sup>. Etant donné

<sup>9</sup> Voir le Discours du Président de la République de Pologne du 30 novembre 1939 (*Monitor Polski* 1939, n° 271-276, 9 décembre); d'après le texte reproduit dans le recueil de T. M o ł d a w a: *Konstytucje polskie 1918-1998* [Les constitutions polonaises 1918-1998], Warszawa 1999, pp. 91-92.

<sup>10</sup> Organisé en vertu de la loi du 27 avril 1946 sur le vote direct du peuple (*Journal des Lois* 1946, n° 15, texte 104).

<sup>11</sup> Dans la Loi électorale relative aux élections à la Diète constituante du 22 septembre 1946, puis dans la Constitution de la République populaire de Pologne du 22 juillet 1952. On peut admettre que selon un calcul prudent, le nombre des suffrages exprimés dans le référendum pour la suppression du Sénat ne dépassa pas en réalité 26,9% des voix, alors que le chiffre mentionné dans le communiqué officiel se montait à 68,2%. Voir

les résultats officiels peu crédibles du référendum de 1946, il y a lieu d'admettre que l'opinion exprimée ça et là en 1989 que le Sénat supprimé par voie de vote direct du peuple ne peut être rétabli que par la même voie, n'est pas convaincante.

A l'époque de la « dictature du prolétariat », l'idée du Parlement bicaméral était reprise de temps à autre en tant qu'elle indiquait une des voies vers la « démocratisation » hypothétique du régime constitutionnel de l'Etat, cet-a-dire vers la réforme étant comprise par les uns de façon radicale comme synonyme d'un changement qualitatif du système politique existant, et par les autres comme une correction de ce système ne touchant pas à ses fondements, ses buts ni ses principes.

Le postulat de rétablissement du Sénat, qui faisait partie des décisions des participants à l'accord de la Table ronde de 1989, transformées en loi sous la forme de ce que l'on a appelé la révision d'avril (datée du 7 avril 1989) de la Constitution de 1952 (dans la rédaction de 1976)<sup>12</sup>, avait une double motivation: idéologique, car il indiquait l'intention des réformateurs de renouer avec les institutions éprouvées de la démocratie parlementaire libérale, au reste profondément ancrées dans la tradition nationale polonaise; politique, car les élections sénatoriales devaient être entièrement démocratiques (contrairement aux élections à la Diète en partie réglementées) et garantir une libre rivalité de tous les candidats, indépendamment de leur affiliation politique<sup>13</sup>. La légitimation démocratique de ce Sénat, le premier en Pologne après la Deuxième Guerre mondiale, était donc pleine et entière, à la différence de celle de la Diète.

Paradoxalement, ce fut là une raison de plus pour soumettre le Sénat ainsi élu à la domination de la Diète, ne pas le doter de compétences trop vastes, en faire une chambre qui, sans être du même rang que la Diète, compléterait et, éventuellement, réglerait les activités de celle-ci, tout en lui laissant le « dernier mot » dans la procédure législative.

Peu de temps après, en 1991, la liberté cessa d'être l'attribut distinctif des élections sénatoriales, les élections à la Diète devinrent pour le moins tout aussi démocratiques que celles à la chambre haute, et les avantages découlant des compétences du Sénat en matière d'amendement des lois s'avérèrent plus petits que l'on n'escomptait. Un problème délicat apparut, engendré par certaines usurpations de la part du Sénat qui outrepassait les limites de ses fonctions et de ses compétences constitutionnelles en ce qui concerne soit la participation à l'orientation de la politique extérieure de l'Etat, soit le contrôle du gouvernement en général. La question du sens de l'existence d'un tel Sénat et du rapport entre celui-ci et la chambre basse du Parlement, la Diète, s'est posée une nouvelle fois.

---

A. Paczkowski: « Referendum z 30 VI 1946. Próba wstępnego bilansu » [Le référendum du 30 juin 1946. Essai de bilan provisoire] (dans:) D. Waniek, M. T. Staszewski (réd.): *Referendum w Polsce współczesnej* [Le référendum en Pologne contemporaine], Warszawa 1995, pp. 74-76.

<sup>12</sup> Voir W. Sokolewicz: « Kwietniowa zmiana konstytucji » [La révision d'avril de la constitution], *Państwo i Prawo* 1989, n° 5, pp. 9-14.

<sup>13</sup> Ces motifs ont fait l'objet d'une ample et pénétrante analyse dans la monographie de W. Orłowski: *Senat Trzeciej Rzeczypospolitej. Geneza instytucji* [Le Sénat de la Troisième République. La genèse de l'institution], Zamość 2000. Voir aussi le compte rendu critique de M. Kudej, *Przegląd Sejmowy* 2001, n° 3, pp. 89-93. A la lumière de cette analyse, la supposition que le Sénat a été créé « pour assurer des postes prestigieux aux activistes et aux autorités morales de „Solidarność” réactivée » (B. Łagowski dans son feuillet cité à la note 1) apparaît comme dénuée de fondement ou, pour le moins, partielle.

L'existence du Sénat trouve une justification plus solide lorsque ses membres sont élus d'une manière différente que les membres de la chambre dite basse et que le système électoral enrichit le caractère représentatif du Parlement dans son ensemble, contribuant par conséquent à ce que ce dernier remplisse mieux toutes ses fonctions, et en particulier sa fonction législative. A ce propos, il y a toutefois lieu de poser la question de la forme à donner aux élections sénatoriales à la différence de celles à la chambre basse, traditionnelles, démocratiques et libres, au suffrage universel, direct, égal et proportionnel, au scrutin secret, pour que le caractère représentatif du Parlement s'en trouve complété et enrichi sans pour autant subir une déformation trop sensible par rapport à la gamme et à la proportion des opinions et des intérêts de la société qui y est représentée.

Ce problème se montre particulièrement aigu dans les Etats unitaires, et la Pologne, comme on le sait, en est un. En effet, dans un Etat fédéral, et plus encore dans une union d'Etats (une confédération) la situation est plus simple. La chambre haute assure la représentation égale des parties constituantes de ce genre d'Etat, même si elle est désignée de manières différentes: au suffrage universel (comme par exemple aux Etats-Unis ou en Suisse), par les parlements des parties constituantes d'une fédération (ou d'une confédération) ou bien par les gouvernements de ces parties (comme en République fédérale d'Allemagne), ou enfin par ces deux éléments combinés (comme par exemple en Fédération russe). L'institution de la chambre haute trouve en fait une justification analogue dans les pays où existent des régions dotées d'autonomie (comme par exemple les communautés autonomes en Espagne),.

En ce qui concerne l'existence hypothétique de la chambre haute dans les Etats unitaires actuels, on peut en chercher la justification dans trois directions suivantes:

Premièrement, marchant dans les pas de la France, on peut voir dans la chambre haute une représentation potentielle des collectivités locales. Il s'y rattache toutefois au moins trois questions dignes d'attention. La première concerne le mode d'élection des membres de ce genre de chambre « des collectivités », la deuxième, les compétences de celle-ci et la troisième, son orientation politique. Pour être une émanation réelle des collectivités locales<sup>14</sup>, les représentants des collectivités devraient être élus au suffrage indirect à plusieurs degrés, c'est-à-dire en principe par les corps représentatifs des collectivités de différents niveaux. Cela limite d'une certaine manière le caractère démocratique de ce genre d'élections.

Il y a en outre une certaine contradiction logique entre le caractère de la chambre haute en tant qu'émanation des collectivités locales qui par nature défendent leurs intérêts particuliers et ont tendance à adopter à cet égard des attitudes éminemment égoïstes,

---

<sup>14</sup> Il est intéressant qu'en France, le principe de la proportionnalité est mis de plus en plus largement en pratique dans ce genre de suffrage indirect; dernièrement, il a été appliqué aux départements qui élisent au moins trois sénateurs et non, comme jusqu'à présent, au moins cinq. Cela produit aussi, de l'avis des observateurs, des effets secondaires défavorables, tels que la rivalité fratricide des candidats d'un même parti. Voir par exemple O. P o g n o n: « Le Sénat se renouvelle dans la discorde », *Le Figaro*, 9 septembre 2001, p. 6.

et les fonctions du Parlement à l'échelle de la Nation et de l'Etat, que la Constitution de la République de Pologne de 1997 met en corrélation avec le principe du mandat libre des parlementaires, qu'ils soient députés ou sénateurs.

Il faut enfin tenir compte du phénomène que confirme l'expérience française et qui se manifeste aussi, dans une certaine mesure, dans d'autres pays, à savoir que les représentants des collectivités locales ont tendance, en abrégé, à se comporter de façon plus conservatrice que l'on n'attend de la représentation de la Nation *at large*.

Deuxièmement, il est possible d'envisager la construction, dans un Etat unitaire, de la chambre haute comme une représentation des différents groupes sociaux et professionnels (comme c'était autrefois le cas du Parlement à plusieurs chambres de la République socialiste fédérative de Yougoslavie), ce qui d'ailleurs, dans certaines conditions, peut être l'expression de la préférence accordée à la conception corporatiste et solidariste de l'organisation des pouvoirs publics. Cette orientation se traduit notamment par la création de conseils sociaux et économiques extra-parlementaires (comme par exemple en France) ou d'institutions encore plus éloignées du modèle de la chambre parlementaire, comme la Commission tripartite en Pologne qui offre un terrain de coopération aux représentants du gouvernement, des employeurs et des salariés (des syndicats); son fonctionnement n'encourage d'ailleurs nullement à poursuivre la recherche de solutions de régime constitutionnel dans cette direction.

Troisièmement, on peut puiser à la tradition nationale polonaise et, cherchant à répondre aux besoins actuels du pays, tenter de créer un « modèle de sénateur » moins dépendant de sa base politique qu'un député ne l'est de la sienne et se guidant dans l'exercice de son mandat avant tout par le sens de l'équité et de la justice. Il serait naïf de croire qu'il soit possible de « dépolitiser » entièrement les élections sénatoriales ou plutôt de les soustraire à l'empire des partis. Des amendements relativement peu importants à la Loi électorale seraient pourtant susceptibles de contribuer de façon essentielle à ce que l'on peut appeler la personnalisation de l'élection. Il est significatif que les propositions de politiciens et de journalistes de différentes couleurs politiques vont dans la même direction<sup>15</sup>.

En réactivant le Sénat en 1989, on admit que les élections sénatoriales auraient un caractère majoritaire et seraient organisées dans le cadre des 49 voïvodies d'alors. Dans chaque voïvodie, indépendamment du nombre des habitants, deux sénateurs devaient être élus (à l'exception des voïvodies de Varsovie et de Katowice dont chacune devait élire trois sénateurs), ce qui donnait l'avantage aux petites voïvodies et par conséquent rendait inactuel le principe du suffrage égal pris au sens d'égalité des droits des électeurs à l'échelle de l'Etat. Malgré ce mode d'élection des sénateurs, ceux-ci ne constituaient pas la représentation des collectivités des voïvodies. Jusqu'au 1<sup>er</sup> janvier 1999 les voïvodies n'étaient que des circonscriptions administratives dirigées par les voïvodes en tant que représentants du gouvernement, et non des collectivités territoriales

---

<sup>15</sup> Voir J. Paradowska: « Izba ratunkowa » [La chambre d'urgence], *Polityka*, 4 août 2001, pp. 24-26; de même Z. Romaszewski dans une interview intitulée de façon significative: « Antidotum na SLD » (Un antidote contre l'Alliance de la gauche démocratique), *Rzeczpospolita*, 17 juillet 2001, p. A4.

ayant la personnalité morale. Dans ces conditions, le principe de la représentation égale des voïvodies, destiné à protéger les petites voïvodies contre la prépondérance des grandes et s'inspirant de l'exemple du Sénat des Etats-Unis d'Amérique dont la position dans le système politique américain est pourtant entièrement différente, était pour ainsi dire dépourvu de fondement naturel.

Les résultats des élections sénatoriales de 2001 (et notamment l'élection de deux sénateurs indépendants, c'est-à-dire non soutenus officiellement par aucun groupement politique) semblent indiquer que l'élément personnel y joue un rôle un peu plus important que dans les élections à la Diète. Toutefois, également dans le cas des élections au Sénat les électeurs prennent très souvent en considération l'appartenance du candidat à un parti donné et non ses qualités personnelles, et la proportion des forces politiques au sein de la chambre haute met au jour les mêmes préférences des électeurs que révèle la composition de la Diète, à cela près qu'elles sont encore plus accentuées dans la première: 75% de mandats pour le groupement majoritaire au Sénat contre 41% à la Diète (en 1989, le groupement majoritaire qu'était « Solidarność » eut 99% de places au Sénat).

Si l'on veut que le Sénat devienne un modèle de modération et de bon sens et qu'il soit capable de s'opposer aux initiatives de la Diète au cas où elles seraient trop radicales et dictées par l'intérêt politique immédiat, le caractère représentatif de la chambre haute doit être corrigé d'une manière appropriée et ses compétences adaptées à l'exercice d'une telle fonction. Par quels moyens une telle correction hypothétique pourrait-elle s'opérer?

On pourrait « corriger » le caractère représentatif de la chambre haute, par exemple, en y faisant entrer soit des virilistes, soit des personnes désignées par le Président de la République, de manière à remplacer les élections au suffrage universel ou du moins à en réduire l'importance, se guidant en quelque sorte, et pas nécessairement de très près, sur le mode de composition du Sénat indiqué par la Loi gouvernementale du 3 mai 1791 ou la Constitution de 1935 (voir ci-dessus). L'idée d'incorporer dans la chambre haute des virilistes *sui generis* revint d'ailleurs dans le débat constitutionnel récent où la proposition était avancée de désigner d'office au Sénat les plus hauts fonctionnaires d'Etat à la fin de l'exercice de leurs fonctions. Toutefois, premièrement, il n'est pas certain que le système de sélection sera parfait au point de garantir que les postes les plus hauts seront confiés aux meilleurs des candidats, soit à ceux qui ont le sens de l'équité, se montrent capables de penser d'une manière indépendante et sont dotés de qualités intellectuelles remarquables. Deuxièmement, même si dans le passé tel ou tel candidat avait fait preuve de ce genre de qualités, ce potentiel a pu s'épuiser pendant qu'il exerçait sa fonction précédente. Ajoutons à cela l'exemple peu encourageant des anciens présidents de la République française dont la participation au Conseil constitutionnel, prévue par la Constitution<sup>16</sup>, a un caractère purement formel, en partie d'ailleurs pour des raisons objectives<sup>17</sup>. La gérontocratie ne se fonde pas nécessairement sur la raison: le gouvernement des vieillards n'est pas toujours celui des sages.

<sup>16</sup> Voir l'article 56 de la Constitution française de 1958.

<sup>17</sup> Voir W. Skrzydło: *Ustrój polityczny Francji* [Le système politique français], Warszawa 1992, p. 228; L. Garlicki: *Rada Konstytucyjna a ochrona praw jednostki we Francji* [Le Conseil constitutionnel et la protection des droits individuels en France], Warszawa 1993, p. 28.

Tenant de toute façon de la politique, la nomination par le Président de la République équivaudrait dans la pratique à une rétribution de ses amis politiques, et ce ne sont pas leurs qualités intellectuelles et morales qui décideraient de leur désignation, indépendamment de la bonne volonté du Président. Sans parler de ce que le danger d'un affaiblissement du système essentiellement démocratique des pouvoirs publics en son point névralgique qu'est le pouvoir législatif serait d'autant plus grand que la légitimation politique du chef de l'Etat serait plus faible. Il pourrait s'avérer bientôt que le caractère représentatif du Sénat non seulement n'a été corrigé (enrichi), mais encore s'est trouvé déformé (appauvri).

Il est possible d'éviter ces pièges en prenant le chemin bien connu d'élever le niveau des qualifications personnelles requises dont devraient faire preuve non seulement les sénateurs, mais encore, chose très controversée, l'électorat. Quant à l'âge légal élevé par les constitutions polonaises de 1921 et de 1935 à 30 ans pour le droit d'élection et à 40 ans pour le droit d'éligibilité au Sénat, au deuxième alinéa de l'article 99 de la Constitution de 1997 il n'est question que de l'âge de 30 ans accomplis requis cette fois pour être éligible au Sénat. Peut-être donc cela vaudrait-il la peine de rétablir un âge légal également pour le droit d'élection à la chambre haute? Je formule cette question, tout conscient que je suis de son caractère controversé et du mécontentement que le seul fait de l'avoir posée est susceptible d'éveiller parmi les personnes plus jeunes.

Tout aussi controversée sera la question suivante: ne devrait-on pas rechercher — au moins rechercher—outre le critère de l'âge, combien imparfait en l'occurrence, d'autres critères objectifs au possible qui permettraient d'évaluer avec plus de vraisemblance les qualités intellectuelles et morales du candidat? Ni le niveau formel d'instruction, ni la recommandation d'un parti (ou d'une organisation) politique ne sauraient en effet être de tels critères. Ne le pourrait pourtant pas être la recommandation d'une association d'artistes ou d'écrivains, d'une collectivité professionnelle ou d'un établissement de recherche scientifique? Nous reviendrons encore à cette question<sup>18</sup>.

#### IV.

Nous prenons pour point de départ de nos considérations la nécessité d'établir une corrélation étroite entre le caractère représentatif, dans telle ou telle acception du terme, du Sénat d'une part et ses fonctions et ses compétences d'autre part. Si l'on accepte l'orientation que nous proposons de donner au changement de mode d'élection des sénateurs, cette corrélation devrait se traduire par une concentration encore plus grande qu'aujourd'hui des activités du Sénat sur l'exercice de sa fonction législative, mettant pleinement en oeuvre ses compétences complémentaires par rapport aux compétences législatives de la Diète.

---

<sup>18</sup> Dans l'avenir peut-être aussi celle d'un syndicat, à la condition que la distinction entre l'activité syndicale et politique devienne plus nette, processus qui semble déjà s'être amorcé en Pologne.

De ce que nous venons de dire il ressort clairement que, conformément à la tradition démocratique du constitutionnalisme polonais et à la situation actuelle du Sénat d'après le droit constitutionnel, nous lui réservons, dans la structure du Parlement, la place d'une « seconde » chambre plutôt que celle de la chambre « haute », donc la place d'une chambre qui en aucun cas ne domine sur la Diète (comme, à un certain point, le Sénat sur la Chambre des Représentants au Congrès des Etats-Unis) ni n'est son égale (comme les sénats en Italie, en Roumanie, en Suisse et, à un degré restreint, celui de la V<sup>e</sup> République en France). La représentation politique démocratiquement élue de toute la Nation, la Diète, devrait prévaloir sur un Sénat tant soit peu élitiste (élitiste?), « dépolitisé » et personnalisé, et notamment, elle devrait avoir voix délibérative en ce qui concerne les questions résolues selon des critères essentiellement politiques. Il en découle des conclusions *de lege fundamentalis ferenda* dont il sera question plus loin.

Malheureusement, le Sénat qui jusqu'à ce jour est élu d'après une procédure trop proche, malgré toutes les différences, de celle des élections à la Diète, était, depuis son rétablissement dans la III<sup>e</sup> République en 1989, enclin à élargir par le fait l'étendue des compétences qui lui ont été attribuées par la Constitution et les lois. Parmi les facteurs qui y ont contribué, signalons une espèce de suractivité (due souvent à l'ambition méritoire de bien représenter le Sénat) des ses présidents successifs, de même que la tendance inspirée par un nominalisme institutionnel spécifique à pousser trop loin les conclusions déduites du nom même de « Sénat » et de l'héritage historique lié à cette institution. C'est ainsi que le Sénat a assumé le rôle du protecteur des Polonais résidant hors de la Pologne et, qui plus est, s'est attribué des compétences égales à celles de la Diète en matière de création et de réalisation de la politique extérieure de l'Etat. En ce qui concerne ce dernier point, il a pour fondement, si faible qu'il soit, la participation du Sénat — prévue par la Constitution et conforme aux principes constitutionnels relatifs à la participation à la législation en général — à l'adoption de la loi autorisant la ratification d'un traité international.

Il n'y a pas de doute que la participation du Sénat à l'accomplissement par le Parlement de sa fonction législative est à la fois la fonction principale de la chambre haute et sa raison d'être, et d'après l'opinion unanime de la doctrine, il faudrait en rester là<sup>19</sup>.

Conformément à l'interprétation de la Constitution, admise également dans la jurisprudence du Tribunal constitutionnel, les propositions du Sénat relatives aux lois votées par la Diète et comportant la possibilité de repousser une loi dans son ensemble, à l'exception de la loi budgétaire annuelle<sup>20</sup>, doivent pourtant respecter, en ce qui concerne l'objet des amendements proposés, les limites strictes et infranchissables de la matière réglée par la loi en question. Ces propositions peuvent aussi être assez facilement repoussées par la Diète (la majorité absolue des voix de députés présents [au moins 50% de tous] est suffisante), à l'exception pourtant de la position prise par le Sénat dans la procédure de révision de la Constitution; une telle révision peut, confor-

<sup>19</sup> Voir P. Winczorek: « Sens istnienia Senatu » [Le sens de l'existence du Sénat], *Rzeczpospolita*, 17 juillet 2001, p. A2.

<sup>20</sup> Voir l'article 223 de la Constitution de la République de Pologne de 1997, comparé avec le deuxième et le troisième alinéa de l'article 121.

mement à l'article 235 de la Constitution, être bloquée et réduite à néant. Cette solution avait sans doute pour objectif de rendre pratiquement impossible toute tentative visant à éliminer de la Constitution l'institution du Sénat et à établir un Parlement unicaméral.

La procédure législative est engagée en Pologne toujours et exclusivement à l'une des deux chambres: la Diète (à la différence, par exemple, du Parlement britannique ou du Congrès des Etats-Unis). Toutefois, l'un des sujets ayant en principe une compétence égale en matière d'initiative législative - illimitée quant à l'objet, à l'exception de la loi budgétaire, mais dans le cas du Sénat embrassant également la révision de la Constitution - est le Sénat qui, *nota bene*, en fait usage plutôt rarement (plus rarement que, par exemple, le Bundesrat en Allemagne fédérale).

La position clé de la Diète dans la procédure législative ne s'exprime pas seulement par la possibilité déjà mentionnée qu'elle a de rejeter les amendements proposés par le Sénat ou la résolution de celui-ci sur le rejet d'un projet de loi dans son ensemble, et ce sans constituer, par exemple, des commissions paritaires conjointes des deux chambres pour éliminer les divergences, comme cela se fait dans les parlements de certains pays. S'y ajoutent des compétences de la chambre basse telles que la prise de position par la Diète seule sur ce que l'on appelle le veto (suspensif) opposé par le Président de la République à une loi qui pourtant a été votée avec la participation du Sénat, l'élimination de l'inconstitutionnalité d'une loi par la Diète seule dans certains cas où des dispositions concrètes de la loi en question auront été déclarées non conformes à la Constitution par le Tribunal constitutionnel statuant en application de la procédure de contrôle préventif engagée sur proposition du Président de la République, ainsi que l'adoption par la Diète seule d'une résolution<sup>21</sup> relative au choix de la procédure d'autorisation de la ratification d'un certain type de traité international (par une loi adoptée selon une procédure spéciale ou par référendum national).

Tous ces symptômes du rôle secondaire joué par le Sénat dans la législation ne sauraient bien entendu être compensés par l'aptitude générale du Président du Sénat (analogue à celle reconnue, entre autres, au Président de la Diète) à demander l'engagement par le Tribunal constitutionnel du contrôle de la conformité à la Constitution d'un texte législatif en vigueur ainsi que des objectifs ou de l'activité d'un parti politique donné<sup>22</sup>. Le fait que cette dernière compétence a été attribuée précisément au Président du Sénat est d'ailleurs difficile à expliquer rationnellement, même si elle rentre dans l'aptitude à déposer les requêtes en général devant le Tribunal constitutionnel.

La deuxième fonction du Sénat consiste à prendre part - le plus souvent par l'autorisation de la nomination de certains organes unipersonnels ou directeurs (le Président de la Chambre suprême de Contrôle, le Défenseur des Droits civiques, le Défenseur des Droits de l'Enfant, le Président de l'Institut de la Mémoire nationale - Commission de Poursuite des Crimes contre la Nation polonaise, l'Inspecteur général de la Protection des Données personnelles) ou par la nomination d'une partie, définie par la Constitution ou les lois, des membres des organes collégiaux (le Conseil national de Magistrature, le Conseil national

---

<sup>21</sup> En application du quatrième alinéa de l'article 90 de la Constitution de 1997.

<sup>22</sup> Voir le premier point du premier alinéa de l'article 191 de la Constitution de 1997.

de la Radiophonie et de la Télévision, le Conseil de la Politique monétaire, le conseil de l'Institut de la Mémoire nationale) - à la création de certains organes centraux de l'Etat, c'est-à-dire à la réalisation par le Parlement de sa fonction créatrice.

La participation du Sénat à la fonction créatrice du Parlement est limitée. Premièrement, comme l'indiquent les énumérations ci-dessus, elle porte sur les fonctions situées en dehors de l'administration gouvernementale et sur celles seulement qui exigent la plus grande confiance de l'opinion publique et une orientation dépassant l'esprit de parti. Deuxièmement, les personnes nommées par le Sénat ou avec sa participation se voient attribuer une étendue plus ou moins grande d'indépendance garantie par la stabilité de leur fonction; elles ne peuvent pas être révoquées de façon arbitraire, avec ou sans la participation du Sénat; au contraire, leur révocation se fait toujours et exclusivement dans les conditions et selon la procédure prévues par la loi. Troisièmement, l'exigence de l'autorisation par le Sénat signifie que l'initiative de la nomination d'une personne concrète relève de la compétence d'un autre sujet, le plus souvent de la Diète, et, dans le cas du Président de l'Institut de la Mémoire nationale, du conseil de l'Institut. La participation du Sénat, limitée de la façon que nous venons de présenter, à la réalisation par le Parlement de sa fonction créatrice doit être considérée comme optimale, justifiée et par conséquent ne demandant pas de changements importants.

Bien que la Constitution (au deuxième alinéa de l'article 95) pose en principe général que le contrôle parlementaire du gouvernement n'est exercé que par la Diète, et que l'étendue en est définie par les dispositions de la Constitution et des lois (et non déduite des autres principes constitutionnels, tels que, par exemple, la souveraineté de la Nation ou la démocratie représentative), le Sénat prend part à l'exercice de ce contrôle contre les intentions des architectes du régime constitutionnel de l'Etat et pour ainsi dire plus ou moins *praeter legem*. Il est vrai qu'à la différence des solutions adoptées dans la Constitution de 1935 (voir ci-dessus), le Sénat ne participe aujourd'hui en aucune manière à l'engagement de la responsabilité politique du gouvernement (par le vote de défiance ainsi que par le refus d'accorder le vote de confiance, voire — mais c'est une autre affaire - le refus de donner quitus). Cependant, dans la pratique parlementaire, des formes « faibles » de contrôle apparues, en partie, à la faveur de certaines ambiguës dispositions de la loi, assurées par les commissions du Sénat au nombre de quatorze<sup>23</sup>. Ce système développé de commissions correspondant pour la plupart aux différents départements de l'administration gouvernementale, non seulement permet d'assurer l'efficacité des travaux législatifs mais encore crée des conditions propices à l'engagement de procédures particulières de contrôle. Il vaut la peine de rappeler qu'en 1989, après que le Sénat fut institué par la Constitution révisée, on se demandait si celle-ci permettait la nomination par le Sénat de commissions permanentes.

D'après la Constitution (art. 115) ce sont uniquement les députés qui peuvent adresser des interpellations et des questions, dont celles portant sur les affaires courantes, au

---

<sup>23</sup> Voir le premier alinéa de l'article 15 de la résolution du Sénat du 23 novembre 1990: *Le Règlement du Sénat de la République de Pologne* (texte unique dans *Monitor Polski* 2000, n° 8, texte 170).

Président du Conseil des Ministres et aux autres membres du Conseil des Ministres. Dans la pratique, les déclarations des sénateurs, prévues par le Règlement du Sénat, revêtent un caractère semblable aux interpellations (ou aux questions) des députés, alors que les réponses à ces déclarations, dans la mesure où elles portent sur des affaires étant du ressort de l'administration gouvernementale, sont requises par les organes directeurs du Sénat non moins rigoureusement que les réponses aux interventions des députés le sont par le Président de la Diète. Cette pratique rapproche un peu les compétences du Sénat polonais en matière de contrôle de celles de la Chambre haute en France ou aux Etats-Unis d'Amérique.

On ne saurait ignorer la circonstance qu'également pendant l'exercice de ses compétences législatives, le Sénat peut engager certaines procédures de contrôle à l'égard du Conseil des Ministres, par exemple en mettant en discussion dans les commissions les différents aspects de la pratique gouvernementale d'appliquer les dispositions de la loi que la Diète vient d'amender par une loi transmise à la chambre haute pour qu'elle se prononce en la matière.

Pour finir, le droit polonais attribue au Sénat des compétences particulières dont la réalisation doit être liée à des éléments de contrôle de l'administration gouvernementale. Ainsi par exemple, si le Défenseur des Droits civiques est tenu d'informer chaque année non seulement la Diète, mais encore le Sénat aussi bien sur ses activités que sur l'état du respect des libertés et des droits de l'homme et du citoyen (article 212 de la Constitution de 1997), il est évident qu'une partie considérable de cette information devant nécessairement porter sur le respect des libertés et des droits en question par l'administration gouvernementale, des éléments de contrôle des travaux du gouvernement apparaîtront lors de sa mise en discussion.

Pour ce qui est des compétences de la Chambre haute en matière de ce que l'on peut appeler le contrôle du Président de la République et que le Sénat exerce en débattant conjointement avec la Diète en tant qu'Assemblée nationale, elles n'ont plus grand-chose à voir avec la fonction assignée au Sénat dans le domaine du contrôle proprement dit. Il s'agit en particulier de la reconnaissance de l'incapacité permanente du Président de la République à l'exercice de ses fonctions en raison de son état de santé ou, dans une autre situation, de la mise en état d'accusation du Président devant le Tribunal d'Etat pour violation de la Constitution ou des lois, ainsi que pour une infraction. Dans ces cas pourtant, la contribution du Sénat en tant qu'autorité morale collective *sui generis* (qu'il nous soit permis d'employer ici cette appellation dont on abuse souvent) semble entièrement justifiée, à la différence de sa participation controversée à l'exercice du contrôle des activités du Conseil des Ministres, ce contrôle ayant un caractère politique par la force des choses.

## V.

Tout en proposant de conserver le Sénat sous une forme à peine réformée, nous voudrions relier les changements apportés au mode d'élection des sénateurs à certaines

modifications non pas des compétences de la Chambre haute, mais du caractère de ses activités.

Ainsi donc il faut renforcer les compétences fondamentales du Sénat qui assurent sa participation à la législation. Dans le domaine de la création du droit, on peut y parvenir (1) en introduisant l'examen obligatoire par le Sénat de chaque loi adoptée par la Diète; la nécessité d'introduire une telle obligation a dernièrement été mise en lumière par le refus du Sénat de corriger les erreurs législatives universellement relevées dans les lois d'amendement du droit pénal, adoptées par la Diète en pleine connaissance de ces erreurs; (2) en introduisant la participation du Sénat à l'adoption des lois mises une nouvelle fois aux voix sur proposition du Président de la République qui leur a opposé le veto; (3) en élevant à la proportion antérieure de 3/5, et ce, peut-être, par rapport au nombre constitutionnel des députés, la majorité requise des voix à la Diète pour rejeter les propositions du Sénat relatives à une loi adoptée par la Diète; (4) en supprimant dans la pratique les restrictions concernant l'étendue des amendements proposés par le Sénat.

Par contre, le maintien par le Sénat de sa compétence, de nature essentiellement politique et administrative, en matière d'engagement de la procédure législative, ainsi que l'exigence d'autorisation sans appel par le Sénat d'adoption de toute loi portant révision de la Constitution dans les termes adoptés par la Diète, demandent une discussion ultérieure.

Sur le plan de l'application de la loi - facteur qui règle la législation - il y aurait lieu d'encourager le Sénat à examiner les lois non seulement du point de vue de leur correction législative - autrement dit, de la moralité du droit dont parlait en son temps L. Fuller — et de leur adaptation au système des sources du droit dans son ensemble, car une telle tâche conviendrait mieux à un centre parlementaire de législation, mais encore et avant tout en vue d'une appréciation axiologique du contenu du droit créé et de son adéquation au principe de la justice (sociale).

Participant, comme aujourd'hui, à la fonction créatrice du Parlement (voir ci-dessus), le Sénat devrait se pencher avec peut-être plus d'attention sur les candidatures aux hautes fonctions (en procédant, par exemple, à des auditions obligatoires en commission des candidats, en examinant avec attention leur aptitude professionnelle et morale à occuper un poste donné), sans céder à la pression d'un groupe social quelconque et sans accepter aucun compromis dicté par la répartition actuelle des forces politiques.

On devrait également viser à rendre conforme aux intentions des architectes du régime constitutionnel de l'Etat l'activité du Sénat dans le domaine du contrôle parlementaire du Conseil des Ministres et de l'administration gouvernementale soumise à ce dernier. Comme on le sait, la Constitution de la République de Pologne n'attribue pas une telle compétence au Sénat. Il faudrait en particulier ramener aux dimensions convenables, dans la pratique du Sénat, l'institution des déclarations des sénateurs lesquelles devraient être précisément des déclarations et non des questions cachées sous ce nom et adressées au gouvernement. Il y a aussi lieu de s'interroger sur le nombre et le caractère des commissions du Sénat, visant en général à réduire leur liste.

La condition *sine qua non* de la réorientation proposée de la chambre haute et du renforcement de son impact sur le contenu du droit créé est une réforme électorale,

c'est-à-dire l'amendement de certaines parties de la Loi sur les élections à la Diète et au Sénat de 2001, qui par malheur vient seulement d'être adoptée.

Un pas dans la bonne direction serait la modification du système électoral consistant à introduire l'élection des sénateurs dans des circonscriptions à un seul mandat - ce qui favorise toujours la personnalisation des élections et en rend les résultats moins dépendants des décisions des corps directeurs des différents partis - et à maintenir leur élection à la majorité relative (et non absolue) des voix, c'est-à-dire à un seul tour de scrutin. Cela empêcherait les candidats ou les partis (les organisations) qui les soutiennent de conclure des accords quelconques entre eux pendant l'intervalle entre le premier et le second tour de scrutin, ce dernier étant souvent nécessaire lorsque la majorité absolue des voix est requise.

Ensuite, on devrait admettre la présentation des candidats non seulement par les partis et par les électeurs (ou plus précisément par leurs comités)<sup>24</sup>, mais encore, comme il a été dit plus haut, par les associations d'artistes et d'écrivains, les collectivités professionnelles, peut-être aussi par d'autres associations et par les établissements de recherche scientifique. L'indépendance des délibérations prises par les sénateurs, garantie par le renforcement du caractère légal de leur mandat parlementaire en tant que mandat libre et non impératif, est susceptible de jouer un rôle important dans la réorientation du Sénat. Cet objectif sera pourtant difficile à atteindre, d'autant plus qu'il s'harmonise mal avec la proposition d'organiser les élections au Sénat dans des circonscriptions électorales à un seul mandat, laquelle vise, quoi qu'on en dise, à établir un lien plus étroit entre les représentés et les représentants, l'électorat et les sénateurs.

L'autorité personnelle des sénateurs trouvant un appui dans les associations ou les organisations qui présentent leur candidature (voir ci-dessus), ainsi que l'approbation qui leur est exprimée publiquement par la collectivité, et avant tout par l'électorat dispersé et inorganisé de leur circonscription électorale relativement petite (à un mandat!), peuvent apporter un contrepoids à leur dépendance inconditionnelle du parti (de l'organisation) politique dont ils sont membres. Pour être clair, il y a lieu d'ajouter que toutes les initiatives proposées ne visent pas à un changement révolutionnaire mais à un « déplacement de l'accent ». Il serait difficile de défendre aux partis politiques de s'intéresser à l'activité de leurs adhérents au sein du Sénat qui est une institution incorporée dans les mécanismes de l'exercice du pouvoir public, mais on peut s'efforcer de limiter l'intensité de cet intérêt. On peut, par exemple, renoncer assez facilement à la pratique de créer des groupes politiques de sénateurs d'après le critère de l'appartenance à un parti donné (de même qu'à la participation des sénateurs à des groupes analogues à l'échelle du Parlement), et tenter d'organiser les membres du Sénat d'après un autre critère, par exemple celui de l'élection dans les voïvodies particulières. Ensuite, on peut recourir plus souvent au scrutin secret, en particulier en ce qui concerne les affaires personnelles. L'échelle des possibilités est assez vaste; il faut vouloir en tirer parti.

---

<sup>24</sup> Comme prévu au premier alinéa de l'article 100 de la Constitution de 1997.

\* \* \*

Le propos de l'auteur de ces observations n'est pas de présenter *ex cathedra* un projet détaillé de réforme du Sénat, mais de stimuler un débat de fond portant sur la direction des changements souhaitables, débat dont la nécessité est confirmée par les événements et les déclarations sur la scène politique. Le point de départ d'un tel débat doit être une réflexion approfondie sur le sens de l'existence du Sénat dans les conditions d'une démocratie parlementaire rationalisée et toujours en voie de rationalisation. Si l'échange d'opinions ainsi amorcé permet d'atteindre, par delà les intérêts des différents partis, un certain degré de consensus en ce qui concerne l'idée de réorienter tant soit peu le Sénat, et ce de la manière que nous suggérons, il y aura des chances pour réaliser l'idéal mythique de la chambre haute comme garant du bon sens et de la modération, dont les efforts pour assurer le respect des valeurs morales et politiques authentiques dans le droit créé sont efficaces.



## **SOME REMARKS ABOUT THE CONCEPTION OF EXECUTIVE POWER IN THE 1997 POLISH CONSTITUTION\***

**Maria Kruk\*\***

The Polish Constitution, adopted in April 1997, has been in force for five years now, but still some of its provisions, specific institutions or even systemic conceptions require interpretations, theoretical analyses, doctrinal assimilation. The more so that it does not express a direct continuation of the previous constitutional system or a simple evolution of systemic traditions. It grew out of political transformations, with old traditions and contemporary conditions, local and borrowed patterns, fixed habits and new aspirations, as well as a number of other circumstances, all influencing the adopted systemic solutions. Therefore the ongoing process of assimilation of the new constitution justifies all kinds of reflections which may contribute to the creation, against its background, of an up-to-date constitutional doctrine. One of the problems which - as it seems - is worth such reflections is the construction of the executive power. It reflects the whole complexity of the multitude of factors which influenced its constitutional conception.

In the first place, the character of this conception was shaped by the tendency to base the system of government in the 1997 Polish Constitution on a parliamentary model. This tendency originated from the tradition of the 1921 Polish Constitution, the first Polish constitution after more than 120 years of non-existence of the Polish State, which not only was a symbol of renaissance of the State, but also belonged to the generation of democratic European constitutions after WWI.

Although it eventually proved impossible and inexpedient to reproduce this model precisely, there is no doubt that the spirit of this traditional parliamentary system was constantly present during the formation of the constitution. In spite of a number of modifications having been introduced - sometimes of such crucial nature to prompt some to speak of a completely new system - one way or another it did influence the shape of the system of government and of its elements.

The executive power in the Polish Constitution has a dualist structure, i.e. it consists of two basic elements: the Head of State, that is the President, and the Govern-

---

\* This article is an updated version of a text published in *Instytucje współczesnego prawa administracyjnego (Księga jubileuszowa prof. Józefa Filipka)* [Institutions of Contemporary Administrative Law (Prof. Józef Filippek's Jubilee Book)], Kraków 2001.

\*\* Professor at the Institute of Law Studies of the Polish Academy of Sciences

ment, that is the Council of Ministers. Even though the executive power is vested in other entities as well, which is why some authors formulate the thesis of dispersed executive power, the President and the Government have the character of executive organs with general competence and superior position, each within its scope of competence.

In the course of the systemic discussion that accompanied the birth of the Constitution, and lasted even longer, conceptions appeared to exclude the President from this dualist structure of the executive and to put him as an arbiter, outside the system of the three main segments of the division of powers (legislature, executive, judiciary). But finally a more classical and traditional - from the point of view of the parliamentary system - conception was adopted in the Constitution. An argument in favour of this solution is the fact that the President participates in the mechanism of checks and balances and that his sphere of activity is substantively identical to that of the executive.

The adoption of such a conception meant that it was necessary to resolve the problems connected with mutual relations between the two parts of the executive. What made it even more difficult was the fact that the Polish President is not elected by Parliament (the National Assembly), unlike in a classical parliamentary system, but by universal election, which gives him a different kind of legitimacy and justifies the wider scope and more independent character of competencies - which are executive by the nature of things. This, potentially, involves the risk of conflict-producing competition with the government.

This situation determines the second element of the constitutional conception of executive power. Another problem was creating such mutual relations between these two organs so as to use the mechanism of balance and mutual checking, offered by the parliamentary system in the field of relations between the legislature and the two parts of the executive, but also to avoid competition within the executive itself, which would weaken the Government. Such apprehension was not ungrounded if we look at the tough and difficult practice of functioning of the executive, and particularly at the relations between the president and the government under the 1992 Constitutional Law (Interim Constitution).

Thus the authors of the 1997 Constitution did not spare any efforts to prevent such conflicts by precisely defining and separating the spheres of activity of both parts of the executive.

Thus, in general, the positions of the President and of the Government are determined by basic formulae defining their tasks. The President is the supreme representative of the State, the guarantor of the continuity of State authority, ensures the observance of the Constitution, safeguards the sovereignty and security of the State as well as the inviolability and integrity of its territory (Article 126.1). The Council of Ministers conducts the internal affairs and foreign policy of the State and manages the government administration (Article 146.1 and 3). A juxtaposition of these formulae, delineating in general terms the areas of competence of each of the organs in question, shows vividly this fundamental line of division of tasks between the two main parts of the executive power, thereby differentiating the systemic roles they are to play.

At the same time it highlights their separation from the systemic function of the legislature. Enacting laws (statutes) is a domain of the legislature, while the executive functions - ranging from safeguarding State sovereignty to conducting current policies - constitute the domain of the executive.

The above juxtaposition of both these general constitutional formulae makes it clear that the Polish Constitution applies the modern understanding of the executive function. The executive is treated not in the narrow sense of enforcing laws, but in more general terms, identified with implementing the State function in the sphere of State policy: determining and conducting it on all planes, with law enforcement, in the narrow sense, being only one of its elements.

In fact, the Constitution does make a formal reference to the enforcement of laws by listing the implementation of statutes as one of special tasks of the Council of Ministers (Article 146.4.1). However, we have to remember that there is one more dependency involved. On the one hand, it is the statutes that determine in a general manner the substantive sphere of activity of the executive power, because they - directly or indirectly - lay down the foundations and general conditions of State policy. On the other hand, statutes are an instrument of implementation of the government's policy, which is why the government is most interested in initiating them or influencing their contents.

In conclusion, one has to say that several factors have determined the conception of executive power in the 1997 Polish Constitution: firstly, the fact that its structure is based on the traditional model of dualist executive within the parliamentary system and that the competence of the executive (both of the whole executive and of its individual parts) is used in the mechanism of checks and balances; secondly, that the President derives his legitimacy from universal election, which compels strengthening of his position and increasing individual competencies in comparison to the parliamentary model; thirdly, that the competencies of the President and of the Government are separated within the executive, which in turn - if we do not want to subordinate the Government to the President or create conflict-producing areas - requires limitation of presidential competencies in the field of conducting and determining State policy, and especially in the field of his participation in the implementation of current policy.

This is not as bad as squaring the circle yet, but it already is a system in which conflicting factors have to be reconciled, so one may expect from the start that no model can be implemented consistently.

Thus the first question that comes up is how much of the parliamentary system is retained in this conception of the executive. An answer would require, first of all, a definition of this system, and - as we know - there is no single definition if we consider the different variations of this system existing in "time and space," that is in various countries (doctrines) and at various stages of their constitutional development. Because this is not our main question to focus on, we shall adopt only the most important features as the criterion. These features are: a dualist executive, the Head of State being elected by both chambers of Parliament (or not elected in monarchies) and not being held accountable to Parliament, thus free from political dependencies but also deprived of strong influence on State policy. By contrast, the Government appears as an autono-

mous organ implementing the programme of the parliamentary majority and being held politically accountable to Parliament for this and additionally being made responsible for acts of the Head of State by countersigning them. What is also characteristic of the parliamentary system is the specific system of relations within the triangle Parliament - President - Government, such relations maintaining the relative balance between the legislative and the executive powers.

Dualism of the executive power - apart from the phenomenon of including both the Head of State and the Government in the executive - assumes also that these two organs are independent and autonomous as regards their structure and competencies. The Government is not an auxiliary or implementing body for the President as the head of the executive (administration), but a completely separate organ. It is a collective organ, headed by the Prime Minister (and not the President), who is integrally linked with it. The Head of State is also a separate and autonomous organ of State authority and not, for example, one elected from among the Government or Parliament. The relations between these organs, as envisaged in the Constitution, are made up of various links, which fill this structure with important contents.

The 1997 Polish Constitution bases the structure of the executive on such a general pattern. The President of the Republic and the Council of Ministers (that is the Government, because in Poland these terms, and even “cabinet” are synonyms), are separate organs, autonomous as regards their organization and functioning. Even the Constitution makes a formal separation between them by regulating them in different chapters. The Chairman of the Council of Ministers (Prime Minister) heads the work of the Council, represents it, sets the tasks of ministers and entrusts them with the management of specific sectors of the administration. This latter function reinforces the independence of the Government (and thereby that of the Prime Minister, which prompts certain authors to find some elements of the chancellor’s system here), because it signifies departure from the conception present in the 1952 Constitution, according to which the Sejm determined the scope of activity of ministers.

Despite the structural autonomy of the President and of the Council of Ministers, these organs together constitute the executive power, as the Constitution clearly states in Article 10.2. This is of vital importance, because it logically links these two organs in their relation towards the legislative power, and in particular to the Sejm as the chamber that can hold the Government politically accountable. This is precisely where the whole complexity of relations between the Government and the President becomes manifest.

The President nominates the Prime Minister and appoints the Council of Ministers, accepts resignation of the Council, changes—upon the Prime Minister’s motion — persons on the posts of ministers, accepts the oath of members of the Government. While the Sejm is the political “creator” of the Government (government of the parliamentary majority), the President appoints it formally. The Government is then formed within the executive and receives political acceptance for its composition and programme from the Sejm, as expressed by a vote of confidence. This is slightly different in the alternative method of appointment of the Council of Ministers according to Article 154.3 (if the Government appointed by the President does not obtain a vote of confidence, the Sejm chooses the

Prime Minister and the Government), resulting not so much from an exchange of systemic roles between the President and the Sejm but from the need to prevent political crisis (non-appointment of the Government, dissolution of Parliament), but even in this method it is the President who finally appoints the Government formally.

The *sui generis* unity of the executive power becomes even more evident when we remember the President's right to dissolve the Parliament (the current Constitution uses the term "shorten the term of office"). So the President is obliged to shorten the term of office of the Sejm and also of the Senate when the Sejm fails for the second time to grant a vote of confidence in the new Government (Article 155.2). The President also has the discretion to do so if the Sejm fails to present to the President a budgetary statute for signature within four months of submission of a draft thereof. It is clear that the intention behind dissolving the Parliament was to give the President a possibility to act for the benefit of the Government. In the first case the threat of dissolution forces the creation of a positive majority in the Sejm to support the Government, in the second case it prevents the Sejm from paralysing the actions of the Government by not adopting the budgetary statute. These actions serve to support the stability and effectiveness of the Government, and are a kind of means of "providing succour." But — unlike in some other constitutional systems — the Head of State does not act upon a motion from the Head of Government. The institution of dissolving the parliament is also one of the instruments of reaching balance between powers, such balance being inherent in the division of powers, and being stated *expressis verbis* in Article 10.1 of the Polish Constitution.

However, in the 1997 Polish Constitution there is no subordination of the Government to the President, either direct or indirect, e.g. through reporting. In this way the Government is not accountable twice, before the Sejm and the President, but has only the classical parliamentary responsibility, realised in the typical forms of parliamentary control over the Government and the governmental administration. Additionally in the 1997 Constitution the institution of the vote of confidence and of the vote of no confidence is at the top of the list, but with the vote of censure being modified to a constructive form (following the German example), which manifests a rationalization of parliamentarism and is a yet another form of protecting the Government's stability.

As we can see, the basis traits of executive power in the current Polish Constitution correspond to the general features of executive structure in the parliamentary model.

The situation is different as regards presidential elections. In 1989, when the institution of the President was introduced (or restored after 47 years) to replace the Council of State (a collective presidential organ in the 1952 Constitution), the National Assembly was entrusted with the choice of the President, like in the 1921 Constitution. This reinforced the tradition of Polish constitutionalism in this field. In 1989, this Constitution was a kind of point of reference for shaping parliamentary democracy in the period of transformations and was probably the only possible form in the reality of 1989, after the Round Table.

However, as early as in 1991, this method of electing the President was replaced with universal ballot, that is by election by the Nation. Both the 1992 Constitutional Law and

the 1997 Constitution maintained this state of affairs, departing from the classical parliamentary system. Although this departure was introduced in several European constitutions, especially in that of the Fifth French Republic (where some part of the constitutional doctrine does not consider it a departure from the parliamentary system), this could not have remained without influence on the general conception of the executive.

What fundamental value of the parliamentary system is infringed when the President is elected by universal ballot? It seems that, first of all, there is a potential threat to a certain synergy of the executive policy. The President, elected in universal election, takes part in an election campaign, which means political fight with other candidates, presenting and promoting his own political programme, including promises - typical for the language of election campaigns - to achieve specific political and social objectives. An attempt to fulfil such promises may be inconsistent with the programme implemented by the Government, particularly when the President and the Government represent different political options. And this may cause conflicts within the executive. Instead of supporting the Government with the help of his competencies (the right of legislative initiative, refusal to sign a statute, dissolution of Parliament, etc.), the President may be a hindrance to it.

On the other hand, the President's competencies are not strong enough for him to implement his own policy. The practice of recent years in Poland does provide examples of such conflicts, but — what is more - it demonstrates clearly that Polish politicians now realise the existence of this trap. The first President elected by the nation often explained that he was unable to fulfil his election promises through lack of competencies. During the last presidential election campaign, objections were raised against the candidates for their failure to present programmes and to discuss problems. But this - regardless of any other reasons - was quite a healthy reaction against making empty gestures and proposing unreal programmes.

A public campaign has one more aspect, which is not noticed and maybe does not have much importance. It submits the President — as a candidate — to harsh and often unsophisticated evaluation in the course of political electoral fights, which weakens the authority of the later representative of the State. It is not by accident that in the tradition of the National Assembly electing the President, no debates on the candidates were conducted in the course of the election act.

However, the lack of executive competencies of the Head of State to implement his own programme of State policy is inconsistent with the position of a President coming from universal election. The famous French saying that the nation does not elect the President directly in order for him to open exhibitions of chrysanthemums well explains the core of the problem. Therefore in the Constitution of the Fifth Republic the position of the President is clearly stronger, e.g. by the fact that the President heads the sittings of the Government. Recently, one more amendment was made in the Constitution equalling the duration of the terms of office of the Head of State and of the Parliament in order to increase the chances for the President and the parliamentary majority to represent a uniform political option. This further reinforces the President's political power.

The Polish Constitution does not follow the French example in this respect, although such a model was favoured by President Wałęsa. On the one hand, the more traditional option of parliamentarism prevailed, on the other, the Polish system of political parties did not guarantee reproducing the French mechanisms. On the contrary, a decision was made to separate the President from the Government even more strongly than in the period of validity of the 1992 Interim Constitution.

One of the most important manifestations of the reinforced position of the President was to be the wide catalogue of his prerogatives, that is official acts which did not require governmental counter-signature (of the Prime Minister), which e.g. in the 1921 Constitution was necessary for all acts of the Head of State. As for many of these prerogatives this is more of an illusion of power than real independence in decision-making, because a number of these acts either do not involve more important political decisions or are made upon a ministerial motion or — finally — are politically determined, leaving a narrow margin of independence of authority. But we have to admit that in a country where acute political conflicts may occur between the President and the Government, the wide scope of prerogatives makes it impossible for the Government to paralyse the President's decision. But in some cases such as a refusal to sign a statute, legislative initiative, appointing or proposing candidates for certain posts, the initiative of constitutional amendments or a request to conduct a referendum regarding such amendments, complaint to the Constitutional Tribunal — the lack of a required countersignature indeed strengthens the President's powers.

In a vast majority of countries with parliamentary systems, even in modified versions, the right of legislative initiative is vested in only one part of the executive, usually in the Government. Giving this power to both parts of the executive may be another way to disunite the executive and create room for conflict within it. The Polish Constitution gives this right to both the Government and to the President (in order to increase his powers), but so far in the Polish practice any serious reasons for concern have occurred (even though there were cases when conflicting presidential and governmental drafts met in the Sejm) because the Presidents have been rather reticent in submitting drafts of statutes. Actually, this was sometimes criticized. However, reversing this trend would not necessarily have positive effects.

There is an institution which is becoming a strong instrument in the President's hands: the right of refusal to sign a statute. Not long ago the press usually informed about new legal instruments as soon as they were adopted by the Sejm, but nowadays it is more and more frequent to come across the reservation "if the President signs it." It has become a custom for various fractions of public opinion to approach the President to sign or not to sign a given statute. Because usually matters that arise such public or political interest concern important programmatic governmental decisions (it was the case of the tax reform in 1999 or of public enfranchisement in 2000), the President's decision may encroach upon the political and economic actions of the Government and effectively counteract its policies in this respect. Of course, this is not so much an objective instrument of the President's power but rather a weakness of the parliamentary majority, which is not strong enough to re-submit the adopted statute to the Sejm or

which does not base its legislative decisions on a wider consensus, as it happened in the minority Government during the previous term of office.

As we have already mentioned, the authors of the 1997 Constitution were aware of the fact that the powers of a President elected by the nation should correspond to his legitimacy. At the same time, the shape of his powers was influenced by the awareness that if competencies and fields of activity of the President and of the Government in the executive sphere are “mixed,” this may potentially bring about conflicts, weaken the Government and, consequently, the stability and effectiveness of the whole executive and not favour its homogeneity. In the previous periods (1992-1997) even such constitutional guarantees of cooperation between the Government and the President as the requirement of presidential approval for persons nominated for the posts of Ministers of Defence, Foreign Affairs and Home Affairs turned out to be rather a plane of conflict than of accord (Prime Ministers had to leave the personal decisions in this respect to the President to avoid bringing matters to a head).

However, since the executive, as the executive function of the State, is in a way indivisible, no efforts were spared in the course of constitutional work to determine the competencies of these organs as precisely as possible. As we have already mentioned, the general line of this division is based on granting the Government an exclusive right to determine and conduct State policy, with the assumption of governmental competencies wherever such competencies were reserved for other State organs. This is very similar, *toutes proportions gardées*, to the formula that the government governs and the king rules. What should help achieve this goal is a list of competencies and interpretation guidelines, especially in areas where the powers of the President and of the Government converge (particularly defence, foreign policy, State security). The Constitution itself is somewhat useless here and uses vague wording (such as “through” in Article 134.2, “cooperate” in Article 133.5). In such a case either a statute determines the further separation of competencies (the very adoption thereof may provoke disputes between the concerned parties, as it happened in connection with the right to dispose of the army in the course of adopting the 1998 Act on the Deployment or Stay of the Armed Forces Abroad - the problem was which organ is to take the decision and which should make a relevant motion) or this is transferred onto the practical plane (here a competence dispute has already arisen with respect to nominating ambassadors).

As early as in the 1992 Constitutional Law, the institution of the Cabinet Council was introduced into the system of State organs (earlier present in the 1947 Interim Constitution). It is composed of the Council of Ministers presided over by the President, who also convenes it. Although it did not play an important systemic role before, the authors of the current Constitution thought it a useful institution for communication between the President and the Government, providing the President with an opportunity to obtain information and give the Government his opinions about the most important matters of State policy, and also serving as a kind of neutral and yet formal plane of possible cooperation between both parts of the executive. But to prevent transforming the Cabinet Council into an instrument “dispossessing” the Government of its independence in determining and conducting State policy and, this way, allowing the Presi-

dent to take over the Government's functions or simply to subordinate or steer it, the Constitution stipulates that the Cabinet Council does not possess the same competence as the Council of Ministers, which means that it cannot perform the constitutional tasks of the Government.

The beginning of the term of office of the Government of Jerzy Buzek saw an almost perfect occasion for this constitutional idea to materialize. At that time the Council of Ministers decided that a representative of the President would not be invited to regularly participate in meetings of the Government (which traditionally was the case). Breaking this form of working contacts prompted President Kwaśniewski to convene the Cabinet Council. This was not the beginning of a regular practice, but the President has convened the Cabinet Council several times, also during the term of office of a leftist Government (not in opposition to the President), which demonstrates that it is not a completely redundant institution.

It seems obvious that the relations between the President and the Government will be - on the ground of the constitutional conception - different, depending on the political options of the President and the Government (the actual political disengagement of the President, particularly one coming from universal election, depends on non-legal factors). The relatively short constitutional practice in this respect does not yet allow us to discover any regularities today. More experience is probably necessary, especially as regards the function of the Prime Minister, in order to determine how much the system created by the current Polish Constitution can evolve towards the chancellor's system. And how much need for such evolution will the political system show.

The remarks presented here do not exhaust the issue stated in the title and do not deal with all the questions which should complement the reflections about the constitutional conception of executive power, such as the position and competence of the Prime Minister or instruments of the so-called rationalization of parliamentarism, which modify - in comparison to the traditional parliamentary system - the relations between the Government and the Sejm.

But even this brief analysis allows us to state, in conclusion, that the current Polish Constitution, even with its complicated approach to executive power, is prepared for coexistence, within the dualist executive, of various political options, thanks to which it will not lose its regulatory capability even in a situation of the strongest opposition between these two.



## POLISH SEJM'S PROCEDURE FOR APPROXIMATING POLISH LAW TO THE LAW OF THE EUROPEAN UNION

Jerzy Jaskiernia\*

1. On 13 July 2000, the Polish Sejm amended its Standing Orders.<sup>1</sup> Each amendment to the Sejm's Standing Orders (SO) evokes interest among the public opinion and scientific circles.<sup>2</sup> What is at stake here is undoubtedly particularly important systemic problems.<sup>3</sup> Usually they relate to issues which are no less than an extension of constitutional norms and they are based on express provisions of the fundamental law.<sup>4</sup> The recent amendments to SO are directly connected with the problem of adjusting Polish legislation to that of the European Union.<sup>5</sup> SO use the term "law of the European Union," even though this applies *primo loco* to the law of the European Communities, and only to a limited degree to EU law.<sup>6</sup> However, since the whole adjustment procedure focuses on the requirements connected with obtaining membership of the European Union,<sup>7</sup> it is

---

\*Professor of constitutional law at the Świętokrzyska Academy in Kielce, MP, Chairman of the Commission of Foreign Affairs of Polish Sejm.

<sup>1</sup>See the Resolution of the Sejm of the Republic of Poland dated 13 July 2000 on amendments to the Standing Orders of the Sejm of the Republic of Poland, *Monitor Polski*, no. 21, item 428.

<sup>2</sup>Cf. M. K u d e j: "Zmiany w regulaminie Sejmu, dokonane 4 września 128 października 1997 r." [Amendments to the Sejm's Standing Orders made on 4 September and 28 October 1997], *Przegląd Sejmowy* 1998, no. 3, p. 30 and following.

<sup>3</sup>Cf. P. S a r n e c k i: "Funkcje i struktura parlamentu według nowej konstytucji" [Parliament's Functions and Structure in the New Constitution], *Państwo i Prawo (PiP)* 1997, no. 11-12, p. 38 and following; A. S z m y t: "Nowe elementy konstytucyjne i regulaminowe postępowania ustawodawczego" [New Elements of the Legislative Procedure in the Constitution and the Standing Orders], *Przegląd Sejmowy* 1998, no. 3, p. 30 and following.

<sup>4</sup>It is stressed that the 1997 Constitution treats differently the matters regulated in the Standing Orders, for the first time clearly indicating the admissibility of regulating in them certain "external" issues and also setting the limits for regulating them. S e c L. G a r l i c k i: "Konstytucja - Regulamin Sejmu - ustawa" [Constitution - Standing Orders of the Sejm - Statute], *Przegląd Sejmowy* 2000, no. 2, p. 14.

<sup>5</sup>About the duty of approximation in a broader context of the European integration process cf. G. G r a b o w s k a: "Poland on the Way to the European Union: From Association to Accession in the Context of Environmental Policy" [in:] P.L.C. T o r r e m a n s (ed.): *Legal Convergence in the Enlarged Europe of the New Millennium*, The Hague-Boston-London 2000, pp. 2-3.

<sup>6</sup>Cf. J. B a r c z: *Stosowanie prawa Wspólnot Zachodnioeuropejskich w państwach członkowskich (Problemy konstytucyjnoprawne)* [Applying the Law of the West European Communities in the Member States (Constitutional Law Problems)], Warszawa 1991, p. 23 and following.

<sup>7</sup>Cf. B. Brzeziński, J. Głuchowski, C. Kosikowski: *Harmonizacja prawa podatkowego Unii Europejskiej i Polski* [Harmonisation of Tax Law of the European Union and Poland], Warszawa 1998, p. 12 and following; W. Maruchin: *VAT — harmonizacja polskiego prawa podatkowego z prawem Unii Europejskiej* [VAT - Harmonising the Polish Tax Law with the European Union Law], Warszawa 1998, p. 22 and following.

probably in order to simplify the picture that SO use the term "EU law," which is also referred to as "European law."<sup>8</sup>

2. Article 2 of the Treaty establishing the European Community (TEC)<sup>9</sup> stipulates that the Community's task is, by establishing a common market and economic and monetary union and implementing common policies, to "promote throughout the Community a harmonious, balanced and sustainable development of economic activities, sustainable and non-inflationary growth, a high level of protection and improvement of the quality of the environment, a high level of development and social protection, the raising of the standard of living, economic and social cohesion and solidarity among Member States." Integration is perceived, in the neo-functionalist terminology, as a "formal transfer of power from the national level to the supra-national level in the economic areas which are to be covered by its scope," but the purpose of the convergence mechanism, which is connected with it, is to achieve "cohesion" by "reducing the socio-economic differences between regions and nations within Europe."<sup>10</sup> We can observe here a one-way flow of power or competencies from the Member States to the European Communities, which means "a real transfer of power and not just delegation of rights by national legislations."<sup>11</sup> As a consequence, the sovereignty of the Member States becomes limited.<sup>12</sup> However, the States are acting in accordance with their interest, transfer their competencies in the conditions of free expression of will, which satisfies "the principle of sovereign equality."<sup>13</sup>

TEC determined the objectives of activity of the Communities and indicated the instruments for achieving them. They include "the approximation of laws of the Member States to the extent required for the functioning of the common market" (Article 3 h). TEC uses the notion of approximation of legal provisions. Title V in part I reads: "Com-

---

<sup>8</sup> Cf. J. A. Wojciechowski: "Dostosowanie prawa polskiego do prawa europejskiego - proces bez końca" [Approximating Polish Law to European Law - an Endless Process], *Przegląd Prawa Europejskiego* 1996, no. 1, p. 7. Sometimes the term "European legal solutions" is used here, see R. Szostak: "O konieczności dostosowania polskich przepisów o ochronie konsumentów do europejskich rozwiązań prawnych" [On the Necessity of Adjusting Polish Provisions on Consumer Protection to the European Legal Solutions], *Przegląd Sądowy* 1995, no. 2, p. 33.

<sup>9</sup> The Treaty was signed on 15 March 1957 in Rome and was entitled "Treaty establishing the European Economic Community." The current name is used from 1 November 1993, i.e. from the day of entry into force of the Treaty on the European Union; see *Prawo Wspólnot Europejskich. Dokumenty* [Law of the European Communities. Documents] selected and edited by W. Czaplinski, R. Ostriansky, A. Wyrozumska, Warszawa 1996, p. 11.

<sup>10</sup> L. Leonard: *Cohesion and Integration in the European Union*, New York 1995, p. 34. Cf. L. Hooghe: *Cohesion Policy and European Integration*, Oxford 1996, p. 39.

<sup>11</sup> D. Obradovic: "Repartition of Powers in the European Community," *Common Market Law Review* 1997, no. 1, p. 59.

<sup>12</sup> Cf. C. Richmond: "Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law," *Law and Philosophy* 1997, vol. 16, pp. 379-381. Cf. W. Grabska: *Problem suwerenności narodowej w Unii Europejskiej ze szczególnym uwzględnieniem porozumień z Maastricht. Aspekt ekonomiczny* [The Problem of National Sovereignty in the European Union with Special Emphasis on the Maastricht Agreements. The Economic Aspect], Warszawa 1994, p. 12 and following.

<sup>13</sup> A. Wasilkowski: "Uczestnictwo w strukturach europejskich a suwerenność państwowa" [Participation in the European Structures and State Sovereignty], *PiP* 1996, no. 4-5, p. 23.

mon rules on competition, taxation and approximation of laws.” Article 100 is of vital importance here: “The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations and administrative provisions of the Member States as directly affect the establishment or functioning of the common market.” Both notions - adjustment and approximation - refer to the same process of harmonisation of laws of the Member States, whose long-term objective is to be the creation of an integrated legal system.

3. The Europe Agreement establishing an association between the Republic of Poland, on the one part, and the European Communities and their Member States, on the other part, signed on 16 December 1991,<sup>14</sup> contains, *inter alia*, important provisions on the approximation of legal systems. Article 68 provides that “The Contracting Parties recognize that a major precondition for Poland’s economic integration into the Community is the approximation of that country’s existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.” Detailed solutions are contained in Article 69: “The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.”

The adopted construction “in particular” caused problems of interpretation whether the duty of approximation referred to in Article 69 covers all the matters of European regulation with the enumeration serving only as an example or whether it should be interpreted differently.<sup>15</sup> It follows from the interpretation prepared by the Legislative Council that, in the light of the provisions of Article 68 of the Europe Agreement, Poland is not under an absolute obligation to adjust Polish law to EU law. Thus if no direct obligations result from the remaining articles of this document, it is “admissible and possible... to gradually adjust new legal acts, in particular, where the interest of the State or e.g. important social reasons so require.” However, Poland cannot use this possibility without particularly justified reasons, otherwise it would infringe the obliga-

---

<sup>14</sup>The Agreement entered into force on 1 February 1994, text: *Dziennik Ustaw* (Dz.U.) [Official Journal], no. 11/1994, item 38; sec: *Prawo Wspólnot Europejskich* . . ., *op. cit.*, p. 145 and following.

<sup>15</sup>J. A. Wo j c i e c h o w s k i, *op. cit.*, p. 7. Cf. in-depth analyses of interpretation dilemmas contained in the following papers: P. S a g a n e k: “Wybrane problemy dostosowania polskiego prawa do prawa Unii Europejskiej” [Selected Problems of Adjusting Polish Law to the European Union Law] [in:] P. S a g a n e k, T. S k o c z n y (eds.): *Wybrane problemy i obszary dostosowania polskiego prawa do prawa Unii Europejskiej* [Selected Problems and Areas of Adjustment of Polish Law to the European Union Law], Warszawa 1999, p. 44 and following; C. M i k: “Problemy dostosowania polskiego systemu prawnego do europejskiego prawa wspólnotowego (w kontekście przyszłego członkostwa Polski w Unii Europejskiej)” [Problems of Adjusting the Polish Legal System to the European Community Law (in the Context of Poland’s Future Membership of the European Union)], *Przegląd Legislacyjny* 1998, no. 1—2, p. 71 and following.

tion to “use its best endeavours to ensure that future legislation is compatible with Community legislation.”<sup>16</sup>

An example of an obligation formulated in this way is contained in Article 44, paragraph 2 of the Europe Agreement, which stipulates that: “Poland shall, during the transitional periods..., not adopt any new regulations or measures which introduce discrimination as regards the establishment and operations of Community companies and nationals in its territory in comparison to its own companies and nationals.”<sup>17</sup>

The Europe Agreement does not define a detailed plan of adjustment measures but only a general timetable for their implementation. According to that timetable, the adaptation is carried out in three phases: 1) at the entry into force of the Europe Agreement; 2) within the first five years of the implementation of the association agreement; 3) during the entire transition period, i.e. during the ten years following the entry into force of the Europe Agreement.<sup>18</sup> However, there occurred a complication connected with the fact that, in spite of the elapse of the five-year period, the second phase of association did not start on 1 February 1999. The Polish Government argued that “the association covers a transition period of a maximum of ten years, divided into stages, each lasting in principle five years” and “the Association Council will meet to take the decision on moving to the second stage.”<sup>19</sup> Consequently, there appeared a problem of precise determination of the scope of the duty of approximation in the first stage in a situation where the limits of this stage had not been set precisely. This leads to a paradoxical situation: one can claim that the duty of approximation does not exist in certain regulated fields, because the first stage is not complete yet, but the end of the first stage depends, in turn, on whether Polish law has been sufficiently approximated to EU law.

4. The main tasks in the process of approximation are imposed on the Government. The Government's point of reference in preparing the timetable of approximation work was the *White Paper* of the European Commission. In these areas where the duty of approximation exists, the government uses its legislative initiative. The central body of state administration, which programs and co-ordinates approximation activities, is the Committee for European Integration providing expert assistance to the bodies participating in the process of adjusting Polish legislation to EU law. Prepared drafts of nor-

---

<sup>16</sup> See the Legislative Council: “Opinia w sprawie stosowania zasady bezwzględnej zgodności normatywnych aktów prawnych z prawem Unii Europejskiej w nawiązaniu do projektu ustawy o zmianie ustawy Kodeks Morski” [Opinion on the Application of the Principle of Absolute Conformity of Normative Legal Acts with the European Union Law with Reference to the Bill on Amendments to the Act - Sea Code], *Biuletyn Rady Legislacyjnej* 1995, no. 4, pp. 70-79.

<sup>17</sup> Cf. E. K a w e c k a - W y r z y k o w s k a: “Stowarzyszenie Polski ze Wspólnotami Europejskimi - czy bliżej pełnego członkostwa” [Poland's Association with European Communities: Is It Closer to Full Membership], *Wspólnoty Europejskie* 1995, no. 6, p. 15 and following.

<sup>18</sup> See *Narodowa Strategia Integracji* [National Strategy for Integration], *Monitor Integracji Europejskiej* (special edition), January 1997, p. 46.

<sup>19</sup> See the letter of M. K a r a s i Ń s k a - F e n d l e r, acting as the Secretary of the Committee for European Integration, to J. Wojcieszczuk, Under-secretary in the Ministry of Finance, of 21 January 1999, p. 1 (Archive of the European Integration Committee of the Polish Sejm).

mative acts are subject to control from the point of view of their compliance with EU law.<sup>20</sup>

The parliament has an important role to play here as well, because it is responsible for finally developing and adopting the approximation acts.<sup>21</sup> Until 1999, the parliamentary phase of legislative procedure was a weak point in the system of examining the compliance of draft legislation with EU law.<sup>22</sup> There was no comprehensive, efficient procedural mechanism for eliminating inconsistencies with EU law in the drafted provisions.<sup>23</sup> Only governmental bills were sent to the Committee for European Integration to receive an initial opinion. Thus the National Strategy for Integration stated that: "a system of scrutinising members' bills and changes in the Government drafts introduced in the course of legislative work must be set up as soon as possible."<sup>24</sup> The inconsistencies with EU law did not apply only to parliamentary bills, whose compliance with EU law was not subject to control by the Committee for European Integration, but they also appeared in governmental drafts, which obtained positive evaluation from the Committee and which, in the course of the legislative procedure, were modified and thereby made incoherent with EU law.

In legal literature there were postulates to correct this state of affairs, suggesting that a Sejm committee or the Presidium of the Sejm should be granted relevant control powers and also that the justification should contain a declaration that the bill is in conformity to EU law.<sup>25</sup> There were even proposals to create a "European advance warning" system, which would provide for analysing bills at all stages of legislative procedure in the Sejm in order to determine whether any new provisions contrary to EU law have appeared in them.<sup>26</sup> There have also been attempts to amend SO to oblige

<sup>20</sup> Sec Resolution 16/94 of the Council of Ministers of 29 March 1994 on additional requirements for procedure applicable to governmental drafts of legal acts due to the necessity of meeting the criteria of compliance with the law of the European Union, sec *Narodowa Strategia ...*, op. cit., p. 48.

<sup>21</sup> Cf. J. Jaskiernia: "Działalność parlamentu polskiego a proces integracji europejskiej" [Activity of the Polish Parliament and the Process of European Integration] [in:] K. Kik- *Traktat z Amsterdamu a polskie aspiracje prointegracyjne* [The Treaty of Amsterdam and the Polish Pro-integration Aspirations], Kielce 1998, p. 42 and following.

<sup>22</sup> Cf. S. Drabczyk: "Instrumenty wspomagania w sferze prawnej procesu integracji Polski z Unią Europejską" [Instruments of Support in the Legal Sphere of the Process of Poland's Integration with the European Union] [in:] *Dostosowanie polskiego prawa do wymogów Unii Europejskiej* [Adapting the Polish Law to the Requirements of the European Union], Warszawa 1998, vol. 1, p. 33.

<sup>23</sup> Cf. C. Mik, M. J. Nowakowski, B. Pawłowski: "Rola i kompetencje Sejmu w procesie integracji europejskiej" [The Role and Competencies of the Sejm in the Process of European Integration] [in:] *Rola Sejmu a rola parlamentów narodowych państw członkowskich w procesie integracji z Unią Europejską* [The Role of the Sejm and the Role of National Parliaments of Member States in the Process of Integration with the European Union], Bureau of Research of the Chancellery of the Sejm, Information and Opinions, IP-78, Warszawa 1998, p. 1 and following.

<sup>24</sup> Sec *Narodowa Strategia ...*, op. cit., p. 48.

<sup>25</sup> See G. Rysiak: "Dostosowanie prawa polskiego do prawa Wspólnot Europejskich a postępowanie legislacyjne" [Approximation of Polish Law to the Law of the European Communities and the Legislative Procedure] [in:] M. Biernat, J. Adamiec, J. Karolczak, G. Rysiak: *Informacja na temat zgodności prawa krajowego z prawem wspólnotowym* [Information about Domestic Law Compliance with Community Law], Bureau of Research of the Chancellery of the Sejm, 1-159, Warszawa - December 1993, p. 7.

<sup>26</sup> J. Jaskiernia: "Regulacja prawna procedur parlamentarnych" [Legal Regulation of Parliamentary Procedures], *PiP* 1994, no. 11, p. 28.

sponsors of a bill to submit a declaration that the bill is in conformity to EU law.<sup>27</sup> A special European Integration Team was established in the Bureau of Research of the Chancellery of the Sejm to analyse the conformity of bills to EU law.<sup>28</sup>

Finally, the problem was solved in 1999 by amendments to SO.<sup>29</sup> The sponsors of bills are now under a duty to submit a declaration “on conformity of the bill to the European Union law or on the degree and reasons for non-conformity thereto, or a declaration that the subject-matter of the draft regulation is not encompassed by the European Union law” (Article 31 para. 2, subpara. 7). It was decided that the Speaker refers every bill, except for the bills sponsored by the Council of Ministers, to the experts from the Chancellery of the Sejm for an opinion about its conformity to EU law (Article 3 para. 7). Where any non-conformity is found, the bill is sent to the European Union Committee to obtain its opinion, which is then given to the sponsor (Article 31 para. 8). Representatives of the Committee for European Integration were granted the right to warn about any non-conformity between the drafted provisions and EU law at all stages of the legislative procedure.<sup>30</sup>

The introduced mechanism contributed to increasing the Sejm’s sensitivity to the compliance of drafted statutes with EU law. The most important issue here is examination of bills by experts from the Chancellery of the Sejm. Thus, once the legislative initiative is undertaken, the Deputies receive the bill accompanied by their opinion. This makes it possible to spot the non-conformity at a very early stage of legislative procedure and to include the European Integration Committee in resolving disputes where it is indicated that the bill is not in conformity to EU law.<sup>31</sup>

This new procedure meant overcoming the lack of a systemic mechanism for examining the compliance of bills with EU law at all stages of the legislative procedure. It could not, however, have quickened the pace of work on the approximation bills. But the evaluations given by the European Commission indicated that delays in approximation of the Polish law to the EU law might be an important reason for delaying Poland’s

<sup>27</sup> See the Deputies’ draft of Resolution on Amendments to the Standing Orders of the Polish Sejm, II term of office of the Sejm, print 1684. Cf. R. Piotrowski: *Opinia o skutkach projektowanej uchwały Sejmu, dotyczącej uwzględnienia dostosowania prawa polskiego do prawa Unii Europejskiej (druk 1684) oraz poprawności legislacyjnej tej uchwały* [Opinion on the Consequences of Draft of the Sejm Resolution on Considering Approximation of Polish Law to the European Union Law (print 1684) and on the Legislative Correctness of this Resolution], Bureau of Research of the Chancellery of the Sejm, Warszawa - 26 June 1996, p. 6.

<sup>28</sup> See C. Mik: “Zespół Integracji Europejskiej” [European Integration Team] [in:] *Problemy integracji europejskiej - dostosowanie prawa* [European Integration Problems - Approximation of Laws], *Ekspertyzy i Opinie Prawne* (Bulletin of Bureau of Research of the Chancellery of the Sejm) 1998, no. 3, p. 5.

<sup>29</sup> See Resolution of the Sejm of the Republic of Poland of 22 May 1999 on Amendments to the Standing Orders of the Sejm of the Republic of Poland, *Monitor Polski*, no. 34, item 323.

<sup>30</sup> See J. Jaskiernia: “Badanie zgodności projektów ustaw z prawem Unii Europejskiej w sejmowym postępowaniu ustawodawczym” [Examining Conformity of Bills to the European Union Law in the Sejm’s Legislative Procedures], *PiP* 1999, no. 7, pp. 27-30.

<sup>31</sup> More about the comparative experiences, see J. Barcz: “Konstytucyjnoprawne problemy stosowania prawa Unii Europejskiej w Polsce w świetle dotychczasowych doświadczeń państw członkowskich” [Problems of Constitutional Law in the Application of the Law of the European Union in the Light of Experiences of Member States] [in:] M. Kruk: *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym* [International and Community Law in Domestic Legal Order], Warszawa 1997, p. 209.

accession to the EU.<sup>32</sup> According to the Government's analyses, there are 178 approximation statutes to be adopted in the years 2000-2001, out of which 97 should be adopted in 2000 (see table).

In this situation, managing bodies of the Sejm took the initiative to establish a special committee, which might speed up the approximation work according to special procedure. The Presidium of the Sejm, in co-operation with the Government, initiated amendments to SO after consultations with chairmen of clubs of Deputies and the Presidium of the European Integration Committee.<sup>33</sup>

5. The amendments to SO<sup>34</sup> adopted by the Sejm are a novelty in comparison to the existing practice of Sejm's regulations, because they establish procedural mechanisms relating not only to a certain group of matters, but also to the procedure to be followed by a special committee, which is to work according to different rules than those applicable to all other special committees envisaged in SO.<sup>35</sup>

Article 56u SO is of fundamental importance. It reads: "Unless the provisions of this Chapter provide otherwise, the provisions of Section II, Chapters 1,1a and 6, shall apply to procedure for bills about which the Council of Ministers declared that their aim is to approximate Polish legislation to the law of the European Union, hereinafter referred to as 'approximation bills'." Thus, the provisions of SO on the procedure for bills and drafts of resolutions (Chapter 1), on urgent bills (Chapter 1a) and those regulating the sittings of Sejm's committees (Chapter 6) apply only if they regard other matters than those dealt with in Chapter 1c ("Procedure for bills approximating Polish legislation to the law of the European Union"). Therefore, the special procedure regulated in Chapter 1c, is triggered as early as when the Council of Ministers submits a bill accompanied by a declaration that it is an approximation bill. Only the Council of Ministers has the right to make a declaration which produces such effect. It was not granted to other subjects having the right of legislative initiative (Deputies, the President, the Senate, a Sejm committee). This does not mean, however, that only governmental bills may be treated as approximation bills. It follows indirectly from Article 31, paragraph 3b, which stipulates: "The sponsor shall attach a Polish translation of the text of provisions of the European Union to which Polish legislation is to be adjusted to as justification for an approximation bill, referred to in Article 56u, submitted by the President, the Council of Ministers, the Senate or a Sejm committee." This norm tells us that also bills

<sup>32</sup> Sec Stan realizacji działań legislacyjnych, które powinny zostać zakończone do czerwca i września br., w sposób umożliwiający odnotowanie postępu w Regularnym Raporcie Komisji Europejskiej na rok 2000 [Status of Implementation of Legislative Activities to be Completed by June and September This Year in a Way Allowing to Record the Progress in European Commission's Regular Report for 2000], Office of the Committee for European Integration, Warszawa - 25 July 2000, pp. 1-3.

<sup>33</sup> <sup>3</sup> See Projekt uchwały w sprawie zmiany Regulaminu Sejmu Rzeczypospolitej Polskiej [Draft of the Resolution on Amendments to the Standing Orders of the Sejm of the Republic of Poland], Sejm of III term of office, print no. 2010.

<sup>34</sup> Resolution of the Sejm of the Republic of Poland of 13 July 2000 on amendments to the Standing Orders of the Sejm of the Republic of Poland entered into force on the day it was promulgated.

<sup>35</sup> More about the separate procedures for dealing with specific types of bills in M. K u d e j: Postępowanie ustawodawcze w Sejmie RP [Legislative Procedure in the Polish Sejm], Warszawa 1998, p. 55 and following.

Legislative work connected with approximation of Polish law  
to European law for Poland's accession to the European Union in 2003

o

| Area                             | Statutes at the stage<br>of work in the Sejm.<br>To be adopted by the<br>Sejm in: |      |      |       | Statutes at the stage of<br>work in the Government.<br>To be adopted by the<br>Sejm in: |      |      |       | Total to be<br>adopted by the<br>Sejm in: |      |      | Total at the Sejm/<br>Government stage |
|----------------------------------|-----------------------------------------------------------------------------------|------|------|-------|-----------------------------------------------------------------------------------------|------|------|-------|-------------------------------------------|------|------|----------------------------------------|
|                                  | 2000                                                                              | 2001 | 2002 | Total | 2000                                                                                    | 2001 | 2002 | Total | 2000                                      | 2001 | 2002 |                                        |
| Free movement of goods           | 7                                                                                 |      | -    | 7     | 5                                                                                       | 4    | 2    | 11    | 12                                        | 4    | 2    | 18                                     |
| Free movement of persons         | 1                                                                                 | -    | -    | 1     | 2                                                                                       | 2    | 5    | 9     | 3                                         | 2    | 5    | 10                                     |
| Freedom of supply of<br>services | 10                                                                                | —    | —    | 10    | 1                                                                                       | 5    | 2    | 8     | 11                                        | 5    | 2    | 18                                     |
| Freedom of capital flow          | 2                                                                                 | -    | -    | 2     | -                                                                                       | 4    | 1    | 5     | 2                                         | 4    | 1    | 7                                      |
| Company law                      | 2                                                                                 | -    | -    | 2     | 1                                                                                       | 1    | 1    | 3     | 3                                         | 1    | 1    | 5                                      |
| Competition policy               | 2                                                                                 | -    | -    | 2     |                                                                                         | -    | 2    | 2     | 2                                         |      | 2    | 4                                      |
| Agriculture                      | 9                                                                                 | 1    | -    | 10    | 7                                                                                       | 9    | 10   | 26    | 16                                        | 10   | 10   | 36                                     |
| Fisheries                        | -                                                                                 | -    | -    |       |                                                                                         | 4    | 1    | 5     | -                                         | 4    | 1    | 5                                      |
| Transport policy                 | 8                                                                                 | -    | -    | 8     |                                                                                         | 1    | 1    | 2     | 8                                         | 1    | 1    | 10                                     |
| Taxation                         | 6                                                                                 |      | -    | 6     | -                                                                                       | -    | 2    | 2     | 6                                         | -    | 1    | 8                                      |
| Economic and monetary<br>union   | -                                                                                 | —    | —    | —     | —                                                                                       | —    | 1    | 1     | -                                         | —    | 1    | 1                                      |
| Statistics                       | 2                                                                                 |      | -    | 2     | -                                                                                       | -    | -    | -     | 2                                         | -    | -    | 2                                      |

JERZY JASKIERNIA

|                                           |    |   |   |    |    |    |    |     |    |    |    |     |
|-------------------------------------------|----|---|---|----|----|----|----|-----|----|----|----|-----|
| Social policy and employment              | 1  | — | — | 1  | 1  | 1  | 4  | 6   | 2  | 1  | 4  | 7   |
| Energy                                    | 1  | - | - | 1  | -  | -  | 3  | 3   | 1  | -  | 3  | 4   |
| Small and medium-sized enterprises        | 1  | — | — | 1  | —  | —  | —  | —   | 1  | —  | —  | 1   |
| Education and training                    | 1  | - | - | 1  | -  | -  | 1  | 1   | 1  | -  | 1  | 2   |
| Telecommunications                        | -  | - | - | -  | 1  | -  | -  | 1   | 1  | -  | -  | 1   |
| Culture and audio-visual policy           |    |   |   |    |    |    |    |     |    |    |    | —   |
| Regional policy                           | 8  | - | - | 8  | 1  | 2  | 2  | 5   | 9  | 2  | 2  | 13  |
| Environment                               | 1  | - | - | 1  | -  | 1  | -  | 1   | 1  | 1  | -  | 2   |
| Consumer protection and health protection | 1  |   |   | 1  |    | 1  | —  | 1   | 1  | 1  | —  | 2   |
| Justice and home affairs                  | 4  | 1 | 1 | 6  | 2  | 1  | 1  | 4   | 6  | 2  | 2  | 10  |
| Customs union                             | -  | 1 | - | 1  | 1  | -  | 1  | 2   | 1  | 1  | 1  | 3   |
| External relations                        | 6  | - | - | 6  | 1  | -  | -  | 1   | 7  | -  | -  | 7   |
| Common foreign and security policy        | —  |   | — | —  | —  | 1  | —  | 1   | —  | 1  | —  | 1   |
| Financial control                         | -  | - | - | -  | 1  | 1  | -  | 2   | 1  | 1  | -  | 2   |
| TOTAL                                     | 73 | 3 | 1 | 77 | 24 | 37 | 40 | 101 | 97 | 40 | 41 | 178 |

sponsored by other subjects may have the character of approximation bills. This enumeration does not, however, include Deputies' bills. Therefore, a question may arise whether Deputies may initiate bills of such character.

The above dilemmas, in my view, should be resolved in the following way: 1) All subjects having the right of legislative initiative, including Deputies, should have the right to submit bills relating to legal approximation; if the Deputies were to be excluded, the Standing Orders would have to expressly stipulate so. A question arises whether such a reservation would be constitutionally admissible once the Constitution did not introduce such a restriction when regulating the issue of legislative initiative.<sup>36</sup> The enumeration from Article 31, paragraph 3b should be understood exclusively as an indication that these subjects are under a duty to attach Polish translation of the text of provisions of the European Union to which Polish legislation is to be adjusted. Thus, the Deputies are not subject to this duty. It was decided that - realistically - this duty could not be imposed on the Deputies since they may not have access to relevant EU provisions or the possibility to become familiar with their translations. It should be assumed that this task - after the bill has been submitted — may be performed by the Chancellery of the Sejm or the Government upon request from bodies of the Sejm. 2) The only subject having the right to decide whether a given bill is an approximation bill is the Council of Ministers. It may use such a declaration in relation to its own bill, but also in relation to bills submitted by other subjects. Thus only the bills classified in this way by the Government are *ex officio* dealt with according to the legislative path envisaged in Chapter 1c. 3) A subject submitting a bill may specify that it is an approximation bill. As a consequence, the sponsor is obliged to provide (save in the case of Deputies' bills) the text of EU provisions to which Polish law is to be adjusted. Yet, only the Government can make the decision whether a given bill may be dealt with according to the procedure envisaged in Chapter 1c. It may only be assumed that if the sponsor of the bill is interested in the bill being considered as an approximation bill, not only should the sponsor indicate it in the justification, but also specify what provisions the approximation concerns. Therefore, the main issue is not the awareness that a given bill aims at approximating Polish law to EU law, because all subjects seeking to obtain this special status for their bills must have such awareness, but the additional condition of presenting the text of the provisions to which Polish law is approximated, to be fulfilled by some of the subjects vested with the right of legislative initiative. 4) The decision of the Council of Ministers on considering a bill as an "approximation bill" is not subject to control by the Sejm's bodies. In the course of legislative work, there were suggestions to vest the Presidium of the Sejm with such control powers, but they were rejected. The winning argument was that such control procedure would slow down the proceedings and open the possibility for political games, while the new procedure only

---

<sup>36</sup> See M. Kruk: "Prawo inicjatywy ustawodawczej w nowej Konstytucji RP" [Right of Legislative Initiative in the New Polish Constitution], *Przegląd Sejmowy* 1998, no. 2, p. 21; A. Patrzalek, A. Szmyt: "Podmioty prawa inicjatywy ustawodawczej [Subjects of the Right of Legislative Initiative]" [in:] J. Trzcinski (ed.): *Postępowanie ustawodawcze w polskim prawie konstytucyjnym* [Legislative Procedure in the Polish Constitutional Law], Warszawa 1994, p. 132 and following.

makes sense if it leads to making the legislative work more dynamic. It should be taken into account that the scope of approximation work is commonly known<sup>37</sup> and that the probability of the Government abusing this procedure is limited. There is no doubt that it is the Government that has the fullest knowledge about the scope of necessary adjustment in the Polish law.<sup>38</sup> Additionally, the Government's activities are subject to control by the Sejm's bodies and, in particular, the European Integration Committee.<sup>39</sup> There seems to be a real danger, however, in the fact that individual ministries might attempt to use this special legislative path for "smuggling" bills with such regulations that objectively cannot be qualified in this category. Therefore, the Government is under a duty to prevent such situations from occurring. Moreover, even if the Sejm cannot refuse to deal with a bill qualified by the Government as an approximation one under the procedure of Chapter 1c, it may not include the issues that are not eligible for this procedure in the finally adopted bill.

The original draft submitted by the Presidium of the Sejm did not mention the duty to provide Polish translations of EU provisions to which Polish law is to be approximated.<sup>40</sup> It was only introduced as a result of accepting Deputies' amendments submitted during the second reading of the draft of the resolution on amendments to SO.<sup>41</sup> This seems to be of vital importance for the whole procedure. It allows the Sejm to control whether the approximation duty really comes into play, what it refers to, when such approximation duty arises, etc. Lack of such a solution until July 2000 resulted in fact in the Sejm not having such possibilities of control even though it could use, for example, experts' opinions from the Bureau of Research of the Chancellory of the Sejm.<sup>42</sup> Sometimes this led to situations in which the Sejm adjusted Polish legislation to EU law whose normative acts had not been translated. During a debate, when answering to Deputies' questions whether the requirement to provide Polish translations of texts of EU provisions was a realistic one, the Secretary of the Committee for European Integration admitted that only about 70% of EU provisions covered by the duty of

---

<sup>37</sup> See *Narodowa Strategia...*, *op. cit.*, p. 46 and following; C. B a n a s i ń s k i: "Problemy prawne realizacji Układu Europejskiego" [Legal Problems Relating to Implementation of the Europe Agreement], *Kontrola Państwowa* 1994, no. 6, p. 36 and following.

<sup>38</sup> And also is familiar with the legal conditions for Poland's accession to EU. Cf. J. B a r c z: "Akt integracyjny Polski z Unią Europejską w świetle Konstytucji RP" [Integration Act Between Poland and the European Union in the Light of the Polish Constitution], *PiP* 1998, no. 4, p. 4 and following; C. M i k: "Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny" [Systemic Principles of the European Community Law and the Polish Constitutional Order], *PiP* 1998, no. 1, p. 34.

<sup>39</sup> More about the instruments of the Sejm's control function in Z. C z e s z e j k o - S o c h a c k i: *Prawo parlamentarne w Polsce* [Parliamentary Law in Poland], Warszawa 1997, p. 167.

<sup>40</sup> Sec print no. 2010.

<sup>41</sup> Sec Discussion of the Report of the Rules and Deputies' Affairs Committee and the European Integration Committee about the draft of the resolution on amendments to SO, submitted by the Presidium of the Sejm (prints no. 2010 and no. 2046) [in:] *Sprawozdanie stenograficzne z 82 posiedzenia Sejmu RP, 12 VII 2000* [Shorthand Report from 82<sup>nd</sup> Sitting of the Polish Sejm, 12 August 2000], pp. 10-11.

<sup>42</sup> See B. P a w ł o w s k i: "Rola i uprawnienia polskiego parlamentu w procesie integracji europejskiej" [The Role and Powers of the Polish Parliament in the Process of European Integration] [in:] *Problemy integracji europejskiej...*, *op. cit.*, p. 88.

approximation had been translated and that not all these translations were verified, official ones.<sup>43</sup>

The new requirements in the Standing Orders forced the Government to change the procedure for preparing approximation bills. The Committee for European Integration decided that governmental bills aiming at approximation of Polish law to EU law, submitted by the relevant ministers and heads of central agencies to the Office of the Committee for European Integration (OCEI) in order to prepare their final versions, should contain, *inter alia*, a specification of provisions of EU law whose implementation is the objective of the European bill and the corresponding provisions of Polish law as well as the Polish translation of the provisions of EU law introduced by the bill.<sup>44</sup> Moreover, ministers and heads of central agencies are obliged to immediately transfer verified translations of EU legal acts to OCEI. Translations of EU legal acts whose provisions are implemented by the bill are to be submitted to OCEI not later than 60 days before the planned date of examination by the Council of Ministers according to the schedule adopted by the Committee for European Integration. OCEI verifies the translations from the linguistic, terminological and legal points of view.<sup>45</sup>

The competent committee to examine approximating bills is a special one - the European Law Committee. It is also competent in a situation where the approximating bill concerns a code, amendments to a code, statute introducing a code or amendments to such a statute. The Speaker of the Sejm may, after consulting the Presidium of the European Law Committee, send the approximating bill to the relevant standing committee or, if the bill meets the criteria specified in Article 56, paragraph 1 — to the Special Committee for codification amendments. Then the special procedure described in Chapter 1c does not apply.

The above quoted provisions of Article 56w SO were inserted as a result of interesting evolution. Initially, other names were considered for the committee to be established, including “the Great Approximating Committee.” It was supposed to refer to the conception of “great committees” dealing with the problems of European integration in the parliaments of some EU Member States.<sup>46</sup> In the end it was decided that the term “great committee” may be adequately linked only to a committee that not only performs tasks in the legislative process, but also has a control function in the field of European integration. Now in the Sejm there are two committees: a standing committee (the European Integration Committee) which controls the process of European integration and

<sup>43</sup> See Sprawozdanie stenograficzne z 82 posiedzenia Sejmu op. cit., p. 21.

<sup>44</sup> Sec § 1.1-2 of the Resolution no. 3/2000 of the Committee for European Integration of 24 July 2000 on the procedure applicable to governmental bills approximating Polish law to the European Union law.

<sup>45</sup> Sec § 1-2 of the Resolution no. 2/2000 of the Committee for European Integration of 24 July 2000 on coordination and verification of translations of legal acts of the European Union.

<sup>46</sup> The influence of such committees is diversified, some have the right to determine the negotiation mandate being a recommendation (Belgium, Finland, France) or even a binding instruction (Denmark, and to a limited extent also Germany, UK, Austria, France and Holland). See D. Olejniczak: Funkcja prawodawcza i kontrolna parlamentów krajowych państw członkowskich Unii Europejskiej (analiza porównawcza) [Law-making and Control Functions of National Parliaments of European Union Member States (comparative analysis)] [in:] Problemy integracji europejskiej ..., op. cit., p. 49.

analyses the compliance of bills with EU law where non-conformity has been indicated and a special committee (the European Law Committee) which undertakes legislative work in relation to approximating bills. The European Law Committee, regardless of the scope of expectations surrounding its establishment and concerning the acceleration of legislative procedure, does not have the attributes typical for the above-mentioned "great committees." A committee of this type will probably be created in the Sejm after Poland becomes a member of the EU.

The most controversial part in the scope of work of the European Law Committee (ELC) was the fact that it was vested with the right to work on codes or amendments to codes. An amendment was introduced providing for a separate procedure for dealing with documents of this type,<sup>47</sup> but it was not accepted. The winning argument was that SO are flexible in this respect once the Speaker of the Sejm, after consulting the Presidium of ELC, may refer a bill to a standing or special committee working on codification amendments. It was also pointed out that if this amendment was accepted, the time period proposed in it would be exactly the same as the one defined for the ordinary procedure of dealing with drafts of codes. In reality, the rationale for using the European path envisaged in Chapter 1c is linked to the necessity of accelerating legislative work due to the tight schedule of pre-accession process preceding Poland's membership in the EU.<sup>48</sup> One may appreciate this argument, but nevertheless it should be emphasised that the Sejm must act with special caution here, because codes are a fundamental part of the system of law and work in this area requires special thoughtfulness in seeking mature legislative solutions.<sup>49</sup>

A question arises about the legal nature of ELC. In the Standing Orders it is referred to as a "special committee" even though it is not a typical special committee according to SO.<sup>50</sup> Normally, such committees are appointed to examine a specific statute or to examine matters of a specific type (e.g. codification amendments). ELC displays many features of a standing committee. It was not appointed *ad hoc* to examine

---

<sup>47</sup> Deputy J. Zych proposed the following wording of Article 56za, paragraph 1 : "The first reading of an approximating bill may take place not earlier than on the seventh day after the print is delivered to the Deputies. The first reading of a draft of a code or provisions introducing a code may take place not earlier than on the thirtieth day after the print is delivered to the Deputies, and, in the case of a draft of amendments to a code or to provisions introducing a code, not earlier than on the fourteenth day after the print is delivered. The first reading of a draft of a code, draft of provisions introducing a code, draft of amendments to a code or to provisions introducing a code shall take place at a sitting of the Polish Sejm," see "Additional report of the Rules and Deputies' Affairs Committee and the European Integration Committee on the draft of the resolution on amendments to the Standing Orders of the Republic of Poland submitted by the Presidium of the Sejm" (print no. 2010), Warszawa - 12 July 2000 (print no. 2046-A).

<sup>48</sup> Cf. L. Ciamağa, E. Latoszek, K. Michatowska-Gorywoda, L. Oręziak, E. Teichmann:

<sup>49</sup> Cf. A Bałaban: *Pozycja ustrojowa i funkcje Sejmu RP* [Systemic Position and Functions of the Polish Sejm], Warszawa 2000, pp. 56-57.

<sup>50</sup> Cf. M. Chmaj: *Sejm Rzeczypospolitej Polskiej w latach 1991-1997 (I i II kadencja). Studium prawnoustrojowe* [Sejm of the Republic of Poland in the Years 1991-1997 (I and II Term of Office). Systemic Law Study], Warszawa 1999, p. 187, who underlines that special committees are usually appointed when the Sejm or its bodies "cannot or do not want to qualify a given matter as falling within the scope of activities of any existing standing committee."

a specific bill and its lifetime was not determined. It will continue to exist as long as the Polish parliament examines approximating bills, that is, at least until Poland becomes a member of the EU, which will certainly happen after the end of the III term of office of the Sejm.<sup>51</sup> Therefore, this committee will not cease to exist after the examination of a specific bill, which is one of the fundamental features of special committees (yet it should be borne in mind that also the committee for codification amendments does not end its work after a specific draft has been examined, but is competent to examine other codification amendments which may be referred during a given term of office). Thus, it is "special" because - unlike standing committees - it does not participate in performing control functions of the Sejm in relation to public administration organs.<sup>52</sup> Additionally, its competence in legislative procedure does not apply to a specific sector of State administration, but may apply to all issues relating to the approximation process. It is then a consequence of the establishment of ELC that the scope of competence of standing committees was modified by excluding, in fact, the bills having the character of approximating bills, which so far belonged to their competence in the legislative process. The basic consequence of the establishment of ELC is linked to weakening the role of standing committees in a significant field of legislation connected with the approximation of Polish law to EU law.

The role of standing committees was not omitted in the new procedural mechanism. ELC may approach them for giving an opinion and then a standing committee is under a duty to present such an opinion within a time limit corresponding to the schedule of work on the given approximation bill set by ELC. Thus, standing committees did not obtain the right to formulate such opinions of their own initiative. The legislator only made an exception for the European Integration Committee, since it may - pursuant to the provisions of Article 56zc para. 1 - present opinions about all approximating bills both of its own initiative and upon request from ELC. We should stress here the coordinating character of powers of the European Integration Committee. ELC is obliged to send the schedule of work on an approximating statute to both Speaker of the Sejm and the European Integration Committee (Article 56zb). This solution is justifiable because the European Integration Committee controls, on a regular basis, the progress in pre-accession negotiations and has the fullest knowledge in the Sejm about the speed of the required approximation work.<sup>53</sup>

The Committee is composed of no more than 45 Deputies selected by the Sejm, upon a motion from the Presidium of the Sejm, made after obtaining an opinion from the Council of Seniors, by joint voting (Article 56 para. 1). In fact 44 Deputies were

---

<sup>51</sup> The Polish Government declared that Poland will meet the criteria for EU membership by 31 December 2002.

<sup>52</sup> The Legislative Committee in the Sejm of II term of office was similar in nature; cf. M. K u d c j: *Instytucje polskiego prawa parlamentarnego z zakresu legislacji* [Institutions of the Polish Parliamentary Law in the Field of Legislation], Katowice 1995, p. 25.

<sup>53</sup> Cf. B. P a w ł o w s k i: "Główne zadania dostosowawcze stojące przed Polską na drodze do członkostwa w UE" [The Main Approximation Tasks Poland Faces on the Road to EU Membership] [in:] *Problemy integracji europejskiej...*, op. cit., p. 113 and following.

appointed members of ELC.<sup>54</sup> The construction “no more than” was used in order to avoid the deadlock which might occur in the case of determining a fixed number of members and refusing the possibility of participation in works of the committee to a representative, for example, of a Euro-sceptical club. This would open up the possibility of raising an argument that the committee cannot start its work due to basic legal pre-conditions, laid down in SO, not being met.

The fundamental feature of the special procedure of work on bills approximating Polish legislation to the law of the European Union is the possibility of shortening the time periods applicable to the ordinary legislative procedure. In accordance with the provisions of Article 56za, the first reading of an approximation bill may take place as early as on the third day after delivery of the printed bill to the Deputies. Additionally, the delivery may be replaced by information that the printed bill is available in the Chancellory of the Sejm and by transferring the printed bill in an electronic form with information about this fact sent via electronic mail. However, SO provide expressly that proceedings in respect of an approximating bill cannot commence if, on the day the bill is delivered at the latest, the Deputies are not provided with Polish translations of the European provisions to which Polish law amended by the approximating bill is to be adjusted. It is not sufficient then to deliver such translations e.g. at the moment when the first reading starts, but they must be available at the moment when the printed approximating bill is delivered. Otherwise, the time periods that are linked in SO with the fact of delivery of the bill to Deputies will not apply. This requirement also applies to Deputies' bills qualified as approximation bills, even though the Deputies are not under a duty to provide such translations. In this situation, it must be considered that the duty is borne by the Council of Ministers if it decided to declare that the given bill has an approximating nature in accordance with the procedure laid down in Article 56u. If the Government does not fulfil this task, it is borne by the Sejm's advisory bodies (e.g. the Bureau of Research of the Chancellory of the Sejm). Delivery of the translation is a *condition sine qua non* for the possibility of opening the procedure envisaged in Chapter 1c SO.

This special procedure for dealing with approximating bills discussed here combines some elements of the summary and urgent procedures. Each departure from the ordinary legislative procedure is an exception from the principle of democratic legislative procedure, which is an important element of a democratic state of law (Article 2 of the Constitution)<sup>55</sup> as it weakens these values of democratic procedure which foster the implementation of the principle of sovereignty of the Nation in the conditions of indirect democracy. It is not by accident that the proposed amendments provoked critical

---

<sup>54</sup> See “Resolution of the Sejm of the Republic of Poland of 21 July 2000 on the appointment of members of a special committee - the European Law Committee.” Deputy Bronisław Geremek was appointed Chairman of the Committee. At the first meeting, the Committee rejected the idea of rotating chairmanship proposed by the club of “Solidarity” Election Action.

<sup>55</sup> Cf. J. Jaskiernia: *Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym* [Principles of a Democratic State of Law in Sejm Legislative Procedure], Warszawa 1999, p. 57 and following.

opinions and due to that criticism some proposals were weakened (e.g. resignation from the proposed principle that the first reading may take place as early as on the day following the delivery of the approximating bill), because they would decisively prevent the Members of the Parliament from preparing for the legislative work with due care.

However, certain solutions that constitute considerable departures from the ordinary legislative procedure, have remained in force. An example is accepting - in Article 56zd - that an amendment to an approximating bill may be introduced during a meeting of ELC by a group of at least three Deputies, who are members of this Committee, in writing. Additionally, a request for classifying an amendment rejected by ELC as a minority motion must be submitted in writing, together with a description of the consequences for the text of the statute as following from this motion, by at least three Deputies who made the motion for such a rejected amendment. These rules apply also to a motion for rejecting a bill, however, ELC may take a decision by an absolute majority of votes (and not by an ordinary majority as in the case of the ordinary procedure followed by the Sejm's committees). Consequently, not only were individual Deputies deprived of the possibility of introducing amendments and requesting that rejected amendments be treated as minority motions, but also the Deputies not being members of ELC do not have the right to submit motions for such amendments.

Similar restrictions apply to the second reading of an approximating bill, since, according to the provisions of Article 56ze para. 2, "amendments to an approximating bill may be proposed in writing, together with a description of the consequences following from such an amendment for the text of the bill, by a group of at least five Deputies." In the Sejm, there was a discussion about the solutions contained in the provisions of Articles 56zd and 56ze, namely whether they are in conformity to the Constitution if they lead to limiting a constitutional right of a Deputy as a representative of the Nation to influence the shape of a statute. In this context, a problem arises whether the rules of the Sejm may introduce restrictions in comparison to the solutions determined in the Constitution.<sup>56</sup> The constitutional *usus* of approving that SO regulate the number of Deputies vested with the right of legislative initiative, even though the Constitution does not make any limitations in this respect, may be an argument in favour of tolerating this practice. This matter will certainly require further analysis in constitutional law and we cannot exclude that the Constitutional Tribunal will have to give its opinion on this issue in the future.

However, there were no special controversies over the solutions which assume that the second reading of an approximating bill takes place at the next sitting of the

---

<sup>56</sup> It is stressed that the Sejm's Standing Orders have an executive character (L. Garlicki: *Regulamin Sejmu w systemie źródeł prawa (na tle orzecznictwa Trybunatu Konstytucyjnego)* [The Sejm's Standing Orders in the System of Sources of Law (against the Background of Jurisprudence of the Constitutional Tribunal)], so they may introduce more detail in relation to the constitutional provisions and provide original regulations of parliamentary issues provided that they are "matters covered by autonomy of the Standing Orders" (M. Kudej: "Zmiany Regulaminu Sejmu na tle konstytucji" [Amendments to the Sejm's Standing Orders against the Background of the Constitution], *Przegląd Sejmowy* 2000, no. 2, p. 35.

Sejm following the delivery of the Committee's report to the Deputies, unless the speaker of the Sejm, having consulted the Presidium of the Committee, decides otherwise (Article 56ze para. 1) and that amendments introduced by the Senate are examined at the next sitting of the Sejm following the delivery of the Committee's report (Article 57zf). These are typical procedures for accelerating the pace of legislative work.

It should be noted that the procedure in question applies only to those bills in relation to which the first reading had not taken place by the day of entry into force of the amendments (13 July 2000). Therefore, bills having the character of approximating bills for which the first reading took place before that date will be subject to the ordinary rules of legislative procedure. However, there are no obstacles for the Government to determine the character of bills as approximating bills in relation to bills that had been submitted before 13 July 2000 and whose first reading had not taken place. After the Council of Ministers attaches the relevant declarations to them, they will be dealt with according to the legislative procedure envisaged in Chapter 1c, regardless of who initiated them. In this situation they may be e.g. withdrawn from standing committees to which they had been sent for the first reading.

\* \* \*

There is no doubt that the special procedure for dealing with bills approximating Polish legislation to the law of the European Union was introduced in a situation of a serious delay in harmonisation of Polish law with European law, which has an adverse effect on the pre-accession process and may delay the date of Poland's accession to the EU. Therefore, this extraordinary situation, which may be perceived in the context of the Polish *raison d'état* justifies applying extraordinary solutions. However, this is a case of an axiological conflict: on the one hand, there are reasons following from aspirations to EU membership and, on the other hand, this special procedure may give rise to doubts from the point of view of the principle of democratic legislative procedure. Representatives of the Nation may not be deprived, in an institutionalised and permanent manner, of the possibility to discharge their duties of authors of statutes with due care even when faced with such special conditions. It is always possible to raise the doubt whether giving the right to make motions for amendments to three Deputies (in a committee) or five Deputies (in the whole chamber) is not a violation of one of the fundamental values: the right of a Deputy — who holds a democratic mandate of the electors — to influence the shape of the law. The Polish systemic tradition of the recent years may provide examples that such restrictions were tolerated, e.g. in work on the Constitution or on the criminal codification. Moreover, one should appreciate the factor of rationalising the legislative procedure by expecting the author of an amendment to present all legislative consequences of such amendment. One may also consider the argument that approximating legislation is to a large extent objectively determined by the contents of EU law and the legislative "room for manoeuvre" is limited, which undoubtedly affects the scope of freedom of individual Deputies to propose amendments to texts of bills of this kind.

However, one cannot ignore the threats. Even the first bills examined by the Sejm according to the new procedure<sup>57</sup> provoked questions about the criterion applied by the Government when it decided to combine regulations concerning very different matters in one bill. There also appeared the question of constitutional accountability of ministers for the bills prepared in their ministries in a situation where a minister authorised to represent the Government in respect of such a multi-element bill is forced to act as a representative of the Government for other bills, which were prepared under the direction of other members of the Government. There will surely be conflicts between the European Law Committee and the standing committees about the preferred solutions, since it may happen that both these committees may not see eye to eye.

The Sejm reacted to the delay in the process of harmonisation of Polish law to EU law by introducing a new procedural mechanism.<sup>58</sup> Beyond any doubts, there appeared a chance to accelerate the pace of approximating work in the part that lies with the parliament. However, it is only the parliamentary practice that will show whether the expectations connected with the new instrument will have come true and, at the same time, whether there will have appeared no threats to the democratic legislative procedure on such a scale that might considerably affect the system of exercising authority by the Sovereign in the model of indirect democracy dominating in Poland.

---

<sup>57</sup> See the governmental bill on approximation to the law of the European Union of the Act on Executive Proceedings in Administration, the Act on Local Taxes and Charges, the Act on Subsidies to Interest on Certain Bank Loans, the Act - Law on Public Trading in Securities, the Act - Tax Ordinance, the Act on Public Finance, the Act on Corporate Income Tax and the Act on Commercialisation and Privatisation of State Enterprises (print no. 2088); governmental bill on approximation to the law of the European Union of the Act on Higher Education, the Act on Higher Vocational Schools, the Act on Railway Transport and the Act on Tourist Services and on amendments to certain other Acts (print no. 2089).

<sup>58</sup> On 19 October 2001 the Polish Sejm of IV term of office took a decision concerning the change of Sejm's Commissions structure. The Commission of European Integration and the Commission of European Law were bound together. Their competencies - analysing laws' drafts approximating Polish law to the European Union law and giving opinions on laws' drafts on their conformity with the European Union law - have been transmitted to the European Commission. Sec: *Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 19 października 2001 w sprawie zmiany Regulaminu Sejmu Rzeczypospolitej Polskiej* [Polish Sejm's Resolution on Amendments to the Standing Orders of the Sejm of the republic of Poland], *Monitor Polski* 2001, no. 37, item 586.

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

**Maria Matey-Tyrowicz\***

### 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 20<sup>th</sup> 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 Organisation<sup>1</sup> and the European institutions.<sup>2</sup> 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

---

\* Professor of Labour Law at the Institute of Law Studies, Polish Academy of Sciences, Warsaw.

<sup>1</sup> 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.

<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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 flawed<sup>6</sup> - 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.<sup>7</sup>

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,<sup>8</sup> even bringing negative results (due to its pretended lack of productivity),<sup>9</sup> 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

---

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

<sup>4</sup> 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.

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

<sup>6</sup> 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.

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

<sup>8</sup> 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.

<sup>9</sup> 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."<sup>10</sup> 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

---

<sup>10</sup> 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).

<sup>11</sup> 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,<sup>12</sup> 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.

---

<sup>12</sup> *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"<sup>13</sup>).

Social Dialogue in the European Union assumes several basic forms. They include:<sup>14</sup>

- a) day-to-day communication between European Social Partners (UNICE/UEAPME,<sup>15</sup> 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

---

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> 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' councils<sup>16</sup> - 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.<sup>17</sup>

### 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

---

<sup>16</sup> 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.

<sup>17</sup> 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.<sup>18</sup> 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,<sup>19</sup> the Commission's usefulness and the functioning of tripartite social dialogue in Poland were evaluated positively,<sup>20</sup> especially by authors connected with the governmental side of that time,<sup>21</sup> and, as a further consequence, by external observers, including European ones,<sup>22</sup> 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

---

<sup>18</sup> 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).

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

<sup>20</sup> 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 ̑ d z i e w i c z: "Podstawowe zasady zbiorowego prawa pracy" [Basic Rules of Collective Labour Law] [in:] G. G o ̑ 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.

<sup>21</sup> Cf. E. S o b ó t k a: "Dialog Społeczny" - założenia, realizacja, perspektywy [Social Dialogue" - Assumptions, Implementation, Perspectives], [in:] *Trójąstronność 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).

<sup>22</sup> 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.<sup>23</sup> 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”<sup>24</sup> 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.”<sup>25</sup>

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 Commission<sup>26</sup> 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

---

<sup>23</sup> 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”).

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

<sup>25</sup> *Ibid.*

<sup>26</sup> 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 2001<sup>27</sup> 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

<sup>27</sup> *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.<sup>28</sup>

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

---

<sup>28</sup> 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.”<sup>29</sup>

### 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-

---

<sup>29</sup> 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 EU<sup>30</sup> 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,<sup>31</sup> preceded by the need to gain the support of the reluctant Polish social partners.

---

<sup>30</sup> The Directive 2002/14/EC of 11 March 2002.

<sup>31</sup> 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.

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

Ewa Popławska\*\*

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.<sup>1</sup> 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.<sup>2</sup> 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

---

\* The paper is an updated and shortened version of a report presented at the international conference *The politics of enlargement in Central and Eastern Europe: Changing rules and institutions* organised by the Leiden University and Academia Istropolitana Nova, Bratislava (September 2000).

\*\* Assistant Professor, Institute of Law Studies, Polish Academy of Sciences, Warsaw.

<sup>1</sup> 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.

<sup>2</sup> 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).<sup>3</sup>

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.<sup>4</sup>

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

---

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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

<sup>5</sup> 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.*

<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> Article 90 para. 1 of the Polish Constitu-

<sup>7</sup> 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.

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

<sup>9</sup> 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.*

<sup>10</sup> 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).<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.

<sup>11</sup> 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.*

<sup>12</sup> Such as the Italian Constitutional Tribunal, the Spanish Constitutional Tribunal and the German Federal Constitutional Tribunal.

<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

<sup>14</sup> K. Wójtowicz, *op. cit.*

<sup>15</sup> 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.<sup>16</sup>

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

---

<sup>16</sup> 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.<sup>17</sup> A proposal to apply a preventive measure emerged in the doctrine.<sup>18</sup> It was

<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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-

---

<sup>19</sup> 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.

<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> 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-

<sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup> 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,

---

<sup>23</sup> P. Winczorek, *op. cit.*

inter alia, in Protocol No. 9 on the role of national parliaments in the European Union<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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).<sup>27</sup> 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

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

<sup>25</sup> 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.*

<sup>26</sup> J. Jaskiernia: “Konstytucyjnoprawne aspekty ...,” *op. cit.*

<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> After the experiences preceding the adoption of the Constitution in 1997, we can expect angry and

---

<sup>28</sup> 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.

<sup>29</sup> 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.



## LES SOCIÉTÉS UNIPERSONNELLES D'ETAT EN POLOGNE D'APRÈS LA LOI DE 1996 SUR LA COMMERCIALISATION ET LA PRIVATISATION DES ENTREPRISES D'ETAT

**Barbara Bajor\***

La présentation est consacrée aux sociétés des capitaux avec un seul associé — le Trésor d'Etat, autrement dit aux sociétés unipersonnelles d'Etat, constituées par voie de transformation de l'entreprise d'Etat en société des capitaux.

Après le changement économique en Pologne, on peut constater l'accroissement considérable de l'importance des sociétés des capitaux sur le marché. Les sociétés des capitaux (SA et SARL) deviennent d'une part une forme d'organisation des entreprises privées, et d'autre part - de plus en plus — une forme d'organisation des biens étatiques<sup>1</sup>. Il faut souligner surtout l'utilisation de la forme juridique de sociétés des capitaux dans le processus de transformation et de privatisation des entreprises d'Etat. La loi du 13 juillet 1990 sur la privatisation des entreprises d'Etat<sup>2</sup> a initié de façon complexe le processus de privatisation en Pologne et, ensuite, la loi du 30 août 1996 sur la commercialisation et la privatisation des entreprises d'Etat<sup>3</sup> - en abrogeant celle de 1990 — a fait avancer ce processus.

En réalité, on constate que pour les entreprises étatiques, l'utilisation de forme juridique de société des capitaux jusqu'à la fin des années 80, était très rare, même si le code de commerce de 1934<sup>4</sup> (abrogé par la loi de 2000 « Le code des sociétés commerciales »<sup>5</sup>), prévoyait la possibilité de créer une société unipersonnelle d'Etat. En plus, en 1981 la Diète a voté la loi sur les entreprises d'Etat (toujours en vigueur)<sup>6</sup>, laquelle prévoit une forme juridique spéciale pour les entreprises étatiques - celle de l'entreprise d'Etat. D'après cette loi, les entreprises d'Etat obtiennent une personnalité morale, et par ce moyen deviennent des sujets indépendants du point de vue financier et de

---

\* Maître assistant à l'Institut des sciences juridiques de l'Académie Polonaise des Sciences à Varsovie.

<sup>1</sup> On peut même constater qu'actuellement la forme de sociétés des capitaux est la forme juridique d'organisation des entreprises la plus utilisée.

<sup>2</sup> *Journal des Lois* 1990, n° 51, texte 298.

<sup>3</sup> *Journal des Lois* 1996, n° 118, texte 561.

<sup>4</sup> Le règlement du Président de la République de Pologne du 27 juin 1934 « Le code de commerce », *Journal des Lois* n° 57, texte 502, avec modifications ultérieures.

<sup>5</sup> La loi du 15 septembre 2000 « Le code sur les sociétés commerciales », entrée en vigueur le 1er janvier 2001, *Journal des Lois* n° 94, texte 1037. La société anonyme peut être créée par une seule personne: physique ou morale (sous une exception - une SARL unipersonnelle ne peut pas être le seul fondateur d'une SA - art. 301)

<sup>6</sup> La loi du 25 septembre 1981 sur les entreprises d'Etat, publiée dans le *Journal des Lois* 1991, n° 18, texte 80.

gestion. En 1982, selon la décision No 42 du Comité Economique du Conseil des Ministres, la plupart des entreprises d'Etat ayant pour l'activité économique l'échange avec l'étranger<sup>7</sup>, ont été transformées en sociétés des capitaux, mais on constate toujours, qu'avant le commencement du processus de transformation et de privatisation en 1990, la forme juridique des entreprises d'Etat restait la plus utilisable. Cette situation n'a pas été changé même après la modification de la loi du 1980 sur les entreprises d'Etat, intervenue en 1987, selon laquelle il était permis de transformer l'entreprise d'Etat en société des capitaux<sup>8</sup>.

Actuellement, comme il a été déjà mentionné, le processus de transformation et de privatisation des entreprises d'Etat est régi, en général, par les dispositions de la loi de 1996 sur la commercialisation et la privatisation des entreprises d'Etat, laquelle a abrogé celle de 1990. Il faut aussi souligner que la transformation d'une entreprise d'Etat en société des capitaux et ensuite l'offre des actions/des parts au public, ne constitue qu'une voie de privatisation - dénommée privatisation indirecte—parce qu'elle comprend deux phases: d'abord une transformation de l'entreprise en société des capitaux et ensuite la privatisation<sup>9</sup>. Les autres moyens de privatisation (dénommée privatisation directe) consistent à disposer des biens des entreprises par la voie: 1) de vente de l'entreprise, 2) d'apport en nature de l'entreprise à une société déjà constituée ou en voie de constitution, 3) de remise de l'entreprise à l'utilisation rémunérée à la base d'un contrat<sup>10</sup>. Dans ce cas, il ne s'agit plus de créer la société avec un seul associé - le Trésor d'Etat - mais de créer des sociétés avec la participation du Trésor d'Etat ou même sans cette participation - des sociétés privées<sup>11</sup>.

Après cette brève description du problème il faut présenter d'abord différentes possibilités création de sociétés unipersonnelles d'Etat dans le système juridique polonais et puis, les principales règles régissant le processus de transformation (autrement dit - de commercialisation) et de privatisation indirecte des entreprises d'Etat (offre des actions/parts au public) d'après les dispositions de la loi de 1996, pour montrer la spécificité de ces sociétés unipersonnelles d'Etat. Elle résulte premièrement du fait que le seul associé reste le Trésor d'Etat et, en second lieu du fait que la loi introduit une règle de participation des ouvriers de l'entreprise transformée aux organes de gestion et de contrôle de la société. Un autre trait spécifique résulte d'une tendance générale à la reprivatisation des biens étatiques. Autrement dit, les ouvriers ont obtenu le droit d'acquérir les actions/parts aux conditions préférentielles (selon la loi de 1990) et en vertu de la loi de 1996, ils obtiennent à titre gratuit des actions/parts de l'entreprise transformée en société des capitaux.

<sup>7</sup> K. K r u c z a l a k: *Prawo handlowe. Zarys wykładu*. Warszawa 1996, p. 268.

\* Article 29 de la loi sur les entreprises d'Etat (actuellement abrogée) et le règlement du Conseil des Ministres de 30 novembre 1981 sur la procédure de liquidation des entreprises d'Etat, dans les articles 51a-51g, prévoyait la possibilité de liquider l'entreprise en vue de créer une société des capitaux.

<sup>9</sup> Les articles 3-35 a de la loi sur la commercialisation et privatisation des entreprises d'Etat.

<sup>10</sup> Les articles 39-54 de la loi sur la commercialisation et la privatisation des entreprises d'Etat.

<sup>11</sup> La présente présentation a pour but principal de montrer la spécificité des sociétés unipersonnelles d'Etat, donc les principes de privatisation directe, cités ci-dessus, ne seront que mentionnés, pour mieux comprendre le processus de privatisation en Pologne.

## 1. Les différentes voies de création d'une société unipersonnelle d'Etat

La société unipersonnelle d'Etat pouvait être créée à la base du code de commerce de 1934 et à partir du 1 janvier 2001 peut être créée à la base du code des sociétés commerciales. De même, sur la base de la loi du 25 septembre 1981 sur les entreprises d'Etat (modifiée), de la loi du 13 juillet 1990 sur la privatisation des entreprises d'Etat (abrogée par la loi de 1996) et de la loi du 30 août 1996 sur la commercialisation et la privatisation des entreprises d'Etat (il s'agit des dispositions de caractère général).

Il faut en plus mentionner des lois spéciales, contenant des règles régissant aussi la création de sociétés unipersonnelles d'Etat, dont la spécificité constitue en général la conséquence des faits suivants. Premièrement, elle est liée au domaine d'activité de l'entreprise et deuxièmement, elle résulte de l'importance de l'entreprise pour l'économie nationale. Dans cet ordre, il faut mentionner: 1) des lois créant indépendamment certaines sociétés unipersonnelles d'Etat, par exemple dans le domaine de télécommunication, de transport aérien, ferroviaire ou d'assurance sociale<sup>12</sup>, 2) la loi du 5 février 1993 sur la transformation propriétaire des entreprises ayant une signification particulière pour l'économie nationale<sup>13</sup>, 3) la loi du 26 août 1994 sur la régulation du marché du sucre et sur des changements de propriétaire dans l'industrie sucrière<sup>14</sup>.

Dans le secteur bancaire, les règles spéciales régissant la transformation des banques étatiques en société anonyme ont été déterminées par la loi du 29 août 1997 « Le droit bancaire »<sup>15</sup>. Les règles de transformation de propriété des entreprises d'Etat faisant partie de l'économie agricole sont déterminées par la loi du 19 octobre 1991 sur l'exploitation des immeubles ruraux du Trésor d'Etat<sup>16</sup>.

Ci-dessous on présentera les règles à caractère général, sans analyser les problèmes de transformation des entreprises d'Etat dans certains secteurs d'activité économique, pour lesquelles le législateur a prévu des dispositions spéciales, en raison, comme il a été déjà mentionné ci-dessus, du caractère de l'activité et de l'importance pour l'économie nationale de ces entreprises d'Etat. En général, ces règles spéciales régissent la transformation, alors que la privatisation, sous certaine restriction, se déroule selon les règles générales prévues par la loi de 1996.

1.1. D'après l'article 308 du code de commerce, la société anonyme pouvait être constituée par trois personnes, à l'exception du Trésor d'Etat et des organes des pouvoirs locaux. Par contre, le nouveau code des sociétés commerciales, datant de 2000 (entré en vigueur le 1er janvier 2001) prévoit la possibilité de créer une société anonyme par chaque personne physique ou morale sauf une exception: la société à responsabilité limitée avec un seul associé ne peut pas être le seul fondateur d'une société

---

<sup>12</sup> Par exemple la loi du 14 juin 1991 sur la transformation de l'entreprise d'Etat LOT, Journal des Lois 1991, n° 61, texte 260.

<sup>13</sup> Journal des Lois 1993, n° 16, texte 69.

<sup>14</sup> Journal des Lois 1996, n°152, texte 724.

<sup>15</sup> Journal des Lois 1997, n° 140, texte 939.

<sup>16</sup> Journal des Lois 1991, n° 107, texte 464.

anonyme (art. 301). Quant à la société à responsabilité limitée, depuis 1988 elle peut être créée par une seule personne morale ou physique. D'après le nouveau code, cette possibilité a été maintenue. La société à responsabilité limitée peut être toujours créée par une seule personne physique ou morale, excepté le cas, où son seul fondateur voudrait être une société à responsabilité limitée avec un seul associé (art. 151 § 1 et 2 du code des sociétés commerciales)<sup>17</sup>.

1.2. La loi du 25 septembre 1981 sur les entreprises d'Etat. D'après cette loi, une entreprise d'Etat constitue une organisation juridique dotée de la personnalité morale, autonome du point de vue de la gestion et du financement. Cette loi, après la modification effectuée en 1987, prévoyait la possibilité de transformer l'entreprise d'Etat en une société anonyme ou une société à responsabilité limitée. Le règlement du Conseil des Ministres de 1981 (modifié) précisait que cette voie de changement de la forme juridique consistait en réalité en liquidation sans dissolution de l'entreprise (sans interruption de l'activité économique), en vue de constituer une société des capitaux sur la base du patrimoine resté après la liquidation de l'entreprise. Suite à l'adoption de la loi de 1990 sur la privatisation des entreprises d'Etat, régissant de façon complexe le processus de transformation et de privatisation, cette voie de transformation a diminué sa signification, toutefois sans perdre l'importance<sup>18</sup>.

1.3. La loi du 13 juillet 1990 sur la privatisation des entreprises d'Etat. Cette loi a réglé d'une façon complexe la transformation des entreprises d'Etat en des sociétés des capitaux. Il faut souligner que, d'après ces dispositions, la transformation n'a été prévue qu'en vue de privatisation effective (la transformation en société n'était prévue qu'en tant que phase préparatoire pour la privatisation effective). Les dispositions de l'article 19 prévoyaient l'obligation de mettre à l'offre public des actions (des parts) de la société dans le délais de deux ans après la transformation d'entreprises d'Etat en société anonyme (SARL). Les tiers pourraient les acquérir: 1) aux enchères, 2) d'après l'offre faite au public, 3) par la voie de négociation après une invitation adressée au public.

Les employés d'une société d'Etat avaient le droit d'acquérir sous les conditions préférentielles jusqu'à 20 % des actions/parts et au-dessus de 20 % - selon les règles générales. Les conditions préférentielles, d'après la loi signifiaient que les employés pouvaient d'acquérir jusqu'à 20 % des actions/parts au prix plus bas (lequel équivalait la moitié du prix offert aux autres personnes physiques). Cette loi a consacré aussi la règle de participation des employés aux organes du contrôle (les employés choisissaient 1/3 des membres du conseil de surveillance). En réalité, à cause surtout d'une mauvaise condition économique, la plupart des entreprises d'Etat transformées en so-

---

<sup>17</sup> Il faut souligner qu'aux sociétés nouveaux-crées par le trésor d'Etat (mais pas par la voie d'une transformation de l'entreprise d'Etat en société) ne s'appliquent pas les régies de participation des ouvriers aux organes de la gestion et du contrôle des sociétés unipersonnelles d'Etat (prévues par les lois sur la privatisation des entreprises d'Etat).

<sup>18</sup> La loi sur les entreprises d'Etat a été modifiée plusieurs fois. Dans sa version actuelle, elle prévoit toujours une voie indirecte de changement de la forme juridique et de privatisation par liquidation, fusion ou cession des entreprises ou par création de différents sujets économiques, y compris les sociétés des capitaux.

ciétés des capitaux sont restées unipersonnelles, dont le seul associé reste le Trésor d'Etat<sup>19</sup>.

1.4. La loi du 30 août 1996 sur la commercialisation et la privatisation des entreprises d'Etat. En présentant les principales règles de cette loi, il faut d'abord définir les notions de commercialisation et de privatisation. L'article 1er de la loi définit la notion de la commercialisation. Elle consiste en transformation d'une entreprise d'Etat en société des capitaux - société anonyme ou société à responsabilité limitée.

Par contre, la privatisation comprend: 1) vente des actions/des parts des sociétés constituées par la transformation de l'entreprise d'Etat (la privatisation indirecte), 2) disposition de tous les éléments matériels et immatériels du patrimoine de l'entreprise d'Etat ou de l'entreprise transformée en société (la privatisation directe) par voie: de la vente de l'entreprise, de l'apport de l'entreprise dans la société ou de remise de l'entreprise pour l'utilisation rémunérée.

Le processus de commercialisation ne concerne que les entreprises d'Etat créées à la base de la loi de 1981 citée ci-dessus. Sont donc exclues de ce processus les entreprises créées séparément par les lois et les entreprises dont la situation économique ne permet pas de procéder à la transformation<sup>20</sup>.

Les entreprises d'Etat dont les fonds propres ne dépassent pas le montant prévu par le code des sociétés commerciales, pour constituer au moins la SARL, ne peuvent être transformées que par une voie spéciale - la commercialisation avec la conversion des créances<sup>21</sup>.

Il faut aussi souligner que la loi permettant de commercialiser et de privatiser, contient des règles spéciales pour les entreprises d'Etat et sociétés unipersonnelles d'Etat ayant une signification particulière pour l'économie nationale. L'article 1<sup>er</sup> a de la loi en question laisse à la compétence du Conseil des Ministres la désignation de ces entreprises et sociétés unipersonnelles d'Etat. Le règlement du Conseil des Ministres de 1996 établit la liste des entreprises et sociétés unipersonnelles d'Etat ayant une signification particulière pour l'économie nationale<sup>22</sup>, dont la commercialisation n'est possible qu'avec l'accord préalable du Conseil des Ministres.

- La société constituée par la voie de transformation de l'entreprise d'Etat reprend tous les rapports juridiques de l'entreprise transformée, dont tous ses droits et obligations. Il s'agit donc de succession sous le titre général. Toutefois la notion de commercialisation - transformation suscite beaucoup de controverses dans la doctrine quant à son caractère juridique. D'après l'une des opinions, la commercialisation ne consiste pas en la création d'un nouvel sujet économique. Eu tant que transformation, elle peut être entendue comme un changement de la forme juridique

<sup>19</sup> Il ne faut pas oublier que cette loi prévoyait aussi une voie de privatisation directe, par la liquidation de l'entreprise en vue de la vente, par l'apporter à la société ou en vue de conclure le contrat d'utilisation.

<sup>20</sup> Les entreprises mises en état de liquidation, les entreprises en faillite, en procédure de redressement ou d'accommodement bancaire prévue par la loi du 3 février 1993 sur la restructuration financière des entreprises et des banques (*Journal des Lois* 1993, n° 18, texte 82).

<sup>21</sup> Art. 154 du code prévoit que le montant du capital doit dépasser 50 000,00 zlotych.

<sup>22</sup> *Journal des Lois* 1996, n° 157, texte 792.

d'une entité existante. Par contre, certains auteurs comprennent par la commercialisation la création d'un nouveau sujet<sup>23</sup>.

La première opinion citée trouve sa confirmation dans la jurisprudence. D'après la sentence de la Cour Suprême, par une commercialisation on doit comprendre une transformation de la personne morale étatique<sup>24</sup>. La commercialisation ne consiste donc pas en une création d'une nouvelle société - elle est une simple transformation de la forme juridique, sans interruption de l'activité économique. Elle n'entraîne pas non plus de changement du propriétaire des biens - c'est toujours le Trésor d'Etat qui devient l'associé unique et qui reste le seul propriétaire (du point de vue économique) des biens de l'entreprise constituant son capital social. Ajoutons à cela un dernier argument, à savoir que la société unipersonnelle d'Etat reste toujours une personne morale étatique en tant qu'entreprise d'Etat, jusqu'à l'aliénation des actions/parts aux tiers<sup>25</sup>.

- Il importe de remarquer que la nouvelle loi de 1996 fait une distinction nette entre le processus de commercialisation et celui de privatisation. La commercialisation peut être effectuée soit pour une privatisation future, soit uniquement en vue d'un changement de la forme juridique. On doit aussi souligner que la transformation de l'entreprise en société n'est jamais automatique (*ex lege*). Chaque cas précis, après avoir été l'objet d'une analyse, exige une décision séparée du Ministre du Trésor d'Etat.
- La compétence décisive en matière de transformation de l'entreprise d'Etat appartient au Ministre du Trésor d'Etat sous une restriction. Dans la première hypothèse - concernant la transformation en vue de privatisation - le Ministre du Trésor d'Etat reste seul compétent pour prendre la décision. Par contre, dans la situation d'une transformation en vue d'un autre but que la privatisation, le Ministre du Trésor d'Etat prend sa décision après avoir obtenu l'acceptation du Conseil des Ministres, étant obligatoire.
- En vue de la transformation, le Ministre du Trésor d'Etat prépare l'acte de commercialisation, lequel remplace les actes nécessaires pour constituer une société

<sup>23</sup> St. Włodzka (dans:) *Prawo spółek* [Droit des sociétés], Kraków 1996, s. 646; G. Bieniek: « Komercejalizacja i prywatyzacja przedsiębiorstw państwowych według ustawy z 30 sierpnia 1996 r. - część I » [La commercialisation et privatisation des entreprises d'Etat d'après la loi de 30 août 1996 - part I], *Praca i Zabezpieczenie Społeczne* 1997, n° 6, p. 15; K. Kruczałak: *Spółki prawa handlowego i cywilnego* [Les sociétés de droit commercial et civil], Gdańsk 1996, p. 196 et *Prawo handlowe*, Warszawa 1996, p. 272; S. Soltyskiński (dans:) *Kodeks handlowy. Komentarz* [Code de Commerce, Commentaire], vol. I, Warszawa, p. 157; A. Jakubicki, R. Skubisz: « Prywatyzacja przedsiębiorstw państwowych » [La privatisation des entreprises d'Etat] {dans:) *Zarys prawa spółek* [Les précis de droit des sociétés], Lublin 1994, p. 231; J. Rajski: « Założenia ustawy o prywatyzacji przedsiębiorstw państwowych » [Les principes de la loi sur la privatisation des entreprises d'Etat], *Państwo i Prawo* 1990, n° 12, p. 3; L. Morys: « Szczególny status prawny jednoosobowej spółki akcyjnej Skarbu Państwa powstałej w wyniku przekształcenia przedsiębiorstwa państwa » [Le regime juridique particulier de société unipersonnelle anonyme d'Etat constitué par voie de la transformation d'entreprise d'Etat], *Przegląd Prawa Handlowego* 1995, n° 4, p. 15; P. Dybowski: « Przekształcenie przedsiębiorstwa państwowego w jednoosobową spółkę Skarbu Państwa » [La transformation d'entreprise d'Etat en société unipersonnelle d'Etat], *Rejent* 1992, n° 6, p. 85; A. Szajkowski (dans:) *Kodeks handlowy, Komentarz* [Code de commerce, Commentaire], vol. II, Warszawa, p. 1272.

<sup>24</sup> La sentence de la Cour Suprême du 19 mai 1992, III CZP 49/92, OSN 1992, n° 11, texte 200.

<sup>25</sup> Voir aussi la sentence de la Cour Suprême du 25 mai 1994, III CZP 38/94, OSNCP 1994, n° 11, texte 201.

des capitaux, prévus dans le code des sociétés commerciales,. La société est ensuite inscrite au registre. Le moment de l'inscription de la société au registre suit la radiation de l'inscription de l'entreprise d'Etat au registre.

- La commercialisation avec la conversion des créances. La loi de 1996 prévoit une voie spéciale de transformation de l'entreprise d'Etat - la commercialisation avec la conversion des créances. Cette voie suscite beaucoup de critiques. Elle permet, à l'occasion de transformation de l'entreprise d'Etat, une remise partielle des dettes. Dans ce cas, il ne s'agit plus d'une société unipersonnelle d'Etat, mais d'une société dont les associés sont: le Trésor d'Etat et les créanciers de l'entreprise transformée.

Le Ministre du Trésor d'Etat peut transformer l'entreprise d'Etat en société à responsabilité limitée avec la participation des créanciers dans le cas suivant:

- 1) si le total des obligations, des dettes et des crédits, y compris les intérêts de retard, constitue plus de 60 % de l'actif comptable ou
- 2) le total des obligations à court terme, des crédits et des prêts à court terme ainsi que des crédits et des prêts périmés y compris les intérêts de retard, constitue plus de 50% des revenus de l'entreprise, réduit des revenus obtenus par l'entreprise entre le 1er janvier au 31 décembre 1995, résultant de la vente des biens durables et des investissements.

La loi introduit une restriction - certaines créances ne peuvent pas être l'objet de conversion en parts. Il s'agit des créances non-convertibles (résultant des obligations de l'entreprise dues aux rapports de travail, ensuite des obligations dont le montant ne dépasse pas 5 mille zlotys, des obligations envers des sujets étrangers, puis des obligations envers le Trésor d'Etat et celles résultant de l'assurance sociale, ainsi que des amendes pour violation des lois sur la protection de l'environnement.

Cette voie de transformation est possible à réaliser à condition d'obtenir l'accord des créanciers représentant plus que 50 % des créances (convertibles en parts et celles qui seront partiellement annulées). Et cela parce qu'en cas de la transformation de l'entreprise avec la conversion des créances, certaines dettes de l'entreprise seront partiellement annulées. Il s'agit des dettes résultant en général des obligations de caractère public. Ces dettes, jusqu'au montant de 70 %, seront annulées de plein droit au moment d'immatriculation de la société au registre. Les 30 % restants seront remboursés par versements mensuels, dans le délais de 24 mois. Chaque créancier obtient les parts dans la société dont le montant total représente 1/3 de la valeur de ses créances. Dans la doctrine, on constate que cette voie permet de réduire considérablement les dettes d'entreprise aux frais des créanciers. Cette voie de privatisation n'était pas prévue par la loi de 1990.

## **2. Les problèmes de l'organisation des sociétés unipersonnelles d'Etat**

La société unipersonnelle d'Etat est régie par les dispositions du code des sociétés commerciales, à moins que la loi de 1996 n'en dispose autrement. La spécificité des sociétés unipersonnelles d'Etat (et des sociétés dans lesquelles le Trésor d'Etat garde

une partie des actions) - constituées à la base de la loi de 1996, comme cela a déjà été constaté - consiste surtout dans l'organisation interne, laquelle diffère de l'organisation de société constituée à la base du code de commerce et, à partir du 1<sup>er</sup> janvier 2001, de code des sociétés commerciales. La loi de 1996 (mais la loi de 1990 privoyait uniquement la participation des ouvriers aux organes du contrôle) introduit une règle de participation des ouvriers à la gestion et au contrôle de la société.

### 2.1. *La société anonyme*

Selon le code des sociétés commerciales, les organes de la société anonyme sont les suivants: l'assemblée générale des actionnaires, l'organe d'administration composé d'une ou plusieurs personnes et le troisième organe - le conseil de surveillance<sup>26</sup>. La loi sur la commercialisation et la privatisation des entreprises d'Etat modifie les règles concernant l'organisation de la société unipersonnelle d'Etat constituée par la voie de transformation de l'entreprise d'Etat.

- L'assemblée générale des actionnaires est composée d'une seule personne - le Trésor d'Etat, représenté par le Ministre du Trésor d'Etat. Il faut souligner que la loi élargit les compétences de l'assemblée générale des actionnaires par rapport aux dispositions du code des sociétés commerciales<sup>27</sup>. Dans la société unipersonnelle d'Etat ou dans la société dans laquelle plus de la moitié des actions appartiennent au Trésor d'Etat, l'accord de l'assemblée des actionnaires est nécessaire pour créer une nouvelle société, pour l'acquérir ou vendre les actions d'une société dont la société unipersonnelle d'Etat est actionnaire. En outre, dans la société unipersonnelle d'Etat l'assemblée des actionnaires, en cas de faillite, obtient la compétence de décider de la suspension de l'activité du conseil de surveillance et de la révocation de ses membres (cette solution diffère des règles générales). Il faut aussi rappeler qu'après la privatisation, les actionnaires étant employés de la société peuvent réaliser leur droit de vote à l'assemblée par personne dotée des pouvoirs, restant en même temps employé de la société (ce qui diffère des règles du code des sociétés commerciales)<sup>28</sup>.
- S'il s'agit de l'organe d'administration, la loi prévoit deux possibilités de son organisation. Selon la première - le directeur de l'entreprise transformée devient le Président de l'organe d'administration. Au cas du manque de son accord, c'est le Ministre du Trésor d'Etat qui désigne le Président dans l'acte de commercialisation, ainsi que les autres membres de l'organe d'administration<sup>29</sup>. Si la société emploie 500 travailleurs en moyenne annuelle, les salariés obtiennent le droit de choisir un membre de l'organe d'administration. Ils gardent ce droit tant que le Trésor d'Etat reste l'actionnaire, même minoritaire de la société.

---

<sup>26</sup> Art. 368 § 2, art. 381 du code des sociétés commerciales.

<sup>27</sup> Voir art. 393 du code des sociétés commerciales.

<sup>28</sup> Art. 412 § 3 du code des sociétés commerciales.

<sup>29</sup> Selon le code des sociétés commerciales - les membres de l'organe d'administration de la société anonyme sont choisis par le Conseil de Surveillance, sauf si le statut de la société n'en prévoit autrement - art. 368 § 4.

Cette règle, permettant aux employés de participer à l'organisation de l'organe d'administration, est exclue dans la deuxième possibilité d'organisation de cet organe. La gestion de la société peut être confiée à une personne morale ou physique par un contrat de gestion. Dans ce cas, l'organe d'administration n'est composé que d'une seule personne - morale ou physique. La loi précise les conditions que le contrat de gestion doit contenir. Parmi elles, la loi permet de prévoir la possibilité d'un paiement partiel de la rémunération sous forme d'actions de la société.

- Le premier conseil de surveillance - obligatoire dans chaque société unipersonnelle d'Etat - doit être composé d'au moins 5 personnes, dont 2 personnes sont choisies par les employés de l'entreprise transformée<sup>30</sup>. Dans les entreprises de l'industrie agricole et alimentaire, dans l'organe de surveillance les agriculteurs et/ou pêcheurs (fournisseurs de l'entreprise) choisissent un représentant et les employés de l'entreprise transformée choisissent aussi un représentant. Les autres membres du conseil de surveillance, ainsi que les membres du conseil suivant - avant le commencement du processus de privatisation de la société - sont choisis par l'assemblée générale des actionnaires, donc par le Trésor d'Etat, parmi les personnes présentées conjointement par le Ministre du Trésor d'Etat et l'organe fondateur de l'entreprise transformée, et cela sous la restriction que 2/5 des membres du Conseil de Surveillance sont toujours choisis par les salariés.

Après la commencement de la privatisation de la société, même lorsqu'on a vendu plus de la moitié des actions de la société aux tiers, les salariés gardent leur droit de choisir leurs membres au conseil de surveillance. Les conditions sont les suivantes:

- les salariés choisissent deux membres, si le conseil comprend jusqu'à 6 membres,
- les salariés choisissent trois membres du conseil composé de 7 à 10 membres,
- si le Conseil est composé de 11 membres ou plus, les salariés choisissent quatre membres.
- S'il s'agit des entreprises ayant une signification particulière pour l'économie nationale dont on trouve la liste dans le règlement de 1996 du Conseil des Ministres (actuellement 124 entreprises d'Etat) et qui ne peuvent être commercialisées qu'avec l'accord de leur Conseil des Ministres, leur organisation est régie par des dispositions spéciales<sup>31</sup>. La composition du conseil de surveillance, de même que le statut de la société doivent être l'objet de concertation du Ministre du Trésor d'Etat avec le Ministre compétent du point de vue de l'activité de l'entreprise (le Conseil des Ministres détermine, par voie de règlement, les compétences des ministres en matière de la commercialisation). Au moins la moitié des membres du conseil de surveillance est nommé parmi les candidats présentés par le Ministre compétent. Cette règle n'exclut pas le droit des employés de choisir leurs représentant au conseil de surveillance<sup>32</sup>.

<sup>30</sup> Selon art. 385 du code des sociétés commerciales, le conseil de surveillance doit être composé d'au moins trois personnes, choisies par l'Assemblée des actionnaires.

<sup>31</sup> Le règlement du 23 décembre 1996 déterminant les entreprises d'Etat ayant une signification particulière pour l'économie nationale, *Journal des Lois* 1996, n° 157, texte 792.

<sup>32</sup> On doit souligner aussi que selon la loi de 1996 dans ces sociétés, les membres de l'organe d'administration sont nommés par le conseil de surveillance - ce qui différerait du code de commerce de 1934 (abrogé par celui de

## 2.2. *Société à responsabilité limitée*

Selon le code des sociétés commerciales la structure de cette société est légère. En effet, elle se limite aux organes suivants: l'assemblée générale des associés et l'organe de direction. L'organe de contrôle: le conseil de surveillance ou la commission de vérification (ou ces deux organes à la fois, si le contrat de société le prévoit) n'est obligatoire qu'en cas d'une société dont le capital social dépasse 500 mille zlotys et le nombre des associés dépasse 25 associés (ces deux conditions doivent être remplies conjointement)<sup>33</sup>.

La loi de 1996 n'impose pas non plus l'obligation de constituer l'organe de surveillance dans les sociétés unipersonnelles d'Etat créées à la base de cette loi (la loi de 1990 en prévoyait l'obligation). Dans ce cas, le droit de contrôle appartient à l'associé ou à une personne dotée par l'associé de procuration. Si l'organe de contrôle, malgré le manque d'obligation, est constitué, il ne s'agit dans ce cas que du conseil de surveillance (donc il n'y a pas de choix), auquel s'appliquent des règles relatives à la participation des employés au choix des ses membres.

## 3. Certains problèmes de la privatisation des sociétés unipersonnelles d'Etat

Après avoir indiqué quelques problèmes choisis d'organisation de la société unipersonnelle d'Etat, il nous faut maintenant présenter les règles concernant la privatisation de ces sociétés par voie de vente des actions (dénommée par la loi « une privatisation indirecte »). Dans cet ordre, il faut évoquer surtout les dispositions relatives au droit d'acquérir des actions à titre gratuit par les employés de l'entreprise transformée.

Les règles générales de la loi de 1996 sur la vente des actions au public seront aussi applicables, sous certaines restrictions, aux sociétés unipersonnelles d'Etat créées dans le secteur bancaire et aux sociétés unipersonnelles créées par la transformation des entreprises d'Etat — représentant certaines domaine d'activité, comme par ex. transport ferroviaire ou aérien - sur la base des lois spéciales.

3.1. Les règles générales concernant l'aliénation des actions. Les actions appartenant au Trésor d'Etat peuvent être vendues par suite de l'offre fait au public de vente aux enchères ou par voie de négociation après une invitation adressée au public. Les conditions précises en sont déterminées par le règlement du Conseil des Ministres du 29 juillet 1997 sur les règles relatives à la vente des actions du Trésor d'Etat, du financement de l'aliénation des actions et sur la forme de paiement<sup>34</sup>. La vente des actions par une voie autre que celle citée ci-dessus suscite une annulation de plein droit.

---

2000), selon lequel les membres de l'organ d'administration ont été choisis par l'assemblée des actionnaires (art. 366). D'après le nouveau code des sociétés commerciales les membres de l'organe d'administration sont choisis par le conseil de surveillance.

<sup>33</sup> Art. 213 du code des sociétés commerciales.

<sup>34</sup> *Journal des Lois* 1997, n° 95, texte 578.

3.2. La loi de 1996 détermine le montant des actions destinées à titre gratuit aux employés et précise qui a le droit d'acquérir des actions à titre gratuit (« les employés en droit d'acquérir des actions à titre gratuit »).

Par la notion « les employés en droit d'acquérir les actions/parts à titre gratuit » on comprend - en général — des personnes étant, au moment de la radiation de l'entreprise d'Etat du registre, employés dans l'entreprise. Il s'agit aussi des personnes retraitées, qui ont travaillé au moins 10 ans dans l'entreprise. Cette notion englobe aussi des agriculteurs et pêcheurs - fournisseurs de marchandises (d'une certaine valeur définie par la loi) à l'entreprise pendant au moins 5 ans.

Dans son article 36, la loi précise que les employés « étant en droit » ont le droit d'acquérir à titre gratuit jusqu'à 15 % des actions du Trésor d'Etat, dont le nombre total est déterminé selon l'état d'avant le premier offre des actions au public. En introduisant une restriction, la loi précise le montant des actions destinée aux employés. D'un côté, il ne peut pas dépasser 15% des actions appartenant au Trésor d'Etat et d'autre part, le montant total de la valeur nominative des actions destinée aux employés à titre gratuit ne peut pas dépasser une somme déterminée selon les régies suivantes: produit le nombre des employés « étant en droit » par la somme de 18 salaires moyens (dont le montant dans le secteur des entreprises est établi selon les six derniers mois précédant le mois durant lequel la société a commencé l'offre des actions au public, selon les règles générales).

La loi précise que le droit d'acquérir des actions/parts de la société est lié à la période d'emploi. Le règlement du 3 avril 1997 du Ministre du Trésor d'Etat sur les règles de répartition des employés en groupes ayant le droit d'acquérir des actions, sur l'établissement des montants des actions pour chaque groupe et sur les moyens relatifs à l'acquisition des actions, contient des règles précises<sup>35</sup>.

Le règlement en question distingue plusieurs périodes d'emplois (jusqu'à un an, puis de 1 à 3 ans, de 3 à 5 ans, de 5 à 10 ans, de 10 à 15 ans et plus de 20 ans d'emploi). Les employés répartis en groupes conformément à la durée d'emploi obtiennent le droit d'acquérir un nombre précis d'actions à titre gratuit.

Le Ministre du Trésor d'Etat, après avoir préparé l'acte de commercialisation, convoque les employés étant en droit d'acquérir des actions à titre gratuit à déposer des déclarations (concernantes leur volonté d'acquérir des actions). Les employés doivent, sous rigueur de perdre leurs droits, déclarer par écrit la volonté d'acquérir des actions, dans le délais de six mois suivant l'immatriculation de la société au registre. Le manque de la déclaration écrite, suscite la perte du droit d'acquérir des actions à titre gratuit. En plus, ce droit ne peut être réalisé par les employés que dans une seule entreprise. Avant la réalisation de son droit, chaque employé doit déclarer qu'il n'a pas profité du droit d'acquérir des actions à titre gratuit dans une autre société unipersonnelle d'Etat.

Les employés ont un an pour profiter de leur droit. La loi fixe des délais précis pour la réalisation de ce droit par les employés (à titre général, ce délais commence - dont les employés peuvent d'acquérir les actions à titre gratuit - après 3 mois à compter de la

<sup>35</sup> *Journal des Lois* 1997, n° 33, texte 200.

première vente des actions selon les règles générales et expire après 12 mois). Si la première vente des actions, selon les règles générales, a lieu dans les six mois suivant l'immatriculation de la société, le droit d'acquérir des actions à titre gratuit s'établit dans le délai de trois mois à compter de l'expiration du délai pour déclarer la volonté d'acquérir des actions et expire douze mois après).

Il faut souligner que la loi introduit une interdiction générale aux employés de vendre des actions acquises à titre gratuit pendant deux ans à compter du commencement de la vente des actions selon les règles générales. Le contrat ayant pour l'objet la vente des actions acquises par les employés à titre gratuit avant l'expiration de ce délai est invalide.

3.3. Les autres voies de privatisation, dénommées par la loi « une privatisation directe » comprennent différents moyens de privatisation, mais, comme il a été déjà souligné, sans la transformation de l'entreprise d'Etat en société unipersonnelle d'Etat. Il s'agit de la vente de l'entreprise, puis de la privatisation effectuée par l'apport en nature de l'entreprise dans la société et enfin, de la conclusion du contrat ayant pendant l'objet l'utilisation rétribuée de l'entreprise pendant une période ne dépassant pas 10 ans. Dans ce dernier cas il est possible de conclure le contrat avec la société créée avec la participation des employés de l'entreprise. La loi permet entre autres de prévoir dans ce contrat d'utilisation de l'entreprise qu'après l'expiration du délais prévu la société concernée ou un autre utilisateur pourrait acquérir le droit de propriété de l'entreprise.

En concluant la présentation des sociétés unipersonnelles d'Etat créées à la base de la loi de 1996 sur la commercialisation et la privatisation des entreprises d'Etat, on doit encore présenter certains chiffres pour montrer l'ampleur du processus de commercialisation et de privatisation des entreprises d'Etat en Pologne<sup>36</sup>.

Sur un total de 8453 entreprises d'Etat à la fin de 1990, jusqu'à la fin de 1999 4957 entreprises d'Etat ont fait l'objet du processus de transformation propriétaire, et au registre des entreprises d'Etat figuraient encore 2599 entreprises.

Parmi ces 4957 entreprises d'Etat:

- 1454 entreprises d'Etat ont été commercialisées/transformées en sociétés unipersonnelles d'Etat;
- 1727 entreprises d'Etat ont été privatisées par voie d'une privatisation directe (vente de l'entreprise, l'apport en nature de l'entreprise à une société, le contrat d'utilisation rémunérée);
- sur un total de 1641 demandes de liquidation des entreprises d'Etat, surtout à la base de la loi de 1981 sur les entreprises d'Etat, 820 entreprises d'Etat ont fait l'objet d'une procédure de liquidation et 618 ont été déclarées en faillite.

Parmi les 1454 sociétés unipersonnelles d'Etat créées par la transformation des entreprises d'Etat (à la fin de l'année 1999), 83 % représentent le secteur de l'industrie. En grande partie, le processus de commercialisation à la base des lois de 1990 et 1996 concernait les entreprises moyennes et petites, employant de 200 à 500 personnes.

---

<sup>36</sup> Le rapport du Ministère du Trésor d'Etat pour les années 1990-1999.

Parmi les sociétés unipersonnelles d'Etat, pendant la période allant de 1990 jusqu'au décembre 1999:

- 512 sociétés ont été introduites au programme des Fonds Nationaux d'investissement;
- 123 sociétés ont été soumises à la procédure bancaire d'accomendement (d'après la loi du 3 février 1993 sur la restructuration financière des entreprises et des banques qui prévoit une conversion des créances bancaires en actions de la société);
- 276 sociétés unipersonnelles d'Etat ont été soumises à la privatisation indirecte (prévue par les lois sur la privatisation) faite par l'offre des actions aux tiers. Pour privatiser ces 276 sociétés unipersonnelles d'Etat, dans 43 cas on a procédé à une offre publique des actions, dans 43 cas on a procédé à la vente aux enchères et dans 190 cas on a procédé à la négociation après une invitation adressée au public. Dans 14 cas on a procédé à une double transaction: la vente des actions par voie d'une offre publique et l'offre aux investisseurs étrangers.

Parmi les sociétés privatisées par la voie de vente des actions au public, on trouve des sociétés créées selon la loi de 1990, de 1996, puis créées par les lois spéciales et celle de 1993 sur la transformation propriétaire des entreprises ayant une signification particulière pour l'économie nationale, ainsi qu'à la base des lois de 1989 et de 1997 « Le droit bancaire » (dont la dernière a abrogé celle de 1989).

Quant à la commercialisation avec la conversion des créances (prévue par la loi de 1996), sur un total de 61 demandes, elle n'a en lieu que dans le cas de 15 entreprises.



## **INSTITUTE OF LAW STUDIES OF THE POLISH ACADEMY OF SCIENCES - 45 YEARS OF ACTIVITY**

Five years have passed from the moment when we celebrated 40 years of existence of the Institute of Law Studies of the Polish Academy of Sciences. These five years of our history were marked by both continuation and development. Both these processes have had their positive results. Continuation is a proof of maturity, stability and correctness of the direction in which we are heading, while development, which, by the nature of things, stands for dynamism and growth, is a feature that favours change, looking for new and better ways, higher efficiency, deeper knowledge and creative potential, increasing public usefulness. If we add on top of this - and we cannot but do so - that these five years have also been a difficult period in financial terms, then the final balance sheet allows the Institute and its personnel to look back at these past years with quite some satisfaction and optimism.

Five years ago Prof. Andrzej Wasilkowski, who was the head of the Institute of Law Studies of the Polish Academy of Sciences at that time, presented a summary and description of its activities during the whole 40 years of its existence. He underlined certain special features of the Institute as a scientific centre that deserved special attention. Thanks to the fact that it represents all basic branches of law, criminology and sociology of law, which constitute the basis for complementary analysis of any phenomenon and for the possibility of conducting interdisciplinary research, the Institute attempted to attract collaborators from among all the lawyers in this country, not only academics, but also practitioners from the judiciary, law-making centres, public authorities. A symbolic manifestation of the conception of the Institute being not only a research unit of the Polish Academy of Sciences, but also a centre of scientific co-operation, is the tradition of appointing, beside members of the Academy and professors employed by the Institute, representatives of other university centres, particularly from the Faculty of Law and Administration of the Warsaw University as a natural and closest partner in scientific activity, as members of the Scientific Council of the Institute.

For many years, the Institute even played the role of a national co-ordinator of research considered to be of particular importance for the development of the State and its institutions and for jurisprudence itself.

The situation changed in the Nineties with the system of financing scientific activity, which does not favour the Institute initiating and conducting programmes that bring together researchers from other scientific centres, which is not to say that such co-operation is disappearing. The Institute organises many scientific conferences on a national scale, joint undertakings of authors, sometimes very large-scale undertakings,

such as the system of private law, labour law and criminal law, participation of colleagues from other centres in implementing the grants awarded to workers of the Institute, as well as jointly preparing comprehensive expert opinions. Researchers of the Institute are also often and readily invited to co-operate with many various scientific institutions in joint projects, publications and conferences. The tradition of the Institute's active participation, as the initiator, co-ordinator or participant, in research work is therefore such a strong feature in its characteristic that it became a kind of "trade-mark" of the place and role of the Institute of Law Studies in Polish and international scientific life.

Just as the whole country, the legal sciences - and maybe even the legal sciences in the first place - underwent the evolution of the turn of the Eighties and Nineties. Here, it is worthwhile to refer again to a statement made five years ago — that the juridical sciences, for the most part, do not have an abstract character, that they refer to the existing law and if the law is subject to constant transformations, the legal sciences face special tasks: they have to serve as an expert to a considerable degree introducing, at the same time, a certain order based on experience and realistic evaluation of the possibility of achieving certain objectives with the help of the law. This fitting comment by Prof. A. Wasilkowski may be, from the perspective of the further five years of activity of the Institute of Law Studies of the Polish Academy of Sciences, complemented with yet another comment that legal sciences can and should also inspire such transformations of law and that in favourable, democratic conditions of functioning of the State they really perform this scientific mission.

In a general summary of the role played by the Institute in the light of the tasks set before the legal sciences we can see a lot of lasting, positive achievements and - despite the changing conditions or passing circumstances — consistency in studying important and difficult problems of the State, the law, the society and the economy.

### **Scientific Research**

It is in the last of these spheres that comprehensive studies of the legal functioning, organization and economic reforms had been conducted consistently since the Seventies and had contributed significantly to its transformation.

The Team for Legal Issues of the National Economy that existed at the time, which invited lawyers, economists and sociologists from various centres to participate in its works, was involved in developing the legal bases for the economic reform, drafting the fundamental statutes that defined the reforms in management of the national economy and introduction of democratic elements in its structures, including spheres which then were just beginning to develop in Poland, such as anti-monopoly law.

Studies of the Labour Law Team, which were conducted at the same time, focused on creating the theoretical foundations of contemporary labour law in relation to international and foreign standards. The Civil Law Team, in the studies of the classical issues of this branch of law, focused its attention on the most important problems of an individual (a. o.

in the field of inheritance law and inheriting farms, protection of personal goods, ownership law, the status of an individual in relation to mass media, consumer law).

The merger of these three teams, in the beginning of the Nineties, into the Private Law Team, added a new dimension of comprehensiveness to these research problems. At the same time, the Team started dealing with the most urgent questions relating to transformation of the economic system and to new - in the Polish reality - legal phenomena and institutions: company and partnership law, anti-monopoly law, industrial and intellectual property law, advertising law, collective labour relations law, electronic economy (the law on charge cards, electronic signature) and others, in response to the most recent challenges of the development of contemporary world. While continuing the classical research on civil law and the questions of modernising the labour law, the Team is also putting the Polish system of private law into the orbit of European law where, owing to the achievements of Polish science among other things, it is already gaining a strong position.

The fact that the Institute of Law Studies is open to new trends in the development of science is confirmed, *inter alia*, by the establishment of the first agricultural law centre in Poland, such law being treated as an autonomous discipline. The research devoted to this - always special — branch of economy has been of considerable importance among the achievements of the Institute. Moreover, the Team became a centre integrating the lawyers-agrarians all over the country. Dealing with the problems of agricultural law is of particular importance now, when Poland is facing European integration. The research conducted by the Agricultural Law Team covers the full scope of agricultural regulations of the European Community and harmonising the solutions applied in Polish law with Community legislation.

One of the oldest research units of the Institute of Law Studies of the Polish Academy of Sciences is the Criminology Section established in 1955 by the initiative of Prof. Stanisław Batawia, an eminent scholar and founder of the Polish school of criminology. Such a great tradition obliged the Section to keep the highest level of scientific activity, which has been its distinctive feature until this day. Having been, for many years, the leading centre of criminology in Poland and in Central and Eastern Europe, the Section undertook tasks that appeared during the systemic transformations setting a new research perspective.

Basing its scientific searches on empirical studies, on comparative material, on extensive international co-operation, the Criminology Section analysed first of all the social phenomena that caused anxiety and required solutions. It means analysing new forms of criminality, changes in the scope of common criminality and youth criminality, and contemporary models of preventing crime. This research is conducted following a novel approach and in co-operation with scholars of the countries which, as a result of transformation, found themselves in the same situation.

The Criminal Law Team is characterised by a similar approach oriented towards the needs of the present time. This Team conducted research on substantive criminal law in a systematic manner and carried out a broad spectre of work on comprehensive commentaries to the Penal Code. It also undertook studies in the field of basic theoretical problems

of criminal law. A significant domain of studies was the problems of petty offences, including the law on petty offences, criminal policy, research on crime victims and theoretical problems of victimology, as well as studies in the field of international standards of human rights in criminal law and the issue of responsibility for medical operations.

The Team has made considerable contribution in the work on codification of criminal law (the Penal Code and the Law on Petty Offences) and on the statutes concerning secrecy, medical law and protection of rights of crime victims.

Public law has always had broad representation in the Institute. The studies in the field of constitutional law, public administration, local government and territorial self-government, international and European law (Community institutions and law), which were initially conducted separately, in the Nineties were grouped in two teams: the Team of Public Law and European Studies and the International Law Team.

For a long time, the studies on the State system and constitutional systems have been conducted along parallel tracks: both of Polish law and comparative law, including not only socialist law, but, to a considerable extent, the law of democratic States of Western Europe and America. This was why in the lead-up to systemic transformations and during the transformation period itself the Institute was one of the centres which were fully prepared for the development of a new model of political system of the State. Scientific collaborators of the Institute of Law Studies of the Polish Academy of Sciences were "in the front line" of preparatory works in the field of constitutional amendments, developing the new Polish Constitution, laying down the principles of democratic law and constitutional practice, both in the theoretical aspect and acting as experts, since the Institute was the representative of the opinion of the Polish Academy of Sciences in the process of adopting the constitution. Another related domain of studies of this Team is the system of sources of law and the quality and creation of law. As early as in the beginning of the Eighties the Team started dealing with matters relating to the Community, especially in the field of institutions and sources of law, which was later developed into a more thorough domain of European studies.

Also in the sphere of administrative law, for a long time, all the trends marking the future role and character of the public administration have been being worked upon. The main ones included transparency of actions, response to the citizens' right to information, law relating to civil servants, the status of the civil service. Additionally, a very special element appeared in the sphere of administrative law science: the administration of science and protection of monuments and national heritage, which is a rare occurrence in the field of legal sciences and therefore constitutes a certain characteristic feature of the Institute.

Its ally in systemic research, and especially the legal system, has been the International Law Team. In a sort of response to the constitutional conception of sources of law, which incorporated international law into domestic law, both these disciplines became complementary and co-operation between them has produced measurable effects in the form of not only jointly prepared elaborations, but - first of all - breaking the long isolation of international law and domestic law.

International law studies conducted at the Institute cover a very broad range of issues: many aspects of treaty law, Community law, jurisprudence of international and Community courts, the issues of territorial changes in Central and Eastern Europe, space research of the Earth, to name just a few examples. Their common feature is that they are always focused on new problems, general ones of fundamental significance. This is probably why the works of this Team receive prizes so often and in such a spectacular way.

The Institute of Law Studies does not limit its activities to Warsaw: its organisational structure includes units in Poznań and Wrocław, and previously also in Cracow, where now there remain independent researchers only. The characteristic feature of these units, apart from being integrally linked with the Warsaw unit, is the fact that they do not double the trends in research conducted in the capital, but develop different types of problem-oriented research, which is a considerable enrichment of the scope of scientific interests of the Institute.

In Poznań there is a unique Human Rights Centre, which started its activity, with considerable impetus, in 1976, that is, in a period which was not very favourable to developing the idea of human rights, and quickly gained a high position on the international scale. It was thanks to the work of the Centre that Polish doctrine, and what is more - Polish politics, became aware of the enormous importance of such problems. It was in the Centre that the human rights Deposit Library of the Council of Europe was created. A vast regulation of human rights in the Polish Constitution is - to a large extent - owed to the Poznań unit of the Institute.

The second research centre in Poznań is the Team of Family Law and the Rights of the Child. Apart from civil law studies in the field of classical family law, the Team also conducts studies on the rights of an individual, specialising in the field of the rights of the child. It was here that the draft Convention on the Rights of the Child was prepared. In 1979 the Polish Government sent it to the UN Commission on Human Rights. Its basic theses remained in the final version of the Convention.

It is in the two centres in Poznań that Polish and international institutions and organisations look for good specialists, experts and officials.

The profile of studies conducted in Wrocław is related to the natural environment. Contemporary world cannot exist without these problems being treated seriously, which is why the law and the legal sciences have an important role to play here. The Team of Legal Problems of Environmental Protection and Formation was established in 1976 and its history is inseparably linked with the development of environmental protection in Poland and with the evolution of Polish law in this respect. Apart from theoretical studies and participation in international programmes, the Team plays an active part in legislative work. By preparing numerous expert opinions for the State authorities, public organisations and economic entities, the Team members exert far-reaching influence on the public and administrative awareness of the issues of environmental protection.

In Cracow, research is conducted in the field of sociology of law. Additionally, a number of Institute's professors are conducting their studies independently, outside of the organizational structure of the Teams, e.g. studies in the field of the theory of State and the law, consumer law and others. They have devoted much attention to the demo-

cratic judiciary, both in its institutional aspect and as regards jurisprudence, and to functioning of the courts.

The above brief description of selected trends in studies of the particular Teams of the Institute clearly indicates several fundamental features of its scientific activities. Firstly, dealing with the key social, political and economic issues. Secondly, applying, to a large degree, modern research methodology based on empirical research in the field of efficiency of law, its practical functioning, its perception by the general public. Thirdly, representing the attitude which favours the development of democratic institutions and human rights, though obviously within the objective limitations. Fourthly, concentration on keeping the highest scientific and intellectual levels, culture, honesty and scientific reliability. Finally, being widely open to comparative law studies, international co-operation, academic contacts with other domestic units and with scientific centres all over the world, within the framework of large projects, such as Tempus, bilateral projects, such as the one with IRCID in France, and through other forms of academic exchange, within the framework of world-wide scientific associations of, among others, international law, criminal law or constitutional law, and through countless individual academic contacts.

### **Didactic Activities**

The Institute has never isolated itself from didactic activities. On the one hand, it was the organiser of courses, training sessions and studies of various types, on the other, many collaborators of the Institute, from assistants to professors, conducted didactic activities at many universities and in many schools of higher education in Poland and abroad. This activity has become more intensive in the recent years. Under an agreement with the Association of Polish Lawyers, the institute became a partner of the European School of Law and Administration, helping to determine the profile of studies and providing part of the academic personnel. Additionally, the Institute's researchers are also teachers of other schools of higher education, such as the Faculty of Law of the Cardinal Stefan Wyszyński University, in many new non-state owned law schools, in centres located outside of Warsaw, e.g. in Lublin, Płock, Pułtusk, Olsztyn and Siedlce.

The arguments for undertaking this kind of work is not only the financial needs, but also the awareness of a special kind of social role of transferring knowledge and educating the others. As a by-product of this process, a certain new dimension of co-operation in these circles appeared: the Institute's collaborators teaching at various schools of law are acting as a kind of link, a factor integrating the academic staff in Warsaw.

The scope of post-graduate studies conducted in the Institute is also growing. Within the framework of various types of self-government studies, studies of European banking law, studies for the civil service, the Institute participates in raising the qualifications of hundreds of people working in different sectors of the economy and administration.

The latest undertaking of the Institute is the organisation of doctoral studies.

### **Expert Opinions and Academic Studies, Participation in Law-making, Public Functions**

Both the profile of scientific research and its legal and empirical methodology are the reasons why the academic potential of the Institute is in great demand among the political circles, the highest public authorities, economic institutions, the judiciary, legal firms and international organisations.

The most common form of using the knowledge and experience of the scientific personnel of the Institute is through expert opinions. These are countless and probably there is no single Institute's researcher who would not have prepared a considerable portfolio of such opinions. It was particularly during the last decade of transformations of the political and economic system that the activity in this field became more intensive. The transforming State and its institutions needed the scientific background, especially as regards the legal doctrine and information about the solutions applied in other States.

Although the choice is difficult, we should mention several of the most important expert opinions: about the drafts of the Polish Constitution (1994) and about its consolidated draft (1997); about the legal, economic and social effects of incorporating Community directives into the agricultural legislation (1999); about the effects of interpretation declarations relating to treaties for the States — Parties and their obligations under treaties (e.g. about the Concordat in 1996); about the compliance of the Concordat with the Constitution (1997); about the draft of the general part of the Petty Offences Code (1998) and the Code of Procedure in Matters of Petty Offences; about the new Penal Codes (1997); about the draft of amendments to the Family and Guardianship Code (1996, 1999); about the draft Act on Separation of Spouses (1998); about the stage of preparations for accession to the EU in the labour and social field (2001).

A similar type of activity was the participation in creating legal acts, including the most important ones, ones of a fundamental and systemic character, beginning from the Constitution (two researchers of the Institute were members of the team of permanent experts of the Constitutional Commission), the Penal Code (participation in the work of the Codification Commission.) and, similarly, of the Commission for Civil Law Codification and the Commission for the Reform of Labour Law. Researchers of the Institute were among the authors of the Code of Commercial Companies and Partnerships, participated in the reform of marriage law, in the creation of the Convention of the Rights of the Child, the Act on Electronic Signature and many others.

The Institute's workers also work in, or are members of, institutions involved in law-making, especially in the Government's Legislative Centre and the Legislative Council at the Chairman of the Council of Ministers. In the current term of office, Prof. A. Szajkowski is the head of the Legislative Council; Prof. A. Bierć has been, for many years, director of its Department of Studies and Analyses. Prof. W. Sokolewicz for many years has been advising the highest State authorities, including the Chancellery of the Sejm, while Prof. J. Wawrzyniak - the Chancellery of the President.

Many of the highest officials of State authorities come from the Institute: Prime Minister H. Suchocka, ministers: A. Łopatka, K. Skubiszewski, L. Kubicki, H. Su-

chocka; the first Ombudsman, E. Łętowska, and her successors, A. Zieliński and T. Zieliński, who were members of the Scientific Council of the Institute; judges: of the Supreme Court - J. Łętowski, L. Kubicki, of the Constitutional Tribunal - W. Sokolewicz, J. Zakrzewska, J. Cierniewski, of the Chief Administrative Court - E. Łętowska, I. Białecka-Wiszniewska, of the Court of Human Rights in Strasbourg - J. Makarczyk, and earlier of the Hague Tribunal - M. Lachs; Z. Kędzia is the head of a Department in the Office of the UN High Commissioner for Human Rights; Z. Wieruszewski was the head of the Mission in the former Yugoslavia and member of the UN Commission on Human Rights.

### Periodicals and Regular Publications

Several prestigious scientific periodicals are linked with the Institute. Among them, for many years, the most renowned *Państwo i Prawo* [The State and the Law]. The Institute also publishes *Studia Prawnicze* [Juridical Studies], *Polska Bibliografia Prawnicza* [Polish Juridical Bibliography], which is the only periodical of this kind in Poland used by all Polish lawyers, and *Orzecznictwo Sądów Polskich* [Polish Courts ' Case Law], which is also unique and indispensable for this profession. For 60 years, the Institute has been issuing the oldest criminological magazine in Poland - *Archiwum Kryminologii* [Archives of Criminology]. There are also two periodicals in foreign languages: the French and English *Droit Polonais Contemporain-Polish Contemporary Law* and *Polish Yearbook of International Law*.

Both *Studia Prawnicze* and the two periodicals in foreign languages are open to the academic circles in the country, while among the authors of *Yearbook* there are more and more authors from other countries of Central and Eastern Europe.

### Library

A modest room houses an enormous collection of books. Over 43,000 books and collections of documents, including a collection of judgments of the European Court of Justice, a collection of documents of the European Commission of Human Rights and the European Court of Human Rights, a unique collection of criminological literature, documentation of the Council of Europe (in Poznań) make the library of the Institute of Law Studies of the Polish Academy of Sciences one of the best juridical libraries in the country.

### Foundations

The Institute's researchers initiated the establishment of two foundations. One of them is the Human Rights Foundation (with seat in Poznań), the other is the Foundation for the Promotion of European Law (in Warsaw). The foundations closely co-operate

with the Institute, however their activities cover the entire territory of Poland and the whole legal profession. The foundations sponsor scientific research, publications, conferences, practice periods of young academic workers. The Foundation for the Promotion of European Law gives awards for outstanding book publications in the field of European law.

\* \* \*

In the end of this short description of the Institute of Law Studies over 45 years of its activity, there still are topics we have not discussed here. Excellent scientific personnel with several dozen professors and doctors habilitated, among whom we can find the names of many distinguished scholars, a group of gifted and committed young scientific workers and a large group of those who, though working in other institutions, acquire their scientific degrees and titles at the Institute, as well as the small group of reliable and hard-working administrative staff - this is one of such topics, undoubtedly an important one, because it is the people who determine the value and the authority of a given institution. Other topics might cover grants, projects, co-ordination of projects, participation in large international undertakings. The next one: publications, which are so numerous and varied that it is impossible to describe them (part of them is mentioned below in the bibliography of book publications). Other topics are numerous awards, prizes, invitations to foreign lectures at the most famous universities of the world, functions performed in international scientific organisations, a large group of eminent foreign friends of the Institute. And finally, the problem which is not supposed to be exposed on the occasion of an anniversary, but which is part of everyday life of the Institute, namely lack of financial independence, lack of funds to cover the costs of all studies the Institute intended to carry out, the fact that it is impossible to give the workers higher remuneration, which results in a situation where they work, especially the young ones, out of their inner need and passion for this very kind of work.

But it is impossible to present all these topics. And behind what has been presented there was an intention to show what is probably the single most important feature of the Institute: that all those who form the Institute focus on constant development of its public usefulness and scientific potential. It is just like Prof. A. Wasilkowski wrote in his presentation of the Institute five years ago: "the aim is to climb onto a yet higher floor, from which you can see further. ."

*Maria Kruk-Jarosz*

Director of the Institute of Law Studies of the Polish Academy of Sciences



# ACTES LÉGISLATIFS \* LEGISLATIVE ACTS

DROIT POLONAIS CONTEMPORAIN  
POLISH CONTEMPORARY LAW

2000 N° 1-4 (125-128)

2001 N° 1-4 (129-132)

DE ISSN 0070 7325

## **ACT OF 6<sup>TH</sup> JULY 2001 ON THE TRIPARTITE COMMISSION FOR SOCIO-ECONOMIC AFFAIRS AND ON VOIVODSHIP SOCIAL DIALOGUE COMMISSIONS**

### **CHAPTER 1**

#### **GOAL AND TASKS OF THE TRIPARTITE COMMISSION FOR SOCIO-ECONOMIC AFFAIRS**

##### **Article 1.**

1. The Tripartite Commission for Social and Economic Affairs, hereinafter referred to as “the Commission,” is a forum for social dialogue conducted in order to accommodate employee and employers’ rights as well as public interest.
2. The Commission’s objective is to aim for and maintain social peace.
3. The Commission’s competencies include social dialogue relative to salaries and social profits, to other social or economic affairs as well as the realization of tasks defined in separate legal acts.

##### **Article 2.**

1. All parties of the Commission may propose as discussion topics issues of high social or economic importance provided they consider their resolution vital to the preservation of social peace.
2. All parties of the Commission may, acting on their own or with other parties to the Commission, present their position in all matters relative to social and economic policy.
3. Every party of the Commission may call another party of the Commission to take position in a matter it considers as socially or economically important.
4. The employers’ and employees’ parties may conclude supra-enterprise collective labor agreements that will be applied to all employees affiliated within representative organizations, mentioned in art. 7 point 1, or to a group of those employers and employees employed by those employers. Parties may also conclude agreements that define mutual commitments of the parties.
5. Agreements mentioned in line 4 are in the scope of application of dispositions of art. 239-241-13 of the Labor Code, with the exception of art. 241-249 § 3-5.

##### **Article 3.**

1. The government party presents to the Commission, until the 15<sup>th</sup> of April of each year, a preliminary prognosis of macro-economic values being a basis for works on the project of the budgetary act for the next year and - in order to obtain a position by the workers’ and employers’ parties - propositions of rises during the coming year:

- 1) of salaries in the national economy, including the state budgetary sphere, as well as at entrepreneurs,
- 2) of retirement pensions and other annuities paid from the Social Insurance Funds.
2. The employees' and employers' parties take a common position relative to every proposition mentioned in point 1, until the 10<sup>th</sup> of May of each year.
3. If parties do not come to an agreement on a common opinion within the period of time mentioned in point 2, each party may present its own opinion relative to propositions mentioned in point 1, until the 20<sup>th</sup> of May.
4. If the party does not come to an agreement on an opinion within the period of time mentioned in point 3, each organization whose representatives represent the party in the Commission may present its own opinion relative to propositions mentioned in point 1, until the 25<sup>th</sup> of May.
5. The government party will address to the Commission the fundamentals of the budget project of the state for the next year until the 15<sup>th</sup> of June of each year, in order for the employees and employers to present their opinions.
6. The employees' and employers' parties shall take a common position relative to the fundamentals of the budget project of the state for the next year until the 20<sup>th</sup> of July of each year.
7. If parties do not come to an agreement on a common opinion within the period of time mentioned in point 6, each party may present its own opinion relative to the fundamentals of the budget project of the state for the next year, until the 25<sup>th</sup> of July.
8. If a party does not come to an agreement on an opinion on the fundamentals of the budget project of the state for the next year within the period of time mentioned in point 7, each organization whose representatives represent the party in the Commission may present its own opinion relative to the fundamentals of the budget project of the state for the next year, until the 31<sup>st</sup> of July.
9. The government party addresses the budgetary act project for the next year with justification to the Commission, not later than 20 days before presenting the project to Parliament, in order for the employees and employers' parties to formulate an opinion
10. The employees' and employers' parties take a common position relative to the budgetary act project for the next year not later than on the 6<sup>th</sup> working day after receiving the project.
11. If parties do not come to an agreement on a common opinion within the period of time mentioned in point 10, each party may present its own opinion relative to the budgetary act project for the next year, within the next three working days.
12. If a party does not come to an agreement on an opinion on the budgetary act project for the next year within the period of time mentioned in point 11, each organization whose representatives represent the party in the Commission may present its own opinion relative to the budgetary act project for the next year within the next two working days.
13. Time limits presented in points 1-8 may be modified by the Commission following a demand of the governmental party.
14. Failure to present opinions mentioned in points 4, 8 and 12 in the period of time defined for each of those opinions or in the period of time defined by the Commission indicates a resignation of the right to express those opinions.

## CHAPTER 2

### COMPOSITION AND ORGANIZATION OF THE TRIPARTITE COMMISSION FOR SOCIO-ECONOMIC AFFAIRS

#### **Article 4.**

1. The Commission is composed of representatives of the governmental party, of the employees' party and of the employers' party.
2. Representatives of territorial self-government units take part in the Commission's works, with a counseling voice, in the scope relative to the execution of public tasks by the territorial self-government body.
3. Representatives of the President of the National Bank of Poland and of the President of the Central Statistical Office take part in the Commission's works, with a counseling voice.

#### **Article 5.**

1. The government party of the Commission is represented by representatives of the Council of Ministers designated by the Prime Minister.
2. The government party may invite state and self-government administration representatives as well as social and professional organizations' representatives to take part in the Commission's works with a counseling voice.

#### **Article 6.**

1. The employee party in the Commission is represented by members of representative trade union organizations.
2. Representative trade unions are the Independent Self-Governed Trade Union "Solidarność" and the All-Polish Trade Unions Alliance (OPZZ).
3. Those national trade unions, trade unions' alliances (federations) and inter-trade union national organizations (confederations) that meet the following criteria are also considered to be representative:
  - 1) they affiliate more than 300,000 member employees,
  - 2) they are active in fields of national economy accounting for more than half of the Polish Activity Classification (PKD) List, mentioned in the dispositions relative to public statistics.
4. In determining whether a given trade union organization meets the number criterion mentioned in point 3, those organizations are taken into account whose overall membership does not exceed 100,000 employees employed in state economy units, whose basic activity is defined in a single section of the Polish Activity Classification (PKD), mentioned in acts on public statistics.
5. The employees' party may invite trade union and trade union organizations' representatives that do not meet the conditions defined in points 3 and 4 as well as social and professional organizations' representatives to participate in the works of the Commission, with a counseling voice.

#### **Article 7.**

1. The employers' party in the Commission is represented by representative employers' organizations.

2. Representative employers' organizations are: the Polish Employers' Confederation, the Polish Confederation of Private Employers and the Polish Artisan Association.
3. Employers' organizations that meet the following criteria overall are also considered to be representative:
  - 1) they affiliate employers employing more than 300.000 workers,
  - 2) they have a nationwide range of activity,
  - 3) they are active in fields of national economy accounting for more than half of the Polish Activity Classification (PKD), mentioned in the dispositions relative to public statistics, are taken into account.
4. When defining the number criterion mentioned in point 3, employers who employ not more than 100,000 employees and who are affiliated in an employers' organization, whose basic activity is defined in a single section of the Polish Activity Classification (PKD), mentioned in acts on public statistics, are taken into account.
5. The employers' party may invite employers organizations' representatives that do not meet the conditions defined in points 3 and 4 as well as social and professional organizations' representatives to participate in the works of the Commission, with a counseling voice.

#### **Article 8.**

1. The demands of trade union organizations mentioned in art. 6 point 3, relative to the affirmation of their representativeness are assessed by the District Court in Warsaw, which issues a decision in a period of 30 days counting from the day when the demand was made, according to the provisions of the Code of Civil Procedure pertaining to extra-judicial procedures.
2. The demands of employers' organizations mentioned in art. 7 point 3, relative to the affirmation of their representativeness are assessed by the District Court in Warsaw, which issues a decision in a period of 30 days counting from the day when the demand was made, according to the provisions of the Code of Civil Procedure pertaining to extra-judicial procedures.

#### **Article 9.**

1. Every organization mentioned in art. 6 point 1 and art. 7 point 1, has an equal number of representatives to the Commission.
2. The number of representatives mentioned in point 1 is defined by the Commission through a decision.
3. The number of representatives of the Council of Ministers in the Commission and the number of self-government representatives participating in the works of the Commission is defined by the Prime Minister after seeking the advice of the self-government party in the Joint Commission of the Government and Territorial Self-Government.
4. The Chairman of the Council of Ministers designates and calls back from the Commission representatives of:
  - 1) the Council of Ministers
  - 2) organizations mentioned in art. 6 point 1, on demand of each of those organizations.
  - 3) organizations mentioned in art. 7 point 1, on demand of each of those organizations.
5. The Chairman of the Council of Ministers designates and calls back from work at the Commission representatives of:

- 1) the territorial self-government, on demand of the self-government party in the Joint Commission of the Government and Territorial Self-Government,
  - 2) the President of the Polish National Bank, on his demand,
  - 3) the President of the Central Statistical Office, on his demand.
6. Persons that are called to be members of the Commission or to take part in the Commission's works participate in person in the works of the Commission.

#### **Article 10.**

1. The Commission holds plenary sessions.
2. The Commission may take decisions, provided the vote will be made with the participation of representatives of:
  - 1) the Council of Ministers
  - 2) at least one of the organizations mentioned in art. 6 point 1,
  - 3) at least one of the organizations mentioned in art. 7 point 1.
3. Decision-making depends on the agreement of all parties participating in the vote mentioned in point 2.
4. The Commission's sessions take place as needed, but not less often than once every two months.

#### **Article 11.**

1. The Commission may take a decision and call up permanent or temporary problem teams.
2. The decision on creating such a team defines the team's tasks and its composition or the way to define this composition.

#### **Article 12.**

1. The Commission's works are led by the Commission Presidium, composed of the Commission Chairman and Vice-Chairman.
2. The Chairman of the Commission is designated by the Prime Minister among members of the Council of Ministers representing it in the Commission.
3. Representatives of all organizations mentioned in art. 6 point 1 and art. 7 point 1 designate one Commission Vice-Chairman each.
4. The Commission Presidium determines the activity program and works schedule as well as the topics of the Commission's sessions.
5. Sessions of the Commission are called up by the Chairman of the Commission.

#### **Article 13.**

The Commission votes Commission regulations which define detailed principles and modes of operation of the Commission, of the Presidium of the Commission, of the teams mentioned in art. 11, as well as the rights granted to Commission members, connected with participation in the Commission's works.

#### **Article 14.**

1. Every session of the Commission ends with a communiqué, whose form and way of publication will be defined in the Commission's set of rules.

2. The communiqué mentioned in point 1 particularly includes decisions of the Commission and opinions of the Commission's parties.

#### **Article 15.**

1. Office services to the Commission are provided by the Secretariat being an organizational unit of the Chancellery of the Chairman of the Council of Ministers.
2. The costs of the Commission's activities are covered by the state budget in the part relative to the Chancellery of the Chairman of the Council of Ministers.

### **CHAPTER 3**

#### **VOIVODSHIP SOCIAL DIALOGUE COMMISSIONS**

#### **Article 16.**

1. There is a possibility of creating voivodship social dialogue commissions.
2. The decision to create a voivodship social dialogue center is made by the voivode on the common request of at least one of the organizations mentioned in art. 6 point 1 and at least one of the organizations mentioned in art. 7 point 1.
3. The voivode decides to liquidate a voivodship social dialogue commission if all organizations mentioned in art. 6 point 1 or all organizations mentioned art. 7 point 1 decide to withdraw their representatives from that commission.

#### **Article 17.**

1. The voivodship social dialogue commission issues its opinions on issues included in the range of activities of trade union or employers' organizations, belonging to the government or self-government competencies in the local voivodship.
2. The acceptance of the opinion mentioned in point 1 requires the agreement of all representatives of all parties to the voivodship trade union commission; if the voivodship trade union commission does not agree on a common opinion, all parties of the voivodship trade union commission are entitled to present their own opinion on the related question.

#### **Article 18.**

1. The voivodship social dialogue commission is composed of:
  - 1) the voivode - as government party,
  - 2) organizations mentioned in art. 6 point 1 - as the employees' party,
  - 3) organizations mentioned in art. 7 point 1 - as the employers' party,
  - 4) the voivodship marshal - as the self-government party.
2. The voivodship social dialogue commission may invite voivodship district and communal representatives to take part in its meetings.
3. Members of the voivodship social dialogue commission are designated and called-off by the voivode who is member of the commission and acts as its chairman.
4. Detailed principles and modalities of activity of voivodship trade union commissions, the definition of their composition, the designation and dismissal of commission members as well as their rights related to the work in the commission will be defined by a decision of the

Chairman of the Council of Ministers after consultation with organizations mentioned in art. 6 point 1 and art. 7 point 1, also with the self-government party in the Joint Commission of the Government and Territorial Self-Government.

5. Office services to the voivodship trade union commission are provided by the office of the voivodship trade union commission being an organizational unit of the voivodship office.

## CHAPTER 4

### CHANGES IN DISPOSITIONS IN FORCE, TRANSITORY AND FINAL DISPOSITIONS

[This chapter contains changes to a certain number of acts that describe the participation of social partners in numerous institutions at the national level. The adopted general principle defines the participation in such institutions of trade union organizations and employers' organizations that are representative according to the Act of 6<sup>th</sup> July 2001 on the Tripartite Commission for Socio-Economic Affairs and on voivodship trade union commissions].

#### Article 21.

In the Act of 23<sup>rd</sup> May 1991 on trade unions (Journal of Laws No. 55 item 234 with further amendments), the following changes are introduced:

- 1) in art. 19, point 1 stipulates as follows:

“ 1. The trade union organisation, representative in the meaning of the Act of 6<sup>th</sup> July 2001 on the Tripartite Commission for Socio-Economic Affairs and on voivodship social dialogue commissions (Journal of Laws No. 100, item 1080), hereinafter referred to as ‘the Act on the Tripartite Commission for Socio-Economic Affairs,’ has a right to present its opinion on the bases and projects of legal acts being in the statutory scope of trade union tasks. This does not concern budget project bases nor the budgetary act project which are consulted on the basis of distinct dispositions.”

- 2) in art. 20, in point 1, the words “The nationwide inter-trade union which is organization and also the nationwide trade union which is representative for the majority of enterprises are entitled to” are replaced by the words “The trade union organisation, representative in the meaning of the Act on the Tripartite Commission for Socio-Economic Affairs, has the right”;

- 3) in art. 22, point 1 stipulates as follows:

“1. The trade union organisation, representative in the meaning of the Act on the Tripartite Commission for Socio-Economic Affairs, has the right to request a special review of Supreme Administrative Court judgements and any other final judgment by non judiciary organs concluding proceedings concerning issues relating to labour and social security law. Dispositions of art. 57 point 2 of the Act of 11<sup>th</sup> May 1995 on the Supreme Administrative Court (Journal of Laws No. 74, item 368 with further amendments) are applicable according to the extraordinary review requested by a trade union organisation.”

#### Article 22.

In the Act of 23<sup>rd</sup> May 1991 on employers' organizations (Journal of Laws No. 55, item 235 with further amendments), the following changes are introduced:

- 1) in art. 6, point 2 stipulates as follows:

“2. The contributions to employers’ organisations, mentioned in point 1, are accounted for as income generating cost to the maximum amount determined by a decision of the Council of Ministers.”

2) in art. 16, point 1 stipulates as follows:

“1. The employers’ organisation, in the meaning of the Act of 6<sup>th</sup> July 2001 on the Tripartite Commission for Socio-Economic Affairs and on voivodship social dialogue commissions (Journal of Laws No. 100, item 1080), hereinafter referred to as “the Act on the Tripartite Commission for Socio-Economic Affairs,” has a right to present its opinion on the bases and projects of legal acts being in the statutory scope of employers organisations’ tasks. This does not concern budget project bases nor the budgetary act project which are consulted on the basis of distinct dispositions.”

### **Article 25.**

In the Act of 16<sup>th</sup> December 1994 on the negotiated system of determining the increase of average remunerations in enterprises and on the amendment of certain acts (Journal of Laws of 1995, No. 1, item 2 with further amendments), the following changes are introduced:

1) in art. 1 the words “The Tripartite Commission for Socio-Economic Affairs, being a forum of cooperation of supreme state administration organs, trade unions and employers’ organizations” are replaced by the terms “Tripartite Commission for Socio-Economic Affairs”;

2) in art. 3:

a) point 1 stipulates:

“1. The Council of Ministers, until the 15<sup>th</sup> of June of each year, presents to the Tripartite Commission an information on the prognoses of macro-economic values being the basis of works on the project of budgetary act for the next year as well as the proposed maximum annual growth index of average monthly remunerations”

b) in point 2, the words “as well as the proposed maximum annual growth index of average monthly remunerations” are stroked out,

c) in point 3, the words “31<sup>st</sup> August of each year, determines” are replaced by the words “1<sup>st</sup> September of each year, determines, by order.”

### **Article 32.**

The terms of office of the following institutions: Council of Work Protection, Council of the Fund of Guaranteed Employee Benefits, Supreme Employment Council, voivodship and district employment councils, also Statistics Council, National Consultative Council for Handicapped Persons’ Affairs, Supervisory Board of the State Fund for the Rehabilitation of Handicapped Persons and Supervisory Board of the Social Insurances Establishment, in course at the day of publication of the present Act will expire on the 30<sup>th</sup> of June 2002.

### **Article 33.**

1. In order to create the first Commission, the President of the Council of Ministers designated five representatives from every trade union organization among those mentioned in art. 6 point 2 as well as five representatives from every employers’ organization among those mentioned in art. 7 point 2.

2. The President of the Council of Ministers will define, by decision, the Commission regulations that will remain in effect until the Commission votes the regulations mentioned in art. 13.

**Article 34.**

The Tripartite Commission for Socio-Economic Affairs will become active when the first Commission composition is appointed.

**Article 35.**

Every time legal dispositions refer in whatever way to the Tripartite Commission for Socio-Economic Affairs, it is a reference to the Commission described in this Act.

**Article 36.**

The Act enters into force one month of its publication, with the following exceptions:

1. Articles 21 and 22, article 25 point 2 and article 31 enter into force two months after the first Commission has been appointed,
2. Articles 16 through 19, 23, 24, 26, 28 and 29 enter into force on the 1<sup>st</sup> of July 2002.